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The Impact of Technology on Mediator Ethics

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Introduction

My colleagues have asked me to speak briefly about the relationship between information and communication technology (ICT) and the ethical guidelines and imperatives that direct third party behavior. I think Colin and Jason will talk more about ethical issues related to e-commerce and other large online dispute resolution (ODR) systems that rely on algorithms and artificial intelligence (AI) to augment the work of flesh-and-blood third parties. Those issues are important, and are in fact urgent - the rapid development of ODR systems using AI to work with huge client bases will have a profound impact on the field of dispute resolution. The development of ethical standards for those systems will include questions related to developers of software, developers of algorithms and AI frameworks, and providers of online services. For

reasons I'll discuss in a moment, those issues are all important for mediators and other third parties who may not, themselves, be active in the use of those systems.

In my comments today I'd like to focus on the ethical changes and challenges related to technology that affect more traditional third party work.

First, let's be clear - all of us involved in mediation, facilitation, arbitration and other third party work currently use ODR technology. When Colin and I have done presentations together in the past, we have begun the sessions by asking, "how many of you use ODR technology in your practice?" Generally, very few, if any, hands went up. But when we asked, "do you use email?," or "do you use mobile phones?," or "do you use word processing programs to produce settlement drafts?," everyone's hands were raised. There are quite a few definitions of ODR floating around, but the one I have offered for some time now, and the one I think makes the most sense, is that ODR is simply the intelligent application of ICT to any of the elements in the practice of dispute resolution. My use of the word "intelligent" was optimistic - I think in many cases it's more "unthinking" than intelligent. We use ICT in our dispute resolution practices because we use it in every other aspect of our social lives. In my comments today I'll focus on the ethical considerations related to mediation because mediation is, I would argue, the "mainstream" of dispute resolution practice, and the ethical considerations for mediators are largely parallel to those for other third parties. It is true that there is an element of change or challenge associated with the use of ICT in every aspect of dispute resolution ethics, but given the time we have today I want to focus on three general areas that have been directly affected by the increasing use of ICT. Generally:

- The integration of ICT into dispute resolution practice has changed the way we should define "parties;"
- The nature of online interactions and the manner in which information is handled and stored should change the way we assess risk, and;

- Online and offline storage of information generated in mediation sessions and other venues certainly has expanded the conception of the time frames involved in cases.

Who are the Parties?

In the era when mediation was accomplished face-to-face, with notes and agreements on paper, perhaps with some communication over land-line telephones that did not record every conversation, the concept of parties to the dispute was rather straightforward. There were the primary parties, two or more individuals or groups who presented an issue or issues to the "third party." This concept of primary and third parties is important because the ethical guidelines and standards of practice developed for mediation in the pre-Internet era focused on this bounded universe. The basic ethical question was, "how do I as a mediator behave and what principles do I uphold in my interaction with these specific individuals, in this specific case, over this particular time frame?" The Model Standards for Mediators adopted by the ACR/ABA/AAA certainly take this approach.

Katsh and Rifkin's identification of technology as the "fourth party" in dispute resolution adds a bit of complexity to the primary/third party formulation. The basic change is that the technology, when used as part of the mediation process, becomes an active partner, exerting an influence on the proceedings as real as the influences exerted by the primary or third parties. When we talk about chat bots and other AI being used in dispute resolution, the concept of the fourth party is pretty clear and obvious - the technology is intentionally acting as a party in much the same way a third party would act by managing the process, communicating with the parties, and perhaps even offering suggestions about possible outcomes. But Katsh and Rifkin's formulation of the fourth party goes beyond that. Any time we use technology to create and store information or engage in communication we are inviting technology in as a potentially

influential element - a fourth party. Even if we are only using a desktop or laptop computer with no Internet connection, we are creating and storing information in a way that is qualitatively different from the way we did so traditionally, and that may have an impact on the mediation.

I won't go off on too much of a tangent, but Susan Exon, among others, has suggested that there are actually more broad impacts than just the creation of a fourth party. If you consider software designers, cloud storage providers, Internet service providers, etc., one could conceive of fifth, sixth, or N parties.

Let me apply the test that I often use to challenge students in my dispute resolution classes - so what? Now that I know this what difference does it make?

