

**Texas Association of Mediators (TAM) Keynote
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Mediation and Technology: Evolution, not Revolution

First, let me thank TAM for the invitation to come and speak with you today. Although my day job is in Washington, DC, I have been associated with the dispute resolution program at SMU in Dallas for almost a decade now, and I had an apartment in Plano for a while, so I think of myself as at least an honorary Texan.

The topic Jennifer asked me to address is related to the integration of information and communication technology - ICT - into the practice of mediation, and for that matter, the integration of ICT into all forms of conflict engagement.

The term we've come to associate with the incursion of ICT into mediation and other third party work is Online Dispute Resolution - ODR. And the mainstream way we've come to think about the relationship between ODR and ADR is one of opposites - on the one hand there is ODR, and on the other hand there is ADR. In the most recent edition of the International Journal of Online Dispute Resolution there is even a point-counterpoint article by Colin Rule and Carrie Menkel-Meadow on the topic, "Is ODR ADR?"

I'm going to suggest that thinking of technology and conflict engagement as an ODR/ADR dichotomy is not helpful, and is in fact misleading. It is much better, I think, to think of the relationship between ODR and ADR as existing along an evolutionary/revolutionary spectrum -

and up to this time, I will argue that our use of technology has been evolutionary, not revolutionary.

I say that because in order to be revolutionary, the consensus among those who deal in definitions is that revolutionary activity causes “complete, dramatic, fundamental change” - “thorough replacement” of one system with another. We have not nearly revolutionized ADR with the increased use of technology - but we have made some startling evolutionary changes.

I’ll come back to that. For the moment, let me reflect on where we’ve come from in the development of ADR technology.

A year or so ago I was having a conversation with a graduate student at one of the universities where I teach or lecture. She had been asked to pick up from the airport a quite well-known mediator who was to be a guest speaker at a conference being held at the university. During the drive to the campus she told him she was taking my class in Online Dispute Resolution. His reaction was, “Oh, that stuff will never work.” His presentation was entitled, “Dealing With Parties Who Have Intractable Positions.” I suggested that his presentation should be great because he obviously had some direct experience with intractable positions.

It has always seemed to me that ICT and mediation were a natural fit. I first was involved in what could loosely be called an ODR experience back in the mid-1980’s when I helped organize a mediation with parties in North Africa, the UK, and the US - using telephones and fax machines.

From then on, my experience has been that as a third party, I engage in three activities on a regular basis: managing communication with the parties, helping the parties deal with information about their dispute, and managing group dynamics at the table. Three of the central features of ICT are that it gives us more communication channels, helps us deal with information in ways that were heretofore not possible, and it helps us redefine groups and group dynamics. If three of the most important things we do as third parties match exactly three of the major features of ICT, how can one *not* have an impact on the other?

Heretofore, this has not been a mainstream opinion.

I have often felt like one of the voices in the wilderness when it comes to ICT and ADR. There were times when an ODR panel consisting of Ethan Katsh, Colin Rule, and me actually outnumbered the audience at conferences. There have been bright spots - Bill Ussery, one of the true giants in the world of labor mediation, when he formed the Ussery Center in Atlanta, brought in an ODR specialist to make technology's "incursion" into traditional practice part of their work. But mostly, up until very recently, reactions have been more along the lines of "it'll never work."

Anecdotally, I would say that the "it'll never work" attitude is moderating, and even further, it seems that technology and its impact on all forms of conflict engagement are becoming topics of conversation in the ADR community, the legal community, and the peacebuilding community. Just this week I had a look at the documents associated with the International Mediation Institute (IMI) certification in E-Mediation, and I've been working with the InternetBar.Org here in the US to develop training that would address basic technology competencies for mediators and

other third parties. In one sense, ODR is now a “safer” topic - I can talk about online dispute resolution without seeming to be a mad locust-eating prophet wandering around the wilderness.

If I’m right about ODR becoming more mainstream, what’s changed?

One change is the extent to which ICT has become an integral part of the social fabric of our world generally. We are, I would argue, living through a period of communication and social change at least as significant as the one brought on by the invention of the printing press.

