

A Critical Examination of the Need for Litigation Technology in ADR

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Traditionally, courtroom technology has been reserved for precisely that — the courtroom.

However, the need for technology is not exclusive to the courtroom setting. While the benefits of using technology are obvious, an equally significant need has emerged in another area of litigation — that of Alternative Dispute Resolution or “ADR.” Whether it is arbitration, mediation or a disciplinary hearing, presentation tools dramatically improve the lawyer’s ability to clearly advocate his or her positions. So, why have we not witnessed the regular use of technology in ADR? The answer seems to relate to misconceptions prevalent in the legal community as to how ADR differs from traditional litigation. The following will address some of these concerns by providing strategic recommendations for today’s out-of-courtroom lawyer. The three primary issues we will cover are the informal nature of an ADR setting, crafting of the message for non-jurors and tailoring of the technology configurations to match the venue of the proceeding.

Informal Setting

The most commonly cited reason for not utilizing courtroom technology during ADR is the informal nature of the proceedings and the concern that the legal team will appear “too high-tech” for their often less technology-savvy audience. Contrary to jury trials, where no information is provided to the triers of fact prior to their hearing the case, panelists and judges often have the benefit of reviewing briefs and key documents before the attorneys enter the hearing room. In addition, while jury trials are presided over by judges, who are careful to monitor the language and actions occurring in the courtroom, the atmosphere in non-courtroom proceedings tends to be less formal and more direct between the participants. As a result, attorneys often mistakenly believe that using technology



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Andy and Justin combine their experience to discuss the impact of technology in today’s complex litigation matters.

in such a setting is not necessary, and that it may create an artificial sense of formality which would diminish the intimate nature of the proceedings. However, when used correctly, the opposite effect is more commonly observed.

By using a digital display of evidence — including documents and videotaped testimony or written transcripts — specific information can instantly be displayed on screen for all participants to view, without having to wait for the information to be located. While lengthy briefs and other papers may have been reviewed in advance, the attorneys can quickly summarize the relevant information and arguments for the panel within a single graphics presentation, incorporating data charts, timelines and document or testimony excerpts into the introductory presentation. This reminds the panel of specific arguments and supporting evidence, and highlights the points of contention to be decided during the course of the proceedings. In addition, just as magnifications and highlighting of key language is traditionally used in jury trials to further focus attention, those same techniques can be leveraged throughout the hearing to help witnesses and panelists locate and analyze key text, without the need to pause proceedings or generate additional paper copies.

Further, the use of technology has been shown to decrease the length of legal proceedings by streamlining the litigation process. This can result in the overall hearing taking fewer days, or offer greater flexibility in scheduling within the allotted timeframe. More often than not, the result is a general acceptance of and appreciation for the technology used throughout the process. Panelists typically have positive views of technology — when employed effectively — noting that it helped streamline the process and focus the participants on the key issues at hand.

By incorporating this technology, panelists no longer have to contend with logistical issues like passing documents around, waiting for everyone to turn to the same page, or having testimony read back. Instead, attention can be paid to the questions of interest and arriving at answers more efficiently. Panelists also tend to view the party who effectively uses technology as being more prepared and organized, as compared to their low-tech counterparts contending with boxes, binders and copying requests. Thus, using technology in ADR can help you establish credibility with the panel and even foster a sense of cooperation and shared goals for the process.

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One instance where this trust and reliance on technology was particularly apparent was in a recent reinsurance arbitration I was involved in. During the first few days of testimony, whenever a document in the case was referred to, the three panel members deferred to the document binders provided to them by both parties. There were more than 30 binders given to each panel member. At least 30-45 minutes a day were devoted to finding the correct binder, then the correct document and, finally, the correct page. Over the course of the next week, the panel would rely less and less on the binders and began to “trust” the digital version on the screen. Eventually, panel members became so comfortable with the technology that they asked for the documents in digital form so that they may review the documents on laptops during the arbitration, completely foregoing the hard copies in the binders.

– Andy Cepregi

Explaining Your Case to “Sophisticated” Non-Jurors

Most people imagine simplistic, bulleted lists and education-based tutorials when they think of litigation graphics. However, today’s courtroom graphics are not as rudimentary as one might think. For example, in contrast to traditional timelines, where events are simply plotted along a horizontal line, the most effective graphics today tend to be analytical in nature with strategic design — building comprehensive and persuasive visual stories that support the overarching case arguments through a visual display. While the average panelist will not need the basic educational graphics often used with jurors, graphics can still be invaluable when attempting to persuade even the most sophisticated audience.

One major way that graphics can be used in an ADR setting is with expert witnesses. As stated above, some of the educational and introductory graphics used in jury trials may not be applicable and may not generate the same impact in ADR. However, expert witnesses are tasked with presenting complex themes and expressing opinions about the case based on their years of experience — essentially educating the educated. Using graphics helps these witnesses condense and enhance their testimony by giving a visual story to complement their spoken words.

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Other forms of technology, such as evidence display software, also have a place in ADR. While it may not be necessary to spend as much time and attention parsing the language in a particular document for the panel, the ability to instantly display side-by-side comparisons of contradictory evidence may be even more critical in such a setting. One of the best ways to utilize this contradictory evidence is through videotaped deposition excerpts. Experience has taught us that panel members are more inclined to rely on videotaped impeachment of a witness as opposed to simply reading the transcript. Many times, panel members understand the issue at hand but appreciate the context and nuance of the witness’ statements and, in turn, can make credibility assessments more accurately.

Location, Location, Location

Typically, arbitrations and mediations are set in smaller venues, such as conference rooms at hotels or law firms. Due to limitations of space, technology is often perceived to be intrusive and cumbersome. In actuality, technology ultimately will create more available space. With the recent advancements made in server technology and peripheral storage, trial consultants are capable of carrying all case materials on a drive the size of a VHS tape. Having this convenient access to any document, video or graphic reduces the need for boxes and boxes of hard copies, which, obviously, consume much more space than the technology.

I remember working on a hearing in a historic hotel in Washington, D.C. If you are familiar with old hotels, you know that rooms are generally smaller and may have unique layouts. While I appreciated the aesthetics of the room, space was compromised by 20 large boxes filled with hard copies of every document in the case. I suggested that we relocate the boxes to another room so that the client would have a place to sit. “What if I need to see a document?” the attorney asked. “I like having the hard copy.” To resolve this issue, I set up a high-speed printer with wireless connectivity. I could immediately print any document in the case, and the team was pleased with the space made available.

– Justin Kelly

Before any engagement, the venue needs to be inspected and surveyed by trial-technology professionals to identify any space, line of sight or logistical issues prior to the hearing. Equipment layouts should be custom-tailored to maximize space and field of view. Configurations vary in size and complexity based on the needs of the venue. They can range from the simple — consisting of only one large screen and projector — to the more complex, including a screen, a projector, flat-panel monitors, plasma screens and complete audio systems. Essentially, the advancement of technology invites multiple solutions to venue issues. For example, laptops and projectors are becoming smaller and more powerful, and flat-screen monitors enable panel members to immediately focus on the content of an exhibit and not its location.

Conclusion

Ultimately, “show-and-tell” is always better than just “tell,” regardless of the setting, the audience or the venue. The numerous advantages of trial technology have often been overlooked when it comes to ADR, and although the ADR setting differs from the courtroom setting, the similarities are what make it a legal proceeding. The advantage of expeditious proceedings, increased retention by the audience and streamlined presentations, among the other benefits of using technology, are common to both and beneficial to any advocate. Technology not only increases the chances of a favorable outcome in ADR, but should be viewed as an essential part of the strategy for presenting your case to any panel, mediator or judge.

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