I'll talk about risk and time frames later, but for the moment let me focus on the mediator's responsibility for the behaviour of fourth parties. Traditionally, mediator ethics speak to the individual mediator's behaviour. As a mediator, it is my responsibility to uphold the ethical standards of the profession. Among other things, I am charged with maintaining confidentiality, I am supposed to uphold party self-determination, and I am pledged to maintain impartiality (as impossible as that may be). We have always assumed that the mediator does not have control of actions outside herself or himself. As a mediator, I can ask the parties to abide by agreed upon rules, but if they want to violate confidentiality or engage in other bad behaviour, the mediator is not held responsible for the actions of the parties. I think the use of technology changes this equation.

If I send emails (which I shouldn't), or sent text messages to the parties (which I shouldn't), or use an online platform, or use cloud storage to share documents with the parties, I have, as the mediator, invited a fourth party into the process. In the practice of law it is clear that individuals operating for the lawyer are the responsibility of the lawyer

- if the “agents” engage in bad behaviour, the lawyer is responsible. Should there be a parallel with fourth party engagement in mediation? Are the fourth parties invited into the process by the mediator be considered “agents” of the mediator, and should the mediator be held responsible for the actions of the fourth party? I argue that, at least to some degree and in some circumstances, the answer should be yes.

What’s the Risk in Inviting Fourth Parties into the Process?

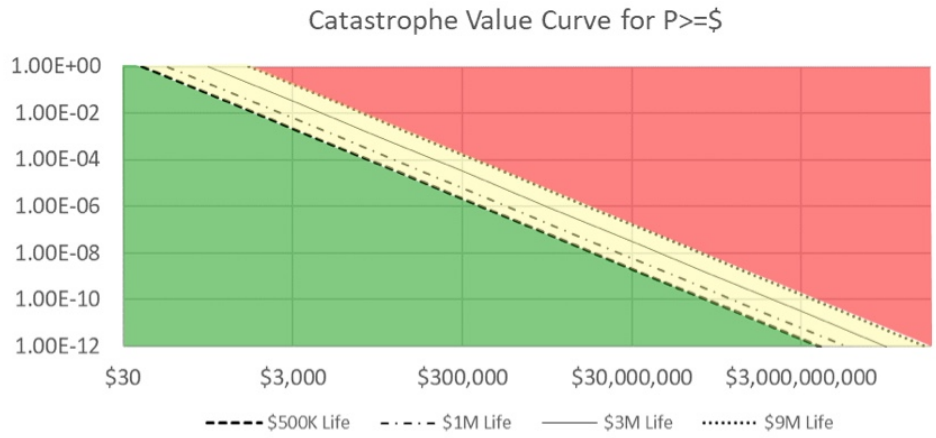
Ethical behaviour for mediators has traditionally been geared toward, among other things, maintaining safety and confidentiality for the primary parties. Using a process that is likely to result in physical or emotional danger to the parties or the mediator is, most would argue, not an ethical approach to practice. Likewise, engaging in a process that increases the risk that confidential information may be shared inappropriately would generally be seen as a poor ethical choice. In this light, *not* using an online platform that would allow interaction among parties where there is a perceived or real threat of violence could be seen as unethical. We could have an interesting discussion about that, but let me focus on another aspect of ethics and technology related to confidentiality.

If there are differences in the risk of breaches of confidentiality associated with the choice of using technology (from not using ICT at all to using any kind of ICT) there is, I would argue, an ethical element imbedded in that choice. Chris Draper, the developer of an ODR platform called Trokt, will soon publish an article that goes into this issue at great length. Chris is an engineer and he has approached this issue in the methodical way one would expect. His formula for choosing ODR as part of a mediation process is simple and, I’m sure, instantly understandable to everyone:

$$P[\geq N] = \frac{P_{Max}}{N^{1.5}}$$

For those of you like me who are somewhat mathematically challenged, the concept, in narrative form, is rather elegant and easily understood.

There are varying degrees of risk that information will be inappropriately shared in every process choice we make, from working completely face-to-face to using various online platforms. If one takes the level of risk associated with the process and considers the damage that can be caused by revelation of the information, it is possible to conceive of three situations - red, yellow, and green.



If the likelihood of inappropriate sharing by using a certain ICT platform is high and the sharing would be very damaging to a party, that's a red condition and it would be unethical to set up a process using that platform. If the likelihood of inappropriate sharing is lower and the results would not be catastrophic to a party, that may be a yellow condition and could be used with everyone's acknowledgement. If the risk of inappropriate sharing is low and nobody cares whether the information gets out, that's a green environment and there's no problem.