A look at a few of the things that have changed in the last decade or so will suggest the depth of the evolution we are living through

According to the Pew Research group, In 2005, 5% of the US population used social media. In 2017, that figure will reach 70%. Social media use is still stratified by age, but that’s breaking down. The highest use is among those 18-29 years old - 80% of that group are regular social media users. But among the 30-49 age group, 70% engage in regular social media. Among the 50-64 age group 50% engage in regular social media use, and the numbers are rising.

Apart from social media, Internet use is also staggering. 87% of US adults regularly use the Internet, and 73% use the Internet daily. 21% of US adults say they are online “almost constantly.”

Basically, we are communicating with more people, more often, through more channels than ever before. The existence of those channels and the level of use we give them almost

inevitably means that we are creating disputes at a record level, and we are creating channels for handling those disputes at an equally record level. As Ethan Katsh once quipped, the ability of the Internet to resolve conflict pales in comparison with its ability to create conflict.

Perhaps the most startling statistic to me is that 1 in 3 new marriages involve individuals who met online.

Another important aspect of ICT use is the introduction of mobility as a key component - in February, 2014, for the first time, more connections to the Internet in the US were made on mobile devices than were made using desktop computers.

So, as I have said in other venues, if our parties can buy houses online, contact a doctor or psychiatrist on a mobile phone, talk to the grandkids across the country by web video, and go to FarmersOnly online dating to find someone to marry - they are going to want to know why they can't deal with us online.

One of the problems we have when talking about mediation and ICT, and one of the reasons the "it'll never work" attitude has been prevalent, is that we are stuck with some misleading terminology, so let me deal with some definitional things up front.

If you are aware of the work being done with technology and conflict engagement at all, you probably have seen and may have used the term ODR - Online Dispute Resolution. In fact, I am the editor-in-chief of the *International Journal of Online Dispute Resolution*. The acronym ODR is a legacy from the time when the Internet was just beginning to make a significant

difference in the way we conduct our social lives. I wish we could come up with a better and more descriptive term. But for now, it's what we've got.

For most of us who have been involved with ODR for a while, the seminal event in the development of ODR was the 1992 decision by the National Science Foundation to remove the ban on commercial activity on the Internet. Up to that point, the Internet had been a research and communication tool used by a select group of academics and government organizations. Allowing commerce onto the Internet changed everything. eBay, the traditional poster child for Internet commerce, was founded in 1995. By the end of the decade of the 90's, if eBay had been a country, its members as citizens would have constituted the third largest country in the world. That seems a paltry number compared to those involved in e-commerce today.

In the mid-1990's, Ethan Katsh, Janet Rifkin, Colin Rule and others began working on dispute resolution systems for e-commerce based on a very direct and powerful observation - with e-commerce we were creating conflict that was unlike the conflict we had been creating in face-to-face, or even mail-based commercial actions. Conflict was being created online by parties who often could not engage in traditional litigation or ADR, where venue and boundaries were almost meaningless, and where the only reasonable venue in which to resolve conflict was the online venue in which it was created. And, in addition, we were creating huge numbers of online conflicts - today, eBay alone handles over 60 million dispute every year. The solution that has been pursued by eBay and everyone else in the e-commerce universe has been to create what are essentially private justice systems involving online dispute resolution schemes.

In this environment, the term ODR was created, and it came to be associated with the type of technology-assisted dispute resolution that happens entirely online, with heavy reliance on automated systems, algorithms, and increasingly these days, artificial intelligence (AI). You simply cannot afford to hire enough flesh-and-blood mediators to handle 60 million disputes every year, so you have to rely on computer programs to serve as direct actors - active "Fourth Parties" - in the dispute resolution process. In e-commerce, dispute resolution processes have merged with customer service processes in what I call a "funnel" system. In most e-commerce schemes the assumption is that many of the "disputes" that come to the system can be handled by providing information, or by offering a series of choices in a decision tree that eliminates many if not most of the disputes before a customer service representative or mediator is necessary.

I'm not here to talk at length about dispute resolution in the e-commerce environment, but if you have any questions about how this all works, you can bring it up in the Q&A, or grab me in the hall and we can talk.

The upshot of all this is that early efforts to address the conflict we create online were developed under the umbrella term ODR and that has led to a tendency to think of ODR as the wholesale overtaking of the mediation process by computer programs, pushing aside mediators, stripping off nonverbal communication, and perverting the course of alternative justice - perhaps inevitably moving toward the creation of a "better mediator" - IBM's Watson for mediation.

That would be revolutionary.

