Mediator Ethics and the Fourth Party

By Daniel Rainey

It has become a cliché to say that online communication channels and social media have changed the way we behave as individuals and as a society. It should come as no surprise that as information and communication technology (ICT) has become ubiquitous it has also changed the way we operate as third parties. At a recent ABA meeting, I asked the audience, "how many of you use technology in your practice?" Everyone in the room raised her or his hand. When I asked, "how many of you have thought about the ethical impact of using technology in your practice?", only one hand went up.

No matter in what area of conflict engagement we are involved, mediators manage communication among parties, help the parties handle information, and manage group dynamics on some level. As it happens, three of the core innovations brought to society by ICT are the creation of new communication channels, the establishment of new ways to share and evaluate data, and the ability to redefine groups and group work. It is inevitable that ICT and its use in dispute resolution will change the practice of conflict engagement. It is probably also inevitable that our organized thinking about the ethical implications of that change has lagged behind our actual use of ICT in our practice.

In this article I will use the term online dispute resolution (ODR) to refer to the integration of ICT into any dispute resolution process. That is a much broader definition than the original one, which referred to a niche practice, largely confined to the world of e-commerce, and focused primarily on conflict created online and addressed online. That definition still holds for part of the field. However, using ICT in any conflict engagement process presents the same ethical issues, and I find ODR the most useful term for the whole range of ICT-enabled practices.

A few years ago, two parties with whom I was associated (let's call them the Hatfields and the McCoys) began the process of negotiating a complex, multi-year contract. They engaged mediators to assist with the negotiations, with the expectation that they would have to meet face-to-face for a significant number of days each month for at least a year before creating a final agreement. The mediators suggested the use of a commercial online group workspace, with asynchronous discussions, single-text editing, document archives, and other features that would make it possible to share

information and work between face-to-face sessions. The parties agreed to use this ODR technology, and indeed at the end of the negotiation process they suggested to the mediators that doing so had saved "one work day each week."

This is, clearly, an ODR success story. But it also highlights several ethical considerations in play with any use of ODR technology. As Ethan Katsh and Janet Rifkin have pointed out, the technology itself functions as an active participant in any conflict engagement process—a "Fourth Party." Three obvious areas of ethical consideration contained in all of the major statements of mediator ethics or standards of practice, and affected by the presence of the Fourth Party, are: 1) confidentiality/privacy, 2) access to the process, and 3) competence.

In the example above, the Hatfields and McCoys used the ODR technology to share documents, including documents containing financial and proprietary information, and to engage in discussions that included comments and options that were speculative or experimental and never made it into the final agreement. Third parties commonly present the face-to-face mediation process as one that can, within defined boundaries, promise confidentiality and privacy, creating a workspace in which parties can communicate and share possibilities without the risk of having those ideas and possibilities taken outside the mediation process. Can the Fourth Party guarantee this?

Recent news stories about Edward Snowden's revelations about the extent of government surveillance, and the compromising of personal data held on Target's servers during the past Christmas shopping season, have sparked a lively debate about the safety and security of any information shared online. In terms of ethical responsibility, what should or can the mediator tell the parties about her or his ability to maintain confidentiality and guard the security of information when the information is being handled by the Fourth Party?

Although what may be said about confidentiality and the Fourth Party varies from platform to platform, I suggest that the mediator has to tell the parties *something* about how the ODR technology affects the concepts of confidentiality and privacy. In the Hatfield/McCoy case cited above, the mediator could have said that the platform was a well-established commercial site, with a built-in incentive to maintain top security, encryption in both directions, and internal controls built on passwords and user rights. Knowing all of that, the parties would have been able to make an informed choice. One might argue that it would have been ethically necessary also to say to the parties, "in fact, any information shared on

the Internet, in any form and on any platform, is never completely safe – I can't guarantee confidentiality and security if you use this technology." Even though the realistic chance of confidentiality being breached, other than by improper actions from the parties themselves, was very small, hearing the caveat about guarantees, and hearing about Edward Snowden and Target, might have caused the parties to make another choice about the process they were accepting.

While it is true that many egregious breaches of confidentiality are possible, and have happened, using paper generated in face-to-face sessions, ODR platforms offer new ways to share information that should not be shared. Even if platforms are encrypted and password-protected, and even if it is not possible to download or copy documents, it is always possible to capture images on a screen and share those images. It is just as possible for breaches of confidentiality to occur in face-to-face sessions as it is in online sessions, but anxiety about surveillance and hacking make the possibility of online confidentiality breaches seem more likely, and that anxiety about the Fourth Party must be addressed in some way by the third party, the mediator.

