Glimmers on the Horizon: Unique Ethical Issues Created by ODR

By Daniel Rainey

Anyone who does a search on the Internet these days knows that we have immediate access to an enormous amount of information. And we also know that Google and other online services have an enormous amount of information about us. Is this related to ethics and ODR? Absolutely.

Questions regarding the relationship between information and communication technology (ICT) and mediator/arbitrator/third-party ethics are not entirely new, but they are generating more interest now because of the increasing use of technology in all forms of third-party work.[1] Most of the writing and thinking about ICT, ODR, and ethics has, so far, been focused on what impact ICT is already having on third-party practice and how the classic ethical canons are affected by the use of technology. Much discussion, and some changes in ethical guidelines, have surrounded the creation of "friends" online and the ability to "recommend" others online. If you are an attorney or a mediator, is being a "friend" to a judge a violation of ethics? Is having a colleague who has never been a client "recommend" your services a violation of ethics? Depending upon where you practice, the answer is yes. Or no. Perhaps the ethical issues that have garnered the most attention are confidentiality (and

safety of information), the parties' right to give informed consent to processes and channels of communication, and the obligation of the third party to be competent to conduct the process.

This article, however, will focus on two interesting ethical issues out on the horizon that are uniquely created by the use of technology: ethical issues surrounding those who develop ODR applications, and ethical issues surrounding the development of "big data" capabilities for dispute resolution. At the moment these are just glimmers, but they will soon loom large, as technology continues to make inroads into all aspects of human communication, including third-party practices.

Ethical Issues for Program Developers

The first of these glimmers on the horizon relates to the ethical responsibilities of the developers who conceive and design program applications for third-party work. For more than a decade, online applications designed specifically for dispute resolution have been available. Some were very specialized, like the online system used by SquareTrade in the resolution of disputes for eBay. Some were driven by algorithms, like the system CyberSettle used for blind bidding resolutions in the

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insurance industry. These types of specialized applications succeeded because they were created for proprietary use in venues with a large number of disputes.

But most dispute resolution practitioners who have used online tools have probably used technology designed for something other than dispute resolution. Telephone and VOIP (Voice Over Internet Protocol) systems allow for audio conference sessions, web video platforms allow for video and audio sessions, survey applications help with intake and decision-making, and online group performance applications offer the ability to create "rooms" for parties, archive documents, and engage in online editing of documents. All these applications were created by individuals and groups who had a specific function in mind, but not one related to dispute resolution.

All technology that neutrals use has an impact on ethics, whether the technology was created specifically for dispute resolution or has been adapted from other uses. Ethan Katsh and Janet Rifkin coined the term "Fourth Party" to describe the role of technology in the dispute resolution process – the technology becomes an influencing factor, just as the primary parties and the third party do. Behind the Fourth Party are developers, who may or may not be dispute resolution practitioners themselves, creating customized technology for dispute resolution.

What are the ethical implications for the developers and third parties who will use these applications? In 2006, the National Center for Technology and Dispute Resolution published a seminal document, *ODR Standards of Practice*, which was intended to point the way toward issues we should be addressing as part of the ethics of creating Fourth Parties.[2] Most of the standards of practice in that document focused on developers and the creation of applications: accessibility, affordability, transparency, and fairness. An effort to update that document is underway today, and privacy, confidentiality, security, and cultural sensitivity probably will be added to the list, along with a more direct discussion of third-party ethics. The traditional role of ethics in dispute resolution has been to tell third parties how to behave; the role of ethics for ODR developers will likely evolve as a set of ethical canons that tell developers *and* the applications they create how to behave. The two roles are closely related.

The question of ethical guidelines for ODR developers and third parties is becoming more urgent by the day as new, made-for-ODR platforms emerge in the dispute resolution marketplace. Many of the new ODR applications are designed to operate in the high-volume, low-value online commerce environment, but many are now targeting individual third-party practitioners and those in small firms who might take more traditional offline disputes into online spaces. The widespread use of ODR tools in the commercial arena has created an interesting practice, in which disputes are not labeled as disputes, and the goal of the third party – and the application – is not to resolve disputes but to create a satisfied customer. In this environment, it is possible, even likely, that the "third parties" and the developers of the applications are only dimly aware, if they are aware at all, of the ethics of third-party practice. (See the article by Ethan Katsh and Orna Rabinovich-Einy on page 8 of this magazine for an interesting discussion of ODR on "sharing economy" platforms.)

