

## Teaching ADR/ODR: Are we at an evolutionary moment?

(Or, a Revolutionary Moment?)

[Speaker's Notes]

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UNIVERSITY of CALIFORNIA HASTINGS COLLEGE OF THE LAW

Let me first thank the organizers of this conference for inviting me to speak to you today – particularly Sheila Purcell, Jolynn Jones, and Jan Martinez, who invited me, and then helped me get here and get ready to speak with you today.

I came in a day early so I could go down to San Jose, and while I was there yesterday I got a call from a colleague who was concerned about me – all of my phone numbers chase me down to this iPhone, so he had no idea where I was, geographically. He opened the conversation by asking, “how are you coping with the snow?” At that moment I was looking out the window at palm trees, so I replied, “Oh, I’m getting by. My biggest problem is that the sky is so blue that it almost hurts to look at it.”

I was in the valley for a couple of reasons. For one, yesterday was the “State of the Valley” conference, which is an annual event that looks at how Silicon Valley is doing, what the prospects for the future may

be, etc. James Fallows gave the keynote speech, and I think I can best summarize his message as, “don't worry, be happy.”

With Colin Rule, from whom you'll be hearing later this afternoon, I dropped by Google to talk to one of their R&D managers who is working on natural language projects – turning the words that comprise the data embedded in all the messages we send into information about us. The highlight of that trip may have been the guy who runs the coffee bar in the R&D building – I got a long, passionate description of a special drink, the name of which I can't remember, that involves getting milk and coffee to just the right temperature, and then pouring carefully over spoons to create layers of hot and cold in the drink. Google's taking over the rest of the world, and based on my experience yesterday I think Starbucks should be worried.

But the real reason I was in San Jose yesterday was to visit the offices of a start up called Modria. Modria's product is an online dispute resolution platform that is capable of handling a wide range of disputes online, both with and without the aid of a live third party. You will hear more about Modria, and other ODR platforms, later this afternoon when Colin presents, but the existence of Silicone Valley and Modria just down the road, makes this conference an excellent place to bring up the topic of my remarks today.

The title of this talk, “Teaching ADR and ODR: Are we at an evolutionary moment?”, was given to me by the organizers of the conference, but it is one that I find appropriately descriptive of the time in which we find ourselves – I do think we, as ADR practitioners and educators, are working in an evolutionