

What You Should Know About Online Dispute Resolution



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served as an associate judge on the Circuit Court for Prince George's County, Maryland from 1982 until his retirement in 1999. He served that court in many capacities including civil case management coordinator. Since his retirement he has been recalled to sit on specially assigned trials. He also is an active mediator, arbitrator, and neutral case evaluator and serves as CEO of VirtualCourthouse.com™. For more detailed information see <http://montyahalt.com/aboutmontyahalt.html>. Substantial portions of this article have been previously published at the 2008 American Bar Association Tech Show presentation *On Line Dispute Resolution: Where We Have Been and Where We Are Going*, by Judge Arthur M Monty Ahalt (ret.) and David Glynn. See www.MontyAhalt.com.

Hon. Arthur M. Monty Ahalt (ret.)

Online dispute resolution (ODR) has all of the advantages of other forms of ADR—and it is faster and more cost-effective.

LESS THAN 15 years ago the legal community struggled to incorporate alternative dispute resolution (ADR) into the case management programs of federal and state trial courts. This effort was largely motivated by overcrowded trial dockets which allowed cases to remain pending four and five years before a trial date. Now ADR is an accepted component of most case management programs of any trial court and reaches into almost every segment of our lives. Schools, prisons, communities, businesses, consumers, and families now have ready access to alternative dispute resolution training and specialists. Many state courts have established conflict resolutions programs such as the highly effective and award-winning Mediation and Conflict Resolution Office (MACRO) of the Maryland Judiciary. See <http://www.courts.state.md.us/macro/>.

ADR has been around in commerce since the 1920s and the founding of the American Arbitration Association. Many date ADR to biblical times and King Solomon. Originally the focus was on providing commercial entities with alternatives to adjudicating their disputes in the court. During the next eight decades many barriers have been overcome; however, the paper-based alternatives of the past that paved the way for ADR have become expensive and time-consuming; in some cases it

is as if a new ADR bureaucracy has replaced the old judicial bureaucracy. Although face-to-face and paper-based alternative dispute resolution is not as time-consuming and expensive as litigation in the courtroom, the time and expense of paper and face-to-face meetings denies many parties the opportunity of a fair and neutral resolution of a genuine dispute.

The ability of technology—especially the Internet—to make many business processes more efficient is now making it clear that online dispute resolution (ODR) is the next frontier of ADR. The Internet promises to make more disputes reachable by ADR and to facilitate the resolution of disputes faster and at a lower cost. But like many shifts from paper to technology, a clear strategic pathway has yet to appear.

WHAT IS ONLINE DISPUTE RESOLUTION?

• ODR provides the ability for two (or more) disparate parties to settle their dispute using the Internet. Sometimes this involves lawyers and mediators and sometimes it does not. It depends on the vehicle/provider that the parties agree to use to resolve their claim.

History Of Online Dispute Resolution

The concept of ODR has been discussed in academic circles since the mid 1990s. See www.odr.info. Professor Ethan Katish was a leading researcher and developer of concepts of ODR. From 1997 to 1999, Professor Katish mediated a variety of disputes online, involving domain name/trademark issues, other intellectual property conflicts, disputes with Internet Service Providers, and others. In the spring of 1999, he supervised a project with the online auction site eBay, in which over 150 disputes were mediated during a two-week period. During the summer of 1999, he co-founded Disputes.org, which later worked with eResolution to become one of four providers accredited by ICANN to resolve domain name disputes. Professor Katish

is also an adviser to SquareTrade.com, an Internet start-up focusing on online ADR. There are over 40 Internet companies listed on the ODR.info site that provide ODR online services.

As a Judge of the Circuit Court for Prince Georges County, Maryland in conjunction with my activities directing the nation's first electronic filing pilot project and managing the courts civil docket, I realized that dispute resolution could be aided by the Internet. The ideas were first published in a series of online articles by VirtualCourthouse beginning in 1996. See <http://www.montyahalt.com/vc.htm>. VirtualCourthouse.com™ was founded in 2001.

The VirtualCourthouse dispute resolution process models a court dispute resolution process delivered on the Internet using Web-based technologies:

- A case is initiated and a list of neutrals is selected and the neutrals are ranked;
- A system-generated email is sent to the other party, inviting it to join the case;
- The other party joins the case and a neutral is agreed upon;
- The neutral reviews the case initiation, and sends an email to both parties, confirming the type of proceeding and the fees;
- The claimant prepares a case presentation and uploads the scanned documents into the online case;
- Once complete, a system-generated email is sent to the respondent, advising it that the claimant has completed its presentation, and now it is time for the respondent to submit its case presentation;
- Once the case presentations are complete, a system-generated email is sent to the neutral advising him or her to review the evidence and render a decision;

- Once reviewed, a verdict is submitted online, and a system-generated email is sent to both parties notifying them that a verdict has been rendered.

VirtualCourthouse creates a marketplace by recruiting the neutrals, administering the electronic case file, and providing access to the system to members of the plaintiff and defense bar, including insurance staff counsel, claims agents, and the parties. It also provides an independent forum by enabling parties to select qualified neutrals (typically judges or attorneys with specific experience), submit digitized materials, schedule an ADR event and track other activities throughout the effort to resolve the claim. Critical to the design of this service is its neutrality: VirtualCourthouse impartially facilitates neutral selection by providing structured communication among parties via a controlled and secure message service. Any party can attach digital exhibits such as digital photographs or scanned images of medical records. The neutral can use the message service to communicate with parties. VirtualCourthouse streamlines every step in the process and minimizes the need and costs of unnecessary face-to-face meetings, mailing, and copying.

The VirtualCourthouse Dispute Resolution Engine (DRE) is a combination of multimedia technologies and business processes, integrated with a customer-friendly user interface. The DRE replicates the current process of dispute resolution in an online environment, removing constraints of time, expense, and distance. The engine is a sequence of events utilizing Internet-based media technologies that are designed to resolve conflicts between two or more parties. The DRE enables the resolution of disputes by functioning as a “middleware” to connect the disparate business processes of attorneys, claimants, and neutrals. The DRE permits the exchange of data between these business processes which would otherwise lack the technology interfaces essential to working together electronically.

The engine, centralized through VirtualCourthouse.com™, is the electronic “glue” that binds these users of otherwise unrelated systems into a virtual private data and business process network.

The Internet creates an online marketplace for dispute resolution by bringing together parties with disputes and neutrals seeking a storefront for their services. Registered users are able to visit the “virtual” court 24/7, review the docket, and conduct any proceedings under way. Lawyers are able to check on the status of their cases, view documents, and make filings at any time. Case administration for the parties and the neutral by a case administrator is minimized, as case administration activities are automated through the virtual private data and business process network.

How Can ODR Help ADR?

ODR promises to enable ADR to become more efficient, faster, and less expensive. By achieving those three improvements ODR will make ADR a real alternative to a greater number of disputes thereby bringing all of the advantages of ADR to a greater number of people. An examination of the ADR process, and the barriers to ADR, will allow a deeper examination of the potential of ODR. The ADR process usually unfolds this way:

- One party decides to pursue ADR, an existing agreement requires it, or a court or other authority requires it;
- A neutral is selected. (This can be by suggestion and negotiation of the parties, identification of the neutral in an existing agreement, or appointment of the neutral by a court or other authority);
- The parties provide the neutral with written documentation of their respective positions;
- An ADR session is scheduled;
- An ADR session is held and conducted; and
- A decision or report is rendered by the neutral.

Each of these steps can be automated by technology and the Internet. The goal of ODR is to reduce the time and cost of each step thereby making it available to a greater number of people.

Change, Not Technology

The adoption of technology by businesses and individuals over the last two decades is astounding. Just 10 years ago managers of the nation's largest law firms were struggling to get their lawyers to put computers on their desks and then actually use them. One manager of a firm found a creative strategy. He announced at a firm meeting that he was conducting a pilot to determine how best to use a computer in the practice. He was going to conduct the pilot with the 10 brightest lawyers in the firm. Anyone who was interested was advised to call his office. One by one, every lawyer in the firm called, and as soon as they did, a computer showed up on each lawyer's desk. Adoption of the computer in the everyday life of that firm was well underway.

Today only a few laggards in the legal profession fail to use a computer. Interestingly enough, the leaders are not always the younger generations as many senior lawyers lead the way. Take Judge Richard Rombro, a retired Judge in Maryland (having been forced to retire because the Constitution requires retirement at age 70). Judge Rombro managed the entire asbestos docket for the Circuit Court for Baltimore City using Lexis-Nexis File and Serve—sometimes even from his winter office in Florida. The legal profession has fully embraced technology including the Internet to help become better lawyers. Those who have not embraced technology are losing the competitive battle.

So why is it that disputes are still largely resolved with a dependency on paper and face-to-face meetings? It is all about change. Old ways are not put aside easily. Who hasn't heard a lawyer say, "I know that is the way it will be done in the future, but I am not going to change now."

Change requires strong and great leadership. And great leaders always have a vision, a strategy, enthusiasm, and work really hard. I learned these attributes of leadership from basketball great Jim Valvano. I was riding in my car to a Maryland basketball game against North Carolina State listening to Johnny Holiday's pre-game radio show. Johnny was interviewing the State coach, Jim Valvano, who had just won a National Championship the year before. Shortly into the interview, Johnny asked Coach Valvano what his secret to success was. Coach Valvano said rather nonchalantly and quickly, "Well Johnny you have to have a vision, then a strategy and you have to be enthusiastic, then you have to work like crazy to make sure that you accomplish the vision." Coach Valvano said that his vision was to win the game on a shot at the buzzer. His strategy was to get to the last two minutes of the game no more than six points down. He was sure that his team could play strong enough defense in the final two minutes to make sure the other team did not score and he was sure his team could execute and score over that relatively short period of time. Sure enough over the years, Coach Valvano executed his plan for success and he wound up being one of the most successful coaches. His life was cut short by a tragic and fatal fight with cancer, but the coach never gave up. His lesson and legacy will live on for years. Valvano's formula for success has four parts: vision, strategy, enthusiasm, and work. In developing a strategy it is essential to identify the barriers. The following are but a few:

- The neutral "needs to see the parties";
- Scanning and uploading documents;
- "It's easier to do it the old way; and
- "My computer is too slow."

As VirtualCourthouse approaches the 1,000th case filing, it has become obvious that ODR requires adoption by three separate constituencies—the claimant, the respondent, and the neutral. Much like a stool, if one leg is absent the stool falls. Thus,

the challenge of change is multiplied or as the mathematician might say—“cubed.”

Most all practitioners have successfully overcome the barriers to change that were presented with the advent of court ordered ADR in the 1990s. The benefits have become obvious: time savings, cost savings, and “resolution satisfaction.” Yet the court dockets keep growing and much more remains to be accomplished.

Students of the dynamics of change will testify that change does not occur unless there is leadership, strategy, and management. Over the past several years, VirtualCourthouse has demonstrated that technology can elevate ADR to higher levels, but it requires the participation of all three legs of the stool: the claimant, respondent, and neutral. Leadership is key and the leaders in each constituency are stepping forward, as the pioneers did and are establishing new territory.

Eric Frye, a lawyer in Upper Marlboro, Maryland, continues to file his cases in VirtualCourthouse before he files in Court. Jeff Wigodsky with Karp Frosh, in Washington, D.C. has successfully adopted the same policy. Several insurance claims departments have successfully integrated VirtualCourthouse into their claims examiner training process. The neutrals have had an easier time adopting as Judge Vincent Femia, Alan Feld, and Cy Pickens will attest. The common denominator with all of these folks is their ability to test the vision of VirtualCourthouse and overcome the reluctance to change.

Most people are risk-averse and therefore resist change. “I have been doing just fine without all of this technology” is a familiar refrain. However, the evidence now is overwhelming that ODR will pay significant dividends to those willing to give it a try. The VirtualCourthouse team does a formal evaluation on every case filing and the results are truly exceptional. Over 90 percent of those responding are “very satisfied”—a “5” on a five-point scale—

with VirtualCourthouse as a method of dispute resolution. About 90 percent are also “very satisfied” with the customer service. Now this does not mean that everyone is thrilled with the result, because as in all dispute resolution, expectations are not always achieved. And yes, there are occasional “technological” glitches and challenges. But that is where the ODR provider excels by its experience in overcoming these challenges. Even in the “paper world” not all is perfect and there are occasional problems and challenges to overcome. Who hasn’t had the experience of a paper file that has been lost or destroyed or a letter that was somehow lost in transit?

WHAT WORKS BEST IN ODR? • In developing a strategy to successfully implement an ODR project, it is helpful to analyze what has been successful. What is becoming clear is that certain case criteria lend themselves to online activity, while other criteria lend themselves to the physical or “bricks-and-mortar” world.

Online activity works best when there are only two parties and when the substance of the dispute is only monetary. ODR also has been effective when the dispute arises out of Internet commerce. ODR is difficult when there are many parties, the substance of the dispute is emotional, or there is a large amount of money in controversy.

Square Trade has handled thousands of disputes that have arisen between the buyer and seller of goods on eBay. Using this online solution a neutral mediates the dispute in an online chat format. Although Square Trade no longer offers ODR for eBay, it demonstrated that ODR is a viable and effective alternative.

