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Artificial Intelligence in the Dispute Resolution Space: Can Robots Replace the Professionals?

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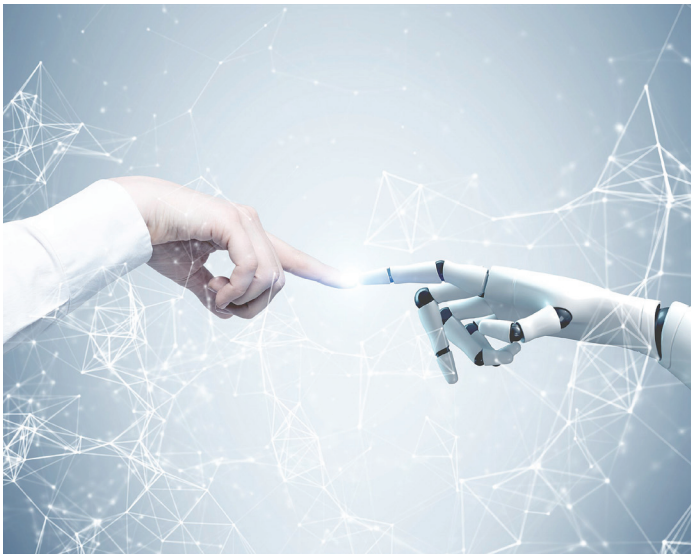
The use of artificial intelligence (AI) is pervading all aspects of the legal profession, and many professionals are questioning the current and future application of AI within each specific practice area. In the dispute resolution (DR) space, the truth is AI has already been a part of this practice area for some time. In fact, AI-based mediators, also known as "virtual mediators" or "digital mediators", have been utilizing advanced algorithms and machine-based learning techniques to assist parties in reaching a resolution for various disputes for over two decades.

Presently, there are three categories of DR that utilize some form of AI. First, online dispute resolution (ODR), which gained traction in in the early 90s and employs algorithms written by programmers, serves to analyze and process data to support a third-party neutral who then utilizes this data to provide a resolution for the disputing parties. This is most commonly seen in e-commerce forums such as eBay and Amazon. Next is blockchain ODR, where the system utilizes cryptography to crowdsource decision-making for an arbitral panel specifically established for resolving disputes. The third is facilitative ODR, where information and communications technology is utilized to bring the parties together, allowing a third party neutral to determine the suit through a digital online forum.

In ODR, the first branch of AI-based DR, the ability of the neutral to utilize the data provided has certain advantages. In these instances, the AI process can take large pools of data and analyze it at a rapid pace. By using AI, patterns can be identified and recognized that quite frankly humans simply cannot accomplish given the volume of information that is being sourced at one time. With this data rapidly sorted and processed, the mediator can gain valuable insight into the strengths and weaknesses of each party's position which can then help inform and guide the negotiation process.



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Using the information as a guidepost or data source, the human mediator can then tap into his or her own emotional intelligence and use their own individual life experience to engage the parties in the dispute and propose a resolution (or resolutions).

The resulting collaboration between AI-sourced data and human experience and emotional intelligence can provide an effective result. The more users who contribute to the system over time, the more data there may be for the system to potentially source and process, thus enhancing the resulting processes. However, in this scenario, the data is merely there to assist the human mediator in navigating the process, rather than to replace or displace them.

In blockchain ODR, the second branch of AI-based DR, blockchain and smart contracts provide a means to resolve disputes that may be otherwise ill-suited for traditional DR systems. For example, blockchain ODR may be better suited to resolve disputes involving unidentified participants going by pseudonyms who are located across varied jurisdictional regions and are desirous of a quick resolution to the dispute. The use of blockchains is valuable for their ability to crowdsource decisions in a manner not limited by time zones or region.

These disputes often involve lower values and thus finding a quick and inexpensive way to resolve them is integral. However, given that this form of ODR is targeted to low value disputes, the participants in this kind of dispute may not get the same attention and priority as other forms of DR. Notably, given that part of the underlying benefit of the initial contract is the inherent anonymity, the platform creates an added complication in the ability to source data to resolve the underlying disputes and/or at times may preclude or impede the uploading of key information.