Several years ago, my colleague Alma Abdul-Hadi Jadallah and I suggested that there was "culture in the code."[3] Our basic argument was, and is, that the culture, perspective, preferences, and ethics of those who develop the applications we use will imbed their cultures and perspectives on dispute resolution into the applications they create. Those cultures and preferences affect ethics in obvious ways relating to confidentiality, security, and party self-determination, but in fact they affect, and are affected by, the entire sweep of ethical considerations applicable to third-party work and the international dispute resolution community. For example, "Western" mediators (and application developers) usually agree that the decision-maker should be at the table and that the dispute resolution process is a linear one, leading from issue framing to interest expressions to option generation to agreement. Applications developed with these assumptions do not match the community and/or family decision-making process that dominates in some cultures, nor do they take into consideration the nonlinear nature of sensitive discussions in many cultures.

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Big Data in Dispute Resolution

Another interesting and potentially consequential set of ethical issues surrounds the creation of an archive of information that is different in size and nature from the archives that have been created through the practice of dispute resolution in the past. In short, "big data" is on the horizon for dispute resolution.

Big data, as a concept, is pretty simple: the term refers to data sets that are so large and so complex that traditional means of analyzing and understanding the information contained in them are inadequate to the task. To

confront the problem of understanding these large data sets, a number of new analytical tools and approaches have been developed.

Ethics and the Proper Use of Data

The use of information and data has always been connected to ethics questions. A major selling point for informal ADR processes has been that information exchanged in a mediation can be protected from later use in formal arbitral proceedings or litigation. For example, parties who engage in grievance mediation with the National Mediation Board do so under process agreements that clearly exclude information revealed in mediation from being used in subsequent arbitration hearings.

Protections, however limited, help mediators resist handing over information from mediation sessions in discovery or in response to Freedom of Information Act requests. Mediators have an ethical requirement to offer a safe, confidential process that promotes party self-determination, and even with training, guidelines, and ethical canons in place, the handling of information has always been a source of potential problems. The advent of ODR technology has increased the probability that questions about the handling of information will mount.

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The "paper age," that time when most information generated in a mediation existed only in print form, is history, and third parties now use computers and word-processing programs to generate and save information on local drives, networks, and the "cloud."[4] Destruction or deletion of data can't be accomplished by shredder; deleted documents remain on the storage medium, albeit not in an easily accessible form. If the information is important enough and if there is an order to produce it, an ICT forensics expert can recover most or all of the deleted information. The only way to reach the level of destruction that equals the shredding of paper is to remove the drives and physically destroy them. This raises the possibility, indeed the probability, that a future attempt to discover information, one that a mediator refuses to comply with, may be turned to the owners or developers of a cloud application on which the information was stored during mediation.

E-commerce sites handle many millions of cases per year using cloud-based ODR systems. Although online mediation and facilitation cases outside the e-commerce environment are not likely to reach those levels in the cloud soon, the numbers will be large. Party information is stored where it is never truly deleted, in a physical location we do not control, and in a volume far greater than we have seen in the past.

Ethics of Mining Big Data

The significance of this for dispute resolution practitioners and for the field as a whole is that we will be confronted with the opportunity to mine "big data" in a way that has not existed before. All the data deposited in cloud applications can be stripped of identifying information and analyzed as a vast database of information about things such as types of disputes, types of disputants, potential resolutions considered by the parties, and outcomes or settlements.

To cite one example, in a branch of computer science known as "natural language" research, some of the work focuses on creating "natural language applications," programs that allow computers to understand and respond appropriately to spoken and written language. One ongoing project, for instance, deals with whether and how computers can tell when online reviews of merchants are false negatives or false positives – reviews planted to either boost or harm the merchant. The same research could, and does, ask whether a computer can tell when the language used in a massive database shows anger, happiness, or satisfaction.

