



The New Frontier: Online Technology for Conflict Intervention

Keynote Address

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National University of Ireland
49 Merrion Square, Dublin

Daniel Rainey

daniel@danielrainey.us

<http://danielrainey.us>

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First, let me thank the organizers of the conference for the invitation to speak here today - particularly Simon Boehme who initially solicited my participation.

I'm particularly glad to be at this conference because I take it as a great honor to be able to give the keynote at the first online dispute resolution conference held in Ireland. I'm glad because I've been involved in ODR for a long time and it is gratifying to see that those of us who insist that technology and dispute resolution are inseparable are no longer considered to be on the lunatic fringe.

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There is a mantra that I repeat to my students about why I think it is absolutely inevitable that ODR technology will play a central role in all forms of conflict engagement as we move further into the 21st Century. As conflict engagement professionals, we do three things in every venue in which we work: we help parties manage communication; we help parties deal with and understand data, and we help the parties manage group dynamics. Three of the basic features of information and communication technology (ICT) and ODR technology are that they create

and use an amazing array of communication channels, they help us deal with and understand information in ways not possible in the past, and they help us redefine and expand the concept of what a “group” is. How can ODR technology not basically impact conflict engagement? In my view, and in the view of many of my colleagues, there is no difference between ODR and ADR - ODR technology is simply integral to all types of human interaction, including conflict engagement.

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I’m also glad to be here because Julia and I have developed a fondness for Dublin from prior visits, and it’s good to be back again. Also, like many in the U.S., I have some ancestral connections to Ireland. The links are tenuous, but they are there - according to the DNA analysis I underwent last year, I am, by ethnicity, ten percent Irish. However, all of my Irish ancestors were in the colonies by the late 1600’s or early 1700’s, so to say this is a homecoming is a bit of a stretch - but if there are Martin’s, Blackwood’s, Reid’s, Craig’s, or Rainey’s in the audience - we are probably distantly related, and I would accept the offer of a pint to celebrate a family reunion.

As I make my remarks today I will try to avoid two of the most irritating behaviors associated with the pomposity of keynote speeches - I’ll try not to belabor the obvious, and I’ll try to avoid being artificially provocative. I may be incidentally provocative, but only because some of the possibilities suggested by the impact of technology on the pursuit of conflict engagement are by their very nature provocative.

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At the outset let me also say that I’ll generally use the term “conflict engagement,” not dispute resolution or conflict resolution, or mediation, etc. I do this because there are many ways that we, as “third parties,” engage with those who are in the cycle leading up to conflict, are in active conflict, and are dealing with the aftermath of conflict - and not all of our intervention efforts are aimed toward resolution, so I’ll use a broader term to suggest that the entire sweep of conflict engagement is and should be affected by the use of ICT.

I want to save a good bit of time for discussion with you, so I’ll be reasonably brief in my comments. I have integrated ODR technology into ombudsman offices, into arbitration programs (using asynchronous text and synchronous audio and video), into access to justice programs, and into mediation and facilitation programs, and I’d be happy to talk about any of

those experiences, depending upon your interest. But for these remarks, I want to focus on the title of this session - The New Frontier.

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At the risk of creating an analogy that may get stretched a bit, let's consider the development of ODR as analogous to finding and exploring what those who were on this side of the Atlantic called "the New World." Before 1992, when the National Science Foundation lifted the ban on commerce on the Internet, we were like those settlers on the Susan Constant, the Godspeed, and the Discovery, looking at the deep forest behind what would become Jamestown, and wondering what we had gotten ourselves into. The "frontier" then was at a line of trees just past the beach. The definition of "frontier" shifted as we explored and developed.

So, with that analogy in mind, I'd like to open our discussion by touching on three conceptions of the frontier of ODR - two that have dominated our work and discussions, and one that has been less discussed, but which is the deepest frontier left to those of us who work in conflict engagement.

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The two frontiers with which we have been most concerned during the past 15 years are e-commerce and the justice system. The "new" frontier I want to suggest involves the world of conflict engagement-at-large.

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E-COMMERCE - The first ODR Frontier

Application of information and communication technology (ICT) to online commerce was the first ODR frontier - e-commerce was that line of trees beyond the beach that my ancestors saw. It was probably natural and inevitable that e-commerce was the first place that ODR raised its head. When the NSF lifted the ban on commerce we began to create a new type of dispute - one born online and capable of being resolved only online. Ethan Katsh's early work with eBay to set up an ODR system, and Katsh and Janet Rifkin's creation of the term "fourth party" to describe the role of technology in ODR, grow out of the massive numbers of disputes created by online commerce, and the impossibility of handling those disputes using traditional face to face methods. Simply put, in the history of mankind we had never seen anything like the e-commerce environment, and we had no idea how huge it would very quickly get to be.