But that's not what has happened, and that's not how I think of ODR in the current context.

ODR in the e-commerce sense has continued to develop, and artificial intelligence (AI) as applied to e-commerce is alive and well. But what has happened in the rest of the dispute resolution world is not so much revolutionary as evolutionary.

As a way to start discussing this, let me reframe the definition of ODR. ODR is *not* just the development of automated systems for disputes handled entirely online. ODR, in the broader sense, is simply the intelligent application of information and communication technology to any conflict engagement process. I say "intelligent" application, but in many cases it's probably the "unwitting" application of ICT - we have integrated technology into what we do professionally because we have integrated the same technology into our everyday lives.

When I say that the use of ICT has been evolutionary I mean that we have found, as ADR practitioners, ways to use ICT to do the things we always did, but with the assistance of various technologies.

I'll come back to the revolutionary stuff later, but let me give you some examples of what I think of as evolutionary uses of ICT, and some ideas about how uses of ICT should make us think differently about the rules and ethics of our profession.

But let me start by saying that all of us use ICT in our practices. If we do nothing more than use mobile phones and e-mail to communicate with parties, we are using ICT. Almost all of the third parties I know who use ICT, even those who use sophisticated platforms to handle

communication and information sharing far beyond phones and e-mail, regularly do so as an adjunct to face-to-face, traditional mediation or facilitation - so the idea of ODR as a fully self-contained online mode of work is, currently, really a feature of e-commerce, not mainstream ADR.

So what do I mean by “evolutionary” uses of ICT in conflict engagement?

On the most basic level, we have taken the normal functions that we have to fulfill as third parties as we walk through the steps of our standard mediation models and used online technology to help us fulfill those functions.

Again, I would guess that almost all, if not all of you in this room use smart phones and e-mail as a baseline set of ICT in your practice. Some of us go further.

For example, I use Survey Monkey and Doodle to help schedule sessions, get agreements to mediate in place, and gather all of the information that we need to have before convening meetings of the parties. I use Zoom, WebEx, and other web video systems to discuss and share documents in real time with parties in dispersed locations. I use FreeMind and MindMeister to conduct online brainstorming, and I use various document handling platforms to engage in single text editing of draft agreements, etc. None of this is revolutionary - it's doing the same old thing using ICT to make it more convenient for the parties and for me.

For a long time, one thing missing as we began to integrate ICT into practice was the availability of a “cradle to grave” ODR platform that would allow for traditional practice handled all online.

We tended to blend apps developed for other purposes that happened to fit with our ADR functions - maybe the most dramatic example in my own practice is the use of mind maps for brainstorming and organizing complex agreements.

That's beginning to change. From early "failures" (and I use that term gently) like The Mediation Room in the UK and Juripax in the Netherlands, to more successful full service platforms like Modria, we have begun to see ICT platforms that will support a full "cradle to grave" process online. Just the other day I sat through a demo of a new online mediation system called Brav that shows real promise as a platform that small firms and sole practitioners may be able to integrate into their practices. But all of these are based on the classic mediation model and are, in my mind, not at all revolutionary.

In other areas of third party work and service delivery, one sees the development of evolutionary technology.

In the law, everyone has heard of Rocket Lawyer. But literally dozens of apps are springing up to make the law and lawyers more accessible - everything from "Ask A Lawyer" that lets one ask questions directly to a lawyer from a mobile phone, to the mobile "Oh Crap App" that gives one guidance and connects to lawyers when those blue lights come on behind you in traffic.

I'm a member of the committee of the Virginia Supreme Court's Access to Justice Commission dealing with how to open up the system to *pro se* litigants - those who usually can't afford a lawyer and try to navigate the legal system on their own. That committee is dedicated to using technology to increase access to justice, but their primary approach is to automate access to

forms - not to use technology to turn the system on its head, as some legal revolutionaries would like to do. I am the non-attorney mediator voice in the room.

In medicine, web video sessions are becoming common, and electronic medical records are becoming standard, and apps like “Doctor-On-Demand” and “ZocDocs” are putting basic medical information at your command through mobile phones.

In Psychology, “PTSD” coach offers mobile access and “iCouch” is an online door to an array of psychological assistance.

James Cartreine and his colleagues at Harvard Medical are working on online apps for treating depression, and they have deployed an ODR system to handle disputes on the Space Station - that moves us closer to what an early MIT computer scientist, J. C. R. Licklider, wanted to call the Internet - The Intergalactic Network.