The usefulness of this type of research on big data in dispute resolution is evident. For any type of dispute for which there is a large database, we could ask and answer questions about what kind of issues prompt disagreement, the range of common approaches to the dispute, and the most common resolutions accepted by the parties. If a third party were so inclined, this type of information could be used to direct parties toward "normal" outcomes. This raises ethical questions about gathering the massive database, doing the research with it, and using the results of the research.

Although this is not universally accepted, in a traditional face-to-face process conducted using paper or storage media controlled by the third party, many people assume that the information generated in the dispute resolution process is "owned" by the parties. For example,

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my agency, the National Mediation Board, has explicitly put a disclaimer on its online platforms that identifies the information as belonging to the parties. What the parties say in the sessions is assumed to be private and confidential, and the parties own the agreement to participate and the settlement document. But in a cloud/big data environment, who owns the information? If identifying information is stripped from the records, should the third party or the ODR service provider be free to conduct and perhaps publish research results using the information? Should the developer be able to use the research to improve ODR systems and profit by those improvements? Should he or she be able to sell the information or make it available to independent researchers or third parties?

All these questions are being actively considered, and in some cases litigated, in the world of e-commerce because that is the first venue in which big data about disputes has been gathered and analyzed. In 2014, LinkedIn, the professional networking site, was sued in a California federal court for selling user profiles. In 2012, the FTC fined SPOKEO, the personal search engine, for selling profiles, and a civil suit involving mishandling of data under the EU data protection laws is now in the commercial court for Vienna. These suits all focus on data related to consumers and marketing. As the cloud data set involving dispute resolution grows, the same issues are very likely to surface in discussion and in litigation.

Technological Competence and Big Data

One ethical issue related to ODR cloud providers is immediate. Third parties have an obligation to provide a process that ensures party self-determination and is acceptable and comfortable for the parties. An article in the November 2014 *ABA Journal* discusses how much a third party should know about the operations of online ODR applications and how the parties' data is handled.[5] How does one describe to the parties the safety, confidentiality – and ownership – of information generated and stored online in a dispute resolution process? If technology is going to be an element of practice, how technologically expert must third parties become to operate ethically?

Conclusion

Developers will continue to create online systems for dispute resolution, big data will continue to grow, and big data analysis will be easily available. The questions we must wrestle with now are whether developers should have to meet standards in the creation of dispute resolution applications, and, given the fact that we will be able to consider big data analysis, whether and how we should use it. ◆

Endnotes

1   In the mid-2000s, Kristen Blankley and Sarah Cole speculated about where we were and where we should go regarding online ethics, and Susan Exon's latest *Advanced Guide for Mediators* contains a discussion of the impact of ICT on mediation. My own article in the *International Journal of Online Dispute Resolution* connects the "classic" ethical guidelines for third parties to the new ODR environment. *See* Sara Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. Tol. L. Rev. 193 (2006); Susan Nauss Exon, Advanced Guide for Mediators (2014); Daniel Rainey, *Third Party Ethics in the Age of the Fourth Party*, 1 Int'l J. Online Disp. Resol. 37 (2014).

2   The National Center for Technology and Dispute Resolution, *ODR Standards of Practice*, ICANN (July 2009), https://www.icann.org/resources/pages/odr-standards-of-practice-2012-02-25-en.

3   Daniel Rainey & Alma Abdul-Hadi Jadallah, *The Culture in the Code*, Mediate.com (Mar. 2009), http://www.mediate.com/articles/culture_in_code.cfm.

4   By "cloud" servers I refer to storage of data on servers accessible via web interfaces, physically located remotely from users, under the control of whatever online service offers access. There are a number of types of cloud applications, but for purposes of this article, the common essential elements are that they are not controlled by the third party, they are shared by many users, and that data persists on the servers after the third party closes a case and "deletes" data.

5   James Podgers, *The Fundamentals: Lawyers Struggle to Reconcile New Technology with Traditional Ethics Rules*, ABA Journal (Nov. 1, 2014, 05:55 AM), http://www.abajournal.com/magazine/article/the_fundamentals_lawyers_struggle_to_reconcile_new_technology_with_traditio.
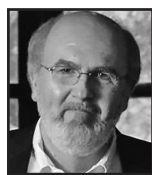
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