Obviously there is a dynamic relationship between risk and importance that is more complicated than the simple examples I've given, but the ultimate result is that, as both Chris and I would agree, choosing to use an ODR platform that puts the parties in a red zone would be unethical, and it arguably could be unethical to *not* use ICT that would put the parties in a green zone, saving time and money.

How does ICT Change the Concept of Time?

In a traditional face-to-face mediation, we open a case with an agreement to mediate, we engage in dialogue, and we close a case with a written or oral agreement, or an agreement to walk away without an agreement. Upon closing the case, most mediators routinely destroy all records of the sessions except the agreement to mediate and the final, signed version of the agreement. Case opened, case closed - in an hour, a day, or however many sessions.

In the current environment, where we all use some ODR technology either wisely or unthinkingly, cases may live on long after the final session and the signing of an agreement. Information shared via email, text, mobile phone calls, and messages sent using Internet connections are copied, backed up, and stored in multiple places, so that when we "delete" information, if it is even possible to do so, there is no guarantee that all of the copies or bits of that information have been eliminated from very place that it was copied or stored. Part of the risk that we take, and that we must calculate when thinking about Chris' red, yellow, and green zones, is the likelihood that information a mediator has "deleted" may show up much later in a context that would damage one of the parties.

One scenario for this risk would involve information that should have been destroyed simply popping up accidentally in one of any number of ways. Another scenario could have one of the original parties or an external party choosing to surface information long after the mediation. How would you feel about long forgotten sensitive information suddenly showing up years after the fact? Although it did not involve ODR, ask Brett Kavanaugh that question.

Another scenario would involve one party or an external party successfully arguing that information that the mediator held as confidential is not confidential, and having that information demanded by a court. All of the deletions the mediator did probably did not remove the information from the sight of a good IT forensics examiner - what was “deleted” may suddenly be there again.

Another scenario could involve a mediator successfully arguing that information was confidential, therefore blocking disclosure and maintaining “ethical purity.” But what if the seeker of the information, having been blocked from getting the information directly from the mediator, turns instead to the ISP or platform administrator through which the information had been shared during the mediation?

A concrete example from the work being done by many community mediation centers and providers of court-related mediation involves restorative justice (RJ). Individuals who are eligible are referred to the RJ program, where they work with those who were harmed to “restore” relationships, etc. As part of the mediation process, the mediator probably receives a number of sensitive documents, including the initial charge and documentation deemed relevant to the discussions in the mediation session. If the mediation is successful, the record of the original charge is supposed to be expunged so there is no record of the transgression. This is, I suggest, high value information, the revelation of which could have negative consequences if revealed, even years after the RJ agreement was reached. If the information is passed using email, or

if the information is stored online or offline in ways that make it difficult or impossible to totally eradicate, I would argue that the risk factor is high. In order to act ethically, with this highly sensitive data, held in high risk storage, the mediator should either choose different ways of sharing and storing the information, or at the least make it clear to the parties that they are operating in a red zone.

In all of these scenarios, the actions of the mediator in setting up the process, conducting the mediation, and managing the information shared during the mediation, have ethical implications.

How Should We Approach ODR Ethics?

In order to guarantee due diligence in choosing and using ODR platforms there are a few things that all mediators in this age where ICT and dispute resolution are all but inseparable should do.

- As part of compliance with the ethical responsibility to maintain competence as a mediator, we should all seek out and complete basic training in the use of ODR platforms and ICT applications. It is not possible to know about and understand every ICT channel available, but it is possible to understand the transition from face-to-face to online work, and to develop an understanding of the basics of ICT architecture and security protocols.

- Every mediator who uses ICT platforms should have in her or his files an agreement with ODR service providers that details the responsibility of the provider, the relationship of the provider (fourth party) to the third party, the security protocols to be used with information generated by the mediation, and the method by which that information will be “deleted” from provider servers.

- Every mediator should have as part of her or his agreement to mediate, and as part of her or his opening statement, an explanation of the ICT that will be used during the mediation, how the information will be handled, and what the risks of inappropriate sharing entail.

- As a group, all of us should be actively involved in dialogue with developers of dispute resolution applications to ensure that, to the extent possible, the ethical imperatives for mediation are embedded in the code.

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