Cybersettle has successfully settled thousands of disputes, mainly involving personal-injury claims. Using the Cybersettle online process, the parties submit blind monetary demands and offers and agree that if they are within certain limits the

case is settled at the midpoint of the last demand and offer.

The American Arbitration Association has settled several thousand cases digitally, but it still remains a very small percentage of the AAA case-load.

VirtualCourthouse.com™ has successfully settled hundreds of personal injury, real estate, construction, and contract claims through an online binding arbitration process. The parties select a neutral through an online negotiation. Once the neutral is selected, each party presents its case online—uploading supporting medical bills, doctor reports, pictures, and other relevant evidence. The neutral then reviews the presentations and renders a binding decision.

Neutral-Focused ODR Providers

Services like VirtualCourthouse.com specialize in providing neutrals a marketplace in addition to taking the parties through the entire ODR process. VirtualCourthouse.com comes closer to mimicking the actual court process than most of the services outlined above. VirtualCourthouse allow exhibits and supporting materials to be submitted electronically and case information is shared among the parties and the assigned neutral in a secure environment. The lowest cost for a simple case brought to VirtualCourthouse.com is less than \$400. When shared by the parties, that results in a dispute resolved for \$200, a major cost saving to either ADR or court.

Mediate.com is a site that helps one locate a mediator in a particular geographical area and practice type. Unlike the VirtualCourthouse.com outlined above, Mediate.com does not offer a Web interface to enable one's case to be submitted and adjudicated online.

Paper-Based Organizations In Transition

The American Arbitration Association offers a lot of information on their Web site, includ-

ing PDF forms. You have the ability to file your case electronically through AAA Webfile. The AAA offers both mediation and arbitration services and is the oldest ADR organization outside of the courts in the United States.

JAMS, founded by the Hon. H. Warren Knight in 1979, provides mediation and arbitration services across the country. They specialize in a variety of claims including bankruptcy, mass tort, and international business. The JAMS Web site allows the visitor to file an initial claim and select a location and neutral. Beyond that, JAMS does not offer the automated case monitoring that the other services outlined above do.

Regional ADR Service Providers

There are several regional ADR providers, like ADR Systems of America, LLC, headquartered in Chicago. ADR Systems has many retired Cook County Circuit Court judges on their roster of neutrals and specializes in complex personal injury cases. The ADR Systems' Web interface is limited but they focus on being a regional provider and therefore the need for automation is not quite as great as in a case involving geographically diverse parties.

Other ODR Providers

The ElectronicCourthouse.com, run by a Canadian company called iVentures, provides services to companies that must offer dispute resolution. They specialize in companies that manufacture and distribute products internationally.

Developing A Successful Strategy

Transferring an existing process from the bricks-and-mortar world to the Internet is a daunting undertaking. The process is fraught with barriers of change involving multiple parties and multiple processes. Developing a strategic approach is therefore essential. It is similar to "eating an elephant": You do not want to plan this event for one meal or you will surely fail. You need to start small, but you

need to start. It is necessary to strategically identify a starting point where the existing barriers are not overwhelming and where efficiencies of online business will bring the greatest bottom-line result.

CONCLUSION • The last 50 years have seen enormous growth in the use of ADR. The growth has been championed and led by the judges and the lawyers of many state courts. Judges have led the way by incorporating ADR in case-flow management and adopting standards and criteria for the certification of neutrals. Lawyers have led the way

by forming professional organizations and adopting ethical standards. ODR promises to take ADR to the next level: meeting the dispute resolution needs of a greater number of people in a way that is both faster and less expensive. By using a technologically sophisticated process over which they have substantial control, litigants will have greater confidence in the legal community and experience a higher level of justice.

PRACTICE CHECKLIST FOR What You Should Know About Online Dispute Resolution

The ability of technology—especially the Internet—to make many business processes more efficient is now making it clear that online dispute resolution (ODR) is the next frontier of ADR.

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- ODR works best when there are only two parties and when the substance of the dispute is only monetary. ODR also has been effective when the dispute arises out of Internet commerce. ODR is difficult when there are many parties, the substance of the dispute is emotional, or there is a large amount of money in controversy. Providers include:
 - ___ Square Trade;
 - ___ Cybersettle;
 - ___ The American Arbitration Association;
 - ___ VirtualCourthouse.com™ (which comes closest to mimicking the actual court process);
 - ___ Mediate.com;
 - ___ JAMS;
 - ___ ADR Systems of America, LLC; and
 - ___ The ElectronicCourthouse.com, run by a Canadian company called iVentures.

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