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As ODR has rolled out across the many online commerce sites around today, there has developed what I would call “the funnel theory” of disputes generated by online commerce. An overwhelming number of buyers have what they perceive to be a problem (eBay once reported handling 60 million of these “disputes” each year - given all the e-commerce sites operating today it is probably not an exaggeration to say that there are billions of these “disputes” created each year). These individuals are given entry into the first level of e-commerce ODR systems, which use algorithms to elicit basic information about the complaint and, with no human intervention, provide basic information that “resolves” a very large number of the problems. The next layer, with a much reduced number of problems, uses more complex algorithms to troubleshoot and problem solve, again without human intervention. The final layer, the small end of the funnel, leads the individual to a customer service representative who takes care of those problems not resolvable through the technology. This model has been repeated over and over again in e-commerce, and has even found its way into speculation about how we can reform the justice system, as I’ll note later in this presentation.

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The first real ODR applications to succeed were proprietary - what my friend Jeff Aresty has called “private justice systems,” created when you click “I Agree” on those ubiquitous buttons that you have to navigate through to get access to any commercial application. Now, eBay, Amazon, and most other large e-commerce companies have “dispute resolution” programs based on the funnel theory. They don’t often call them dispute resolution programs, but that’s for another discussion.

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As e-commerce grew, it became apparent that some public policy was needed to address the unique ability of e-commerce to make borders irrelevant, and to involve citizens from literally anywhere in the world in disputes. So, more recently, a rash of ODR applications that operate in government, and in e-commerce environments of concern to government, have been developed. In the EU, this year and next an ODR scheme will be in place, and for the past five years the United Nations Commission on International Trade Law (UNCITRAL) Working Group III - ODR has been considering what to do with commercial disputes that cross international borders. Companies like Modria.com in the US and Youstice in Europe are offering services to a variety of commercial and government enterprises, using their experience in e-commerce as a base.

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E-commerce is relevant to all of us who engage in any kind of conflict engagement because much of the development of basic technology that can be used for conflict engagement has come from the e-commerce environment, and will eventually be available to the rest of us. So, my message about e-commerce and ODR is, keep an eye on it, but don't worry about it. Development will continue there no matter what the rest of us do or think. Willie Sutton, a noted bank robber in the US, was once asked by a judge, just before sentencing, "Willie, why do you keep on robbing banks?" Sutton answered, "Because that's where the money is." Why will ODR continue to develop in e-commerce? Because that's where the money is.

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JUSTICE SYSTEMS - The Present ODR Frontier

To continue my imperfect analogy, concerns about justice systems, and the realization that ODR technology may be able to help fulfill the promise of access to justice, are like the unknown interior lands - the frontier to which my ancestors went when they put the Atlantic Ocean at their backs and crossed the Blue Ridge and Allegheny Mountains. The first decade of ODR went by with remarkable advances in e-commerce, to the point that the use of technology was assumed to be the default method of dealing with disputes in that territory. Over the mountains in the ODR frontier lay the justice system - The Law - full of unknown challenges and hostile natives - if I can refer to lawyers and judges in that cavalier manner.

The problems faced in our first frontier, e-commerce, were born largely from total unfamiliarity - we had never had the ability to create disputes and difference across time and space with such ease. The problems faced in our first forays into the law were and are born of the very nature of the territory itself. To put it bluntly, around the world, justice systems are much more often than not failed systems.

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The latest World Justice Project rankings of Access to Justice around the world were released while we were at the 14th Annual International ODR Forum in New York two weeks ago. Those rankings place Australia at number 10, the UK at number 12, Canada at number 14, and the U.S. at number 19, out of 102 countries ranked by the survey. They lumped Ireland in with the UK, which is ridiculous, but that's a subject for another discussion.

At any rate, one would expect that those countries making it into the top 20 would be delivering moderately well on the promise of access to justice for their citizens. Here's what one of the most storied trial lawyers in the U.S., Gerry Spence, had to say about the state of the law in the United States:

Most fundamentally, so many men and women in my generation of lawyers entered the profession with hopes and dreams that we would improve our system of justice and give real meaning to the concept of equal justice under law. I regret that, some important improvements notwithstanding, our system of justice is not better than when we started—and in some ways is markedly worse.