Technology is, literally, everywhere. We appear to be hooked on it, and it appears to be deeply affecting the way we live. But ICT has, so far, more often than not pushed us to evolve our dispute resolution habits, not revolutionize our habits. And, as Barry Wellman and his co-author argued, we are not hooked on technology - we are hooked on people, and ICT is just another, arguably sometimes better, way to connect with people.

Our evolutionary use of ICT has some implications for the ethics of our practice. I’m a member of the Ethics Committee for the Association for Conflict Resolution, and I’m chairing a working

group bringing together the ACR, the ABA, and AAA to revisit the Model Rules endorsed by all of those organizations back in 2005 - back when 5% of us used social media.

I think all of the model rules, and all aspects of the ethics of mediation, are affected by the use of ICT, but I'll just discuss two or three examples.

The need to provide an environment in which the parties have "self-determination" is one of the duties of the third party. If the mediator is using a mobile phone, e-mail, or dedicated ODR platform, it is probably incumbent on the mediator to understand him or herself the implications of using that technology, and to be able to adequately describe how the process of mediation will be conducted using the technology, so that the parties can enter into the process with informed consent.

The need to demonstrate "competence" as a mediator calls into question what should be used to determine training standards and demonstrations of skill in using various ICT channels. As a parallel, legal ethicists are struggling with this issue in a way that, I think, presages what the ADR community will need to consider. Victor Li explains that the ABA's Model Rule 1.1, contains the words "a lawyer shall provide competent representation to a client." A comment related to the rule extends that requirement by adding, ". . . including the benefits and risks associated with relevant technology." This year the Florida bar went further, making it mandatory for lawyers to take at least 3 CLE hours in an approved technology program as part of the 33 hours of CLE they have to complete in each three year period.¹ I think our ACR/ABA/AAA joint committee will have to address this issue for mediators.

¹ Victor Li, "Mandate the Update," ABA Journal, February 2017, p. 24.

Finally, “confidentiality” is greatly affected by the use of any ICT. How secure are mobile phones? How secure is e-mail? To what degree is the platform being used able to keep information secure, and, perhaps more importantly, what is the relationship between confidentiality protections for the mediator and confidentiality protections for Fourth Party providers?

Our evolutionary use of ICT has created some issues with which we must deal.

Are we likely to see revolutionary changes? I think so.

In one sense I hesitate to step off into this territory. More often than not, the reaction one gets when looking back at predictions made about what changes are on the horizon is “Geez, I wish I hadn’t said that in public.”

But here goes.

The first revolution we can think of as “driverless mediation.” Ford Motor Company has just teamed with a tech start-up to work on getting a production line driverless car on the market by 2021. The first steps in that direction have already begun. My car for example, has a “smart cruise control” feature. This is pretty common now - when I get on the highway, I can set the cruise control and the car’s computer will keep me at a certain distance from any other cars on the road, maintaining my speed, or braking and accelerating as necessary to navigate traffic. That’s pretty cool - but it still freaks me out a bit. As I see a car with it’s brake lights on as I’m

approaching at 75 mph, I get a little nervous about whether the computer's paying attention. So far, so good. Full automation, if I'm still around, will freak me out more, I'm sure.

Driverless mediation already exists in e-commerce at about the level that my smart cruise control exists. The 60 million disputes that e-Bay handles only use live third parties in 10% of the cases. The other 90% are "resolved" by Fourth Party algorithms created to provide information and offer paths to resolution without the "interference" of a human third party. It is already the case that online apps encourage parties to engage in direct negotiation by leading them through rational decision making steps without a third party.

In the not so distant future, IBM's Watson and the other IE programs that will soon overtake Watson will be able to engage in true driverless mediation - not just leading the parties through a series of steps, but actually operating as a virtual Third/Fourth Party. That, at least in my mind, borders on the revolutionary. I'll stress here that I don't think driverless mediation will be the norm in the near future but I do think that in those areas where there is an economic or systemic advantage for the development of driverless mediation, we will soon begin to see AI platforms appearing.

