

EDITORIAL

Conflict Engagement and ICT: Evolution and Revolution^{*}

Daniel Rainey

The term we've come to associate with the use of information and communication technology (ICT) in alternative dispute resolution (ADR) is online dispute resolution – ODR. The way we have tended to talk 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 a recent edition of this journal there is a point-counterpoint by Colin Rule and Carrie Menkel-Meadow on the topic, “Is ODR ADR?” In their conclusions, Menkel-Meadow argued, “I remain intrigued by what ODR might be able to do in some cases, but I remain a bigger fan of old-fashioned in-person ADR...,”¹ and even Colin Rule, a proponent of ‘ODR as ADR’, ended by saying “I believe that the future of ADR is ODR”² – the future, not the present.

I suggest that our discussions about technology and conflict engagement as an ODR/ADR dichotomy are not helpful, and are in fact misleading. It is much more accurate and conceptually useful to think of the relationship between ODR and ADR as existing along an evolutionary/revolutionary spectrum. Up to this time, our use of technology in ADR has been growing and has been evolutionary, not revolutionary. In addition, it seems that our thinking about ODR has been coloured by the growth of e-commerce and the need to find ways to deal with the flood of disputes caused by the enormous number of interactions on e-commerce platforms.

I think our use of ICT has been evolutionary 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 revolutionized ADR with the increased use of technology, but we have made some startling evolutionary changes.

A year or so ago I was having a conversation with a graduate student at one of the universities where I teach. She had been asked to pick up from the airport a 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 immediate: “Oh, that stuff

^{*} Adapted from the Keynote Address at the 2017 Texas Association of Mediators Conference, February 24, 2017. The direct subject of the address was the relationship of ODR to mediation, but the comments about that relationship can be generalized to the broad spectrum of work done under the umbrella of conflict engagement.

1 C. Menkel-Meadow, ‘Is ODR ADR?’, *IJODR*, Vol. 3, No. 1, 2016, p. 7.

2 C. Rule, ‘Is ODR ADR? A Response to Carrie Menkel-Meadow’, *IJODR*, Vol. 3, No. 1, 2016, p. 11.

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.

The ODR/ADR dichotomy may have been given voice by e-commerce practitioners who know ‘it’ will work (indeed *must* work), and ‘traditional’ practitioners who see ICT as a threat to the ‘human’ nature of ADR, but, as a recent Nobel Laureate once observed, “the times they are a’changing.”

It has for a very long time 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-1980s when I helped organize a mediation with parties in North Africa, the United Kingdom and the United States – 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, it 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?

My colleagues and I who have been working for the past couple of decades to understand and mindfully insert ICT into various forms of conflict engagement have often felt like voices in the wilderness when it comes to ODR and ADR. There were times when an ODR panel consisting of Ethan Katsh, Colin Rule and I actually outnumbered the audience at conferences in the United States. There have been bright spots from unexpected quarters. Richard Barnes initiated the use of ODR tools for contract negotiations at the Federal Mediation and Conciliation Service (FMCS), and Bill Usery, one of the true giants in the world of labour mediation, when he formed the Usery Center in Atlanta, brought in an ODR specialist, Michael Wolf, to make technology’s ‘incursion’ into traditional practice part of their work. But mostly, up until very recently, reactions outside of e-commerce have been more along the lines of “it’ll never work.”

It now seems that technology and its impact on all forms of conflict engagement are becoming topics of urgent conversation in the ADR community and the legal community. The recommendations regarding the use of ODR in access to justice in the United Kingdom and elsewhere are well known, and there is now a working group in the United States involving the American Bar Association, the Association for Conflict Resolution and the American Arbitration Association looking at updating their Model Rules for Mediators to take into consideration changes based on the use of ICT. The International Mediation Institute (IMI) is preparing a certification in E-Mediation, and at the time this editorial is being written at least one state bar association in the United States (Florida) has ordered that 10% of the continuing legal education credits mandated by that state must be focused on the impact of technology on practice.³

3 V. Li, ‘Mandate the Update’, *ABA Journal*, February 2017, p. 24.

What has changed to move discussions of ODR from “it’ll never work” to “I need to know about that”? One change is the extent to which ICT has become an integral part of the social fabric of our lives generally. We are, some would argue, in a period of communication and social change at least as significant as the one brought on by the invention of the printing press.

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% are regular social media users. Among the 30-49 age group 70% engage in regular social media use. Among the 50-64 age group 50% engage in regular social media use.⁴ The numbers in all the groups are on the rise, perhaps faster in the oldest group.

Apart from social media, general Internet use is also staggering. 87% of US adults regularly use the Internet: 73% use the Internet daily, and 21% of US adults say they are online “almost constantly.”⁵ Perhaps the most startling statistic to me is that by 2013, one in three new marriages involved individuals who met and formed relationships online.⁶ That figure is probably higher now.

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. To paraphrase an observation Ethan Katsh made some time ago, the ability of the Internet to resolve conflict pales in comparison to its ability to create conflict.

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 find someone to marry online, they are going to want to know why they can’t deal with conflict engagement professionals online.

One of the problems we have when talking about conflict engagement and ICT, and one of the reasons the “it’ll never work” attitude has been prevalent, is that many are stuck with some misleading ideas about what ODR is, based on the origin of the term.

Outside the vanguard of technology-friendly practitioners, those who are aware of the work being done with technology and conflict engagement probably have seen the term ODR and think of it in a particular context. Those who have been active in the discussion of and development of ODR know the history well. 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, and it derives directly from the 1992 NSF decision to allow commerce on the Internet.