Without legal representation, tens of thousands of poor and vulnerable people across our country go to court every day facing the loss of their children, their marriages, . . . and their homes. Our courthouses and courtrooms present hostile and fearful environments for too many people. The cost of litigation has become burdensome for even the wealthy, and it is prohibitive for working class and middle class people.

The problem is not a lack of lawyers. . . . The trial is not a search for the truth. A trial is a game in which the moneyed usually win. Few cases are tried today: How does a poor man afford a lawyer?

[In the ABA Litigation Magazine, Winter 2015]

Taking Spence's comments together with the fact that huge backlogs in cases clog court systems around the world, that only a small minority of cases filed actually go to trial, and that, at least in the U.S., most justiciable cases never are taken to the courts because of the daunting nature of the system, we see dysfunction on our frontier. As I have said many times at meetings of lawyers in the U.S., unless you are super-rich, access to justice is at best an illusion, and at worst is a cruel joke.

The problems have not gone unnoticed, and there have been significant advances in the use of ODR technology in the law, from virtual hearings that parallel the form of face to face hearings to basic reconceptualizations of the justice system.

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It is not surprising that the first developments in ODR for the law were designed to make the current system work more efficiently - we kept doing the same things we always did, we just did them using technology. Take as an example the developments in e-discovery. Online tools and

smart applications allow firms to store, search, and evaluate massive amounts of information contained in documents produced in discovery in a way that was not possible before the advent of ICT in the law. ODR systems that deal with filing cases, scheduling cases, and other “normal” aspects of the justice system continue to be developed and come on line.

But there are some efforts to totally rethink the justice system, using ODR as a way to change the basic nature of the justice process.

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If you want some enlightening and heartening reading, have a look at the recently released Online Dispute Resolution Advisory Group’s report: Online Dispute Resolution for Low Value Civil Claims. The report is the product of work commissioned by the Lord Chief Justice of England and Wales, produced by a working group led by Richard Susskind. It takes an essential form from e-commerce - the funnel - and uses that approach to reimagine access to justice as a service instead of a physical location. Interestingly, but not surprisingly, the basic format the report suggests is the funnel that e-commerce has used so successfully, but the report leaves the way open for broad discussions about the nature of the law and the practice of law in the Internet age.

The report also acknowledges that this suggested use of ODR technology in the justice system may be perceived as disruptive by the natives - I mean lawyers and judges - but the technology has proven its utility in e-commerce, and use of the same general technology would move the legal system much closer to being a service that could actually be “accessed” to obtain “justice.” Projects are underway in the Scandinavian countries and in Canada to apply ODR technology to the justice system, and as those projects and others move forward I predict that the “standards” set by development of e-commerce systems will cease to be the standards for the law - the natives are pretty smart, and they will eventually see unique opportunities to apply technology to improvements in the law.

One of the primary fears in the legal community should, in my opinion, not be a worry at all. If funnel systems for the justice system work, and if other “smart” systems get legal information to individuals without face to face interaction with lawyers, there will never be a dearth of clients for traditional firms. For the most part, well functioning ODR systems will serve those who would never have seen the inside of a lawyer’s office. What lawyers will see are those cases that

actually need to be handled on an individual basis. If the funnel works as it has in e-commerce, the result may in fact be more work for lawyers, not less work.

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So, here's my message about ODR and the Justice System - stop thinking of ODR technology as a remake of *Terminator 3: Rise of the Machines*, and start thinking about it as an opportunity to take the new social operating system we have created with technology and apply it for the betterment of Justice.

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CONFLICT ENGAGEMENT: The Final Frontier

Going back to my now somewhat tortured analogy, conflict engagement outside e-commerce and the justice system exists like that undefined, scary expanse from the Mississippi River to the Pacific Ocean - an expanse my Irish ancestors took a while to cross.

What do I mean by conflict engagement? In part I mean things that would be recognizable to anyone who has gone through a course in dispute resolution in a university - mediation, facilitation, dialogue, reconciliation, peacebuilding - all of the traditional forms. But, in addition, I am referring to conflict engagement possibilities that are either created by the existence of ODR technology, or which can be reimagined through the use of ODR technology.

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I first became interested in technology and dispute resolution in the 1980's - I helped set up a mediation between the UK, Africa, and the US using telephones and fax machines. Since then, as I've mentioned, I've become convinced that the central activities of conflict engagement are supported and enhanced by the central elements of information and communication technology.