What does this mean for flesh-and-blood mediators? Two things, I think. First, it means that at least in the foreseeable future, traditional third parties will continue to have full case loads, and there will be the ability to focus on those messy, complicated, human-driven conflicts that call for the human touch. We may not have all of the same work going forward, but we'll have work. Second, it is vitally important that the experience, knowledge, ethics, and judgement of

mediators be considered in the development of smart systems. It is in your best interests not to fight the revolution, but to become part of the revolution and guide it from the inside.

Another revolution is here or nearly here. Using big data and sophisticated analytical tools, we can look at a staggering amount of information and make some sense of it in ways that human beings operating alone can't manage. For example, in public policy facilitation it is possible to generate literally millions of comments and messages from interested members of the public. Even the most experienced and dedicated facilitation team can be overwhelmed by the raw amount of data available in public comments. ICT can sift and evaluate masses of information and present it to facilitation teams in a way that makes it possible to understand the conflict dynamic in much more nuanced and useful ways. As a brief hypothetical example, consider public outcry after a perceived police injustice related to a shooting. Working with the community it is tempting, perhaps necessary, to draw the "interested parties" in broad strokes - the Black Community, the White Community, the Police, the Politicians, etc. In fact, in heated and complex conflicts, interests, alliances, and connections are much more complex, messy and human than that. Big Data analytics and natural language programs - programs that can "read" and "hear" written and spoken languages - can help unpack those related interests and make the job of the interveners more effective. I think that's potentially revolutionary. What's the place of traditional third parties in this wing of the revolution? I think we would all agree that one goal of the third party is to offer the best opportunity possible for the parties to understand, and hopefully resolve their conflicts. If a revolutionary tool will help do that, we should join the revolution.

Finally, I think we are on the verge of redefining the nature of the “Justice System.” My colleagues on the Access to Justice Commission, and pretty much everyone else, tend to think of A2J as access to the courts. For many reasons I won’t go into here, that is a dysfunctional way to think about a dysfunctional system. Particularly for those in our country who are in poverty or who have financial resources that do not allow extended litigation, the courts are a place where things happen TO you not FOR you. In places like the UK and British Columbia, and even in some small projects here in the US, the notion of A2J that includes easy access to ADR systems, and which are actually available to the “normal” citizen who is effectively locked out of the court system, may revolutionize our notion of A2J. It is almost universally assumed that opening up the justice system, however it is defined, will rely heavily on ADR systems that handle cases before they go to litigation, and that access to those ADR systems will rely on ICT, particularly mobile technology.

You, mediators in this audience, have an important role to play in this revolution. Playing that role is going to mean that you have to become comfortable with the evolutionary changes ICT has made in our practice as conflict engagement professionals.

I’m of that generation that, stereotypically, should be technology-averse. Instead, I’ve embraced the use of technology wholeheartedly. Why? Because it is in sync with the reason I got interested in conflict engagement in the first place.

I suspect like many of you, I was drawn to conflict engagement because I actually care about what happens to the people who interact with me professionally. We don’t manufacture widgets - we help people, or at least we try to.

One of my mentors was a social critic - Kenneth Burke. Once, on a barstool, which is where a lot of good thinking goes on, I asked him a question about method. What is your method, I asked, for figuring out what's going on in situations with which you are confronted? I expected him to lecture me on one of the many methodological approaches about which he had written - and I was looking forward to that. Instead, he answered, "I don't have a method. I'll use any ideas, any approaches, any tools that will help me understand why human beings, in a given situation, are behaving the way they are behaving." I think that may be the best guidance I ever received.

So, I look at the field of practice we call mediation, and I see the use of Aikido, Yoga, Dance, Theatre, Music, Improvisation, etc., etc., as modes of communication and understanding applied to the participants in conflict. I don't think any of those are strange. If they work for the parties involved, all the better. I have tried to take the same attitude in my approach to the use of technology in mediation and other forms of conflict engagement. If ICT can create communication channels and help open up the possibility of understanding among those in conflict, so much the better. If ICT can help parties understand information and deal with complex elements in their disputes, so much the better. If ICT can help me redefine groups and create interest groups from dispersed individuals, so much the better. Like my mentor, I'll use anything that works for the parties to help them help themselves. That's why I do this work in the first place.

So, ICT has wormed its way into mediation - it has helped us make evolutionary changes to the way we practice - and it offers the possibility of revolutionary change that will increase our ability to assist parties in distress and conflict.

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Viva la revolution!

Thank you for your invitation and your attention.

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