As it happened, in my example the Hatfields and McCoys both were large organizations with more than adequate technical infrastructure and expertise to use the ODR technology suggested by the mediators. The actual individuals at the table, however, were not equally comfortable with the online environment. The mediators spent some time training the parties in the use of the technology, and making sure that each side was able to access information, input information, and navigate the documents stored in the online archive. It is not difficult to imagine a situation in which online tools are not equally accessible to the parties, and in which it would create a disadvantage if it were necessary to use an ODR platform. It is ethically imperative for the third party in a face-to-face environment to design and implement a process that is comfortable for the parties and in which they have an equal ability to engage. It is equally ethically imperative for the third party to consider the impact of the Fourth Party in process design, and in monitoring party activity during the conflict engagement process.

The ethical standards adopted jointly by the American Arbitration Association (AAA), American Bar Association (ABA) and Association for Conflict Resolution (ACR) speak to the issue of mediator competence. What does it mean to be a competent mediator? Does completing a 40-hour court-approved training course make one competent? Does completing a graduate degree in Dispute Resolution make one competent? Does conducting a thousand mediations make one competent? The

answer in each case is, "maybe, but not necessarily." The field has not reached consensus about accreditation, professional standards, and the concept of competence across the field of conflict engagement as a whole. Specifically relating to ODR, there is not even the spotty record that we have for offline third party work.

Fortunately for the Hatfields and McCoys, the mediators with whom they were working had experience with a variety of online platforms, including the one they recommended, and one of the mediators was a self-described "demi-geek." For those of us who now use technology in our practices (and the show of hands at the ABA meeting seems to indicate that most or all of us do so), where do we go for training and education in ODR? What are the elements of competence relating to ODR that are basic? If we are using technology with which we are not completely familiar – learning on the job – do we owe an explanation of that to the parties? And perhaps most importantly, do we need to have enough expertise in technology generally to know the risks and advantages of all of the technology we may want to use with the parties?

One ethical issue related to competence that continues to stand out for me is the willingness of third parties and parties to use e-mail as a channel of communication. It is the worst choice possible for any information one wishes to keep confidential (just ask General Petraeus), and I think it is ethically responsible to tell parties to put nothing into an e-mail that they don't want to see on the front page of the Washington *Post* (or in the Washington Post Online). Perhaps competence, as it relates to ODR, includes both the ability to manage the technology, and knowledge sufficient to advise the parties about the risks involved in using the technology.

One change in the ODR landscape is the emergence of platforms that are both designed specifically for conflict engagement and are commercially viable. Heretofore, most of the technology platforms used by third parties have been designed for communication or information handling, or group work in a general sense, with no particular focus on conflict engagement. As platforms increasingly are developed with conflict engagement in mind, the choices made by designers and programmers will have an impact on the practice of conflict engagement – in their capacity to make decisions that affect the parties and the process, they have been referred to by some as "fifth parties." As our discussion of ethics and standards of practice moves forward, it seems clear to me that those who design and manage ODR platforms should be considered, and should be part of the dialogue.

The experience the Hatfields and McCoys had with ODR technology was a positive one. They used the platform during bargaining, and they continued to use it for communication, discussion, and idea sharing for years after the bargaining round. But it would be an exaggeration to say that their positive experience was a result of anything other than informed luck. They happened to have mediators who happened to have expertise using a platform which happened to fit their needs and which happened to be reasonably secure, and with which there happened to be no problems. That's a lot of happenstance, and most would agree that our parties deserve more than that in terms of disclosure about confidentiality, access to the process, and mediator competence.

Ultimately, it is not necessary to completely retool the ethics or standards of practice that have been developed to guide third party practice. Basically, the standards of practice prompt a series of questions that relate to the third party's duty to involve the parties, maintain impartiality, etc. All the same questions apply to conflict engagement work done completely online, or with the assistance of technology as an adjunct to face-to-face work.

Our debate and discussion about ADR ethics and their relationship to ODR will be, and should be, evolutionary, not revolutionary. It's a discussion we should have started earlier, but which we are beginning, and which we must take forward as the Fourth Party continues to join us at the mediation table.