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One of the companies I am associated with is working at the moment with Youstice, an e-commerce platform based in the Czech Republic. We are working to adjust their e-commerce platform to offer discussion rooms that mirror joint sessions and caucus sessions for mediation.

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I'm working with a group in Iowa and their contract negotiation software, Trochd, to create a submissions-only arbitration platform. Their software was designed to manage contract negotiations in school districts, but the essential functions that drive negotiation can easily be adapted to allow parties to submit arguments and documents online in an asynchronous space,

allow the arbitrator to pick up the submissions, render an award, and post the award in the case work space, all with no scheduled meetings.

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In a recent ODR class I taught for Southern Methodist University, I had the class members create for themselves a mediation platform, from creating the web site all the way through each step and function of mediation, using free software that is readily available. It took the class members less than an hour to go from nothing to each owning a functioning mediation ODR site.

The first wave of technology adaptation is usually to do the things we do by tradition - we just do them using technology. That's where we are now with mediation, reconciliation, etc. But there are other efforts under way. To wrap up my opening remarks, let me highlight some examples of technology changing the nature of traditional conflict engagement.

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At a United States Institute for Peace meeting a few years ago, my colleagues and I introduced the idea of the "E-Jurga." In Afghanistan, traditional access to justice was through Jurga's - councils of elders who heard both sides and helped parties reach a "proper" resolution. Convening Jurgas in Afghanistan is, at present, dangerous for all concerned. We suggested that using mobile phones, which are ubiquitous, parties could record their presentations to the Jurga members, the Jurga could make its recommendations by recording them on a service that all had access to, and that the essence of the traditional justice system could be maintained. This is very important in an environment where a traditional justice system is all but nonexistent.

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In Kenya, election violence is a real threat to general social order. One of the more notable ODR projects there is called Ushahadi Crowdmapping - it uses crowdsourcing to pinpoint sites of violence and links that information to interveners who try to prevent or blunt the impact of the violence. An even more "frontier" project is Umati - a project using mobile phones to counteract hate speech. After the last round of election violence, researchers talked to a large number of individuals who had been involved in the violence, asking them two questions. First, what kind of language or messages incited you to engage in violence? Second, is there any kind of message or language that, if you had heard it, would have made you think twice about engaging in violence? The researchers took the data and put together a database of violence prevention

messages that could be quickly disseminated by a text messaging system. They then created a messaging network by offering various kinds of free information to anyone who would sign up - they got over 30,000 participants. The project operates like this: when one of the members hears messages that sound like the ones that incite violence, it is reported to the system and non-violent messages go out to all 30,000 members before the violence occurs. The ultimate success is still being evaluated, but try replicating that kind of conflict engagement without ODR technology.

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In 2007, my colleague Jeff Aresty and I came up with the basic concept behind a successful ODR conflict engagement project called PeaceTones. A couple of assumptions were driving our thinking. Our first thought was that in the run-up cycle before conflicts break out, and in the post conflict cycle after direct conflict has occurred, it is the lack of opportunity to obtain even the basic necessities of life that drives groups toward conflict and nurtures the tendency toward renewed conflict. Second, in our observation the assumptions behind much of the existing conflict engagement programs were that there had to be a strong “intervener” presence on the ground, there had to be a large pool of money (by developed country standards) to make a difference, and that there had to be a “responsible” agent associated with the interveners on hand to guide decisions about how to use resources. Further, there seemed to be a bias toward tradition: access to justice programs tend to target building up the courts; infrastructure projects tend to build radio stations, hospitals, and drill wells. All of that is good, at least on one level, but in a fundamental way, they take attitudes and forms from the developed world and plop them down on the developing or undeveloped world with the expectation that, if they worked here, they will work there.

Our concept for PeaceTones as an ODR project was different. First, we recognized that in a place where the population is living on one or two dollars per day per person, you don't have to raise a million dollars to make a difference. Second, we redefined access to justice as access to rights and opportunity, not as access to local court systems. Third, we looked for items produced by local populations that had value that could not be unlocked using traditional methods. Finally, we were committed to using ODR tools as the means of intervention and the means of sustaining the results of our conflict engagement.

PeaceTones goes into pre or post-conflict zones, identifies musicians who are creating socially positive music, and helps them record and sell their music. PeaceTones teaches them about intellectual property and how to protect themselves and do business in an e-commerce environment, and how to run their “business” on a day to day basis. We help them record and sell their music in exchange for a promise to put a substantial amount of any money they make back into their communities in projects they and their neighbors choose and manage. PeaceTones could not exist without ODR technology.