4 Pew Research Center, ‘Social Media Fact Sheet’, 12 January 2017, available at: <www.pewinternet.org/fact-sheet/social-media/>.

5 Pew Research Center, ‘Fact Tank’, 8 December 2015, available at: <www.pewresearch.org/fact-tank/2015/12/08/one-fifth-of-americans-report-going-online-almost-constantly/>.

6 S. Jayson, ‘More Than a Third of New Marriages Start Online’, *USA Today*, 3 June 2013, available at: <<https://www.usatoday.com/story/news/nation/2013/06/03/online-dating-marriage/2377961/>>.

In the mid-1990s, 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 traditional 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 'place' to resolve conflict was the online venue in which it was created. And, in addition, we were creating huge numbers of online conflicts. The solution that has been pursued by everyone 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, artificial intelligence (AI). You simply cannot afford to hire enough flesh-and-blood mediators to handle the volume of disputes created by e-commerce 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.

The upshot of all this is that the early efforts to address the conflict we create online were made for e-commerce 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, to some, perverting the course of alternative justice.

There was other work beginning in the 1990s to integrate ICT into conflict engagement, outside of the e-commerce environment, but in the early days that work was localized, did not receive the attention that the work in e-commerce achieved, and did not, I would argue, figure heavily in the 'public' perception of what it was to engage in ODR.

For example, in 1997, I began to work with the National Mediation Board (NMB) to integrate ICT into all of its mission areas (Representation, Mediation and Arbitration), and at about the same time the US Federal Mediation and Conciliation Service (FMCS) developed a suite of in-house ICT tools to handle multi-party, complex labour management negotiations. From 2004 to 2010, the NMB and the University of Massachusetts partnered in two National Science Foundation research grants to investigate the impact of online tools on traditional mediation. In the United Kingdom, the Mediation Room was an early attempt to develop an ODR platform based on a standard model of mediation. Sanjana Hattotuwa's early groundbreaking transformational work in Sri Lanka is well known. Other non-e-commerce work was underway, but our past has been, and still is, dominated by the high-volume dispute environment of e-commerce and other similar contexts.

In light of this, I would slightly 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 ADR practitioners have found ways to use ICT to do the things we always did, but with the assistance of various technologies.

I started my comments to the Texas mediators by saying that all of us now 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.

On the most basic level, we have taken the normal functions that we have to fulfil as third parties as we walk through the steps of our standard mediation models and used online technology to help us fulfil those functions. For example, it is common to use survey and scheduling platforms to help handle intake, get agreements to mediate in place and gather all of the information needed to convene meetings of the parties. Mediators regularly use web video systems to discuss and share documents in real time with parties in dispersed locations. Third parties use online mind maps to conduct online brainstorming, and 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 the third parties.

In other areas of third party work and service delivery, one also sees the development of evolutionary technology. In the law, literally dozens of apps are springing up to make the law and lawyers more accessible – everything from ‘Quick Legal – 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 on the police car come on behind you in traffic.⁷

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.

7 ‘Ask A Lawyer’ can be found at: <<https://play.google.com/store/apps/details?id=com.quicklegal.app&hl=en>>. ‘Oh Crap App’ can be found at: <<http://oh-crap-app.com/>>.

In medicine, web video sessions are becoming common, electronic medical records are becoming standard, and apps that put basic medical information at your command through mobile phones are easily available. 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 School 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.⁸

Technology is, literally, everywhere. We appear to be hooked on it, and it appears to be deeply affecting the way we live. But the use of ICT in ODR 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.⁹

Our evolutionary use of ICT has some implications for the ethics of our practice. The Model Rules for Mediators, adopted back in 2005, when 5% of us used social media, do not speak at all to the influence of ICT on the ethics or modes of practice across the board in conflict engagement.

This is an issue not just in ADR and non-judicial forms of ODR, but it is beginning to be discussed by those involved in the traditional justice system. I just attended an American Bar Association conference in which one panel was dedicated to discussing what it meant to be 'competent' in the use of ICT in the practice of law. The ABA's Model Rule 1.1 says "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."

So, our evolutionary use of ICT has created some issues with which we must deal. Are we likely to see revolutionary changes? I think so.

At some point we will see 'driverless mediation'. The 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 ODR equivalent of 'driverless mediation' already exists in e-commerce at about the level that smart cruise control exists in autos. 90% of e-commerce disputes 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, artificial intelligence (AI) programs will enable true driverless mediation – not just leading the parties through a series of steps,

8 'PTSD Coach' can be found at: <<https://www.ptsd.va.gov/public/materials/apps/ptsdcoach.asp>> – 'iCouch' can be found at <<https://pro.icouch.me/>>.

9 L. Rainey & B. Wellman, *Networked: The New Social Operating System*, Cambridge, MIT Press, 2012, p. 6.

but actually operating as a virtual Third/Fourth Party. That, at least in my mind, borders on the revolutionary

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 cannot 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.

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 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 United Kingdom and British Columbia, and even in some small projects here in the United States, 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 ODR, particularly using mobile technology.

It seems to me that we are at a moment of opportunity vis-à-vis ICT and conflict engagement. E-commerce led the way in using technology for dispute resolution. We have, in an evolutionary way, brought ICT into a broad range of traditional practices. Our challenge now is to take the next step – to engage in a revolutionary manner.