Regardless, even in blockchain ODR, the process is not fully AI based. Human mediators remain at the top of the chain rendering decisions once the data is gathered together and organized for review and consideration.

In the third branch of AI based DR, Facilitative ODR merely brings parties together remotely and facilitates the communication processes itself in order to promote resolution. This is the form most closely connected to the court systems and while it existed a pre-pandemic, it rose in greater prominence during the pandemic and has remained in the DR space post- pandemic.

Pre-COVID, many courts had started to offer mediation as an alternative means of resolving parties' disputes; some to lower legal costs and some to a reduce the general backlog in the courts. Post-COVID, the backlog was an issue that remained.

The DR process, in general, has provided several benefits including: allowing parties the choice of "designing or crafting" an individualized resolution, expediting the overall process, and reducing legal costs. In certain types of disputes, such as family and domestic violence disputes, facilitative ODR can provide a protective buffer to those who may have safety concerns or where an imbalance in power and funds may impede the ability to reach results.

Of course, the loss of the personal touch (as with any of the online forums) can often be a large detractor from facilitative ODR, as it may lead to misread body cues and signals which can be disruptive to what might otherwise be a constructive process.

There are also some additional potential variables that need to be considered. AI can add unintended or unidentified demographic variables that are otherwise unaccounted for. For example, at the most rudimentary level and starting at the baseline of the modelers themselves, women and Latinx are in the minority at tech companies, meaning that there is less diversity among the individuals who actually craft these programs.

Thus, while in traditional DR, if the parties wish to have a diversity of perspective influence their processes, they can seek out individuals with diverse backgrounds to be included in the process. In contrast, in the AI based DR models, diversity of perspective is woefully absent and more difficult for parties to identify and achieve.

Moreover, while AI can analyze data and information, suggest solutions based upon comparable related cases or situations, and perhaps even evaluate risks based on inputted statistical data in similar cases, it is missing quite literally that human touch—it cannot truly hear a party who needs to vent and have

someone listen to their experience and offer empathy, compassion or understanding in response; nor can it provide a relatable life experience to address the parties' emotions.

To be clear, addressing emotions does not just exist in the family or personal injury/sexual harassment context, but often arises in business cases such as business divorces, closely held business disputes, and even in commercial matters of significant import. The key dividing line between humans and computers is just that—our emotions and emotional intelligence.

Human mediators offer adaptability and flexibility that, at present, simply cannot be programmed. Moreover, machines cannot be programmed to understand the concepts of fairness and justice—something individuals often pursue in their legal disputes. Leslie A. Berkoff and Connor Bifferato, *The Price of Principle*, XLI ABI J., no. 6, June 2022. However, in fairness, there are probably times when having AI analyze and provide a more objective and impartial analysis of the dispute and the parties' positions could be beneficial.

Further, AI's solutions depend upon that which it can source from the known published universe. However, much of what occurs within the DR space is never published or known. In fact, most mediated resolutions and settlements occur privately, as do arbitrated determinations. Even where there are decisions that are published (albeit without the names of litigants exposed), the details are often kept to the minimum.

Thus, AI does have a limit as to what it can draw from in reaching its proposed resolutions—it is limited in its "data in" and in turn is limited in its "data out".

Finally, the ever-present concerns of cybersecurity loom about. Putting aside the fact that the use of any online platform and uploading and exchange of data comes with a host of risks (there are variations in the security of each users' individualized platforms/systems and/or unsecured Wi-Fi), but now we factor in that of the AI/ODR system host as well. If the AI-based ODR system/mediator collects personal data from the parties in a mediation, how is that data protected and who has access to it?

So, at present, AI is not replacing humans. What is clear is that in all of these examples, human mediators have not been rendered obsolete. Rather, the AI processes or programs are simply tools to assist the mediators in the resolution process.

In the end, at least as we can currently see, AI has limitations and can only produce solutions based upon those which currently exist and are available in the known, published universe. As such, the solutions are not truly innovative, although the technology and the construct itself may appear to be.

Meanwhile, humans have the ability to imagine and continue to create new, untried, untested, and never before seen solutions—the limits being only the extent of their own individual creativity and experience.

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