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I am currently engaged in trying to find funding for a project in the Niger Delta in Nigeria. There, development of oil fields off the coast have all but destroyed the economy of the small scale fishermen who have traditionally plied the waters off the delta. The ODR project concept is to use online technology to train the local fishermen in basic business processes and to set them up in alternative businesses in villages deeper in the delta. Part of our development process was to try to determine what the local population thought it needed instead of defining their needs from afar. Without ODR technology this is a sometimes difficult and time consuming task. We had a contact in the delta who trusted the Nigerian on our team - we used VOIP to talk with him about a survey we wanted to do. We put the survey up on SurveyMonkey, he talked with fishermen in the villages and responded to the survey on their phones or on his phone, and within 48 hours we had a statistically significant set of responses. We did all of this from Dallas, Texas, from a Friday night through a Sunday night.

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In the early days of the development of what we came to call the Internet and the World Wide Web, one of the primary researchers, J. C. R. Licklider, suggested that we call this thing we were creating “The Intergalactic Network.” I’ve always been sad that we didn’t adopt that name. But in October at the Association for Conflict Resolution conference I’ll be presenting with a colleague who has been working on an ODR conflict engagement platform serving the International Space Station - one step closer to “intergalactic.”

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As I look to the future, one of the great possibilities I see for ODR technology relates to the development of “smart” systems and artificial intelligence - machine language studies and natural language studies.

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In the late 1990's, the United States Department of Agriculture (USDA) first used an online tool, e-mail, to accept public comments about a standard for labelling food as "organic." They had been used to getting hundreds of comments when they went out to the public via mail and local meetings. Using e-mail for the first time, they got over a million and a half comments. Teasing out the threads of interest and truly understanding all of the comments from that large a community of interest is, for a human, difficult or impossible. For a good "smart" program, using algorithms and artificial intelligence (AI), it's simple. In short, the work being done in artificial intelligence and natural language research in e-commerce is going to revolutionize how we do public participation engagement.

There are, I am sure, many more visionary projects out there, and I'm sure in this room there are those who will be out on the frontier of ODR, finding ways to apply technology to the broad sweep of conflict engagement.

One of the founders of AOL recently said in an interview that we are in the second stage of the Internet Age. In the first stage we were building the Internet - creating a layer of communication, information sharing, and social interaction that is unprecedented and revolutionary. In this second stage we *building on* the Internet.

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There will be those who will immediately dismiss the idea that technology can assist in the process of conflict engagement. Recently a very well known practitioner in the U.S. was scheduled to speak at a university where I teach. One of my students was giving him a lift from the airport, and she mentioned that she was taking my ODR course. His immediate response was, "oh, that will never work." His topic for the evening was "how to deal with intractable positions" - she commented that he apparently had first hand experience with them.

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In the CERN museum in Geneva there is a case that contains the original concept paper that Tim Berners-Lee wrote, laying out the essential framework of what became the World Wide Web. On the top of the first page, one of his colleagues had written a note: "vague but exciting."

So, there will always be those who are caught in the past, and those who don't immediately grasp the potential of new ideas. But let me leave you with a gentle exhortation. We have the

“frontier” of e-commerce behind us - we are in the middle of rethinking how ODR can improve the justice system - and we have in front of us, “the final frontier.”

Most of us, echoing Gerry Spence, began working in the area of conflict engagement because there is something compelling and rewarding about being able to work with people under stress and in distress, helping them feel better, live better - be better. Whether it's working to make sure people feel they are being treated fairly when a purchase goes wrong, or feeling that there really is access to justice, or offering ways to reduce or eliminate the cycle of violence, the work we do is important.

In doing this work, we can't ignore the new social reality in which we find ourselves - if your clients and parties can buy anything imaginable online, if they can talk to the grandkids on the other side of the world online, if they can find someone to marry online, they are going to wonder why they can't interact with you online.

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I urge all of you to carefully consider and embrace the opportunities offered by ODR technology. My definition of ODR, the one I use in the classes I teach, is that ODR is the intelligent application of technology to the practice of conflict engagement. Let me stress the word intelligent - there are many things we *could do* with technology in any given venue. We need to look for those things we *should do* to make sure we are using ODR technology to offer our customers, clients, and parties the best customer service, counsel, and support possible.

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There is good, well developed ODR behind us, but there's still a lot of territory in the frontier - let's keep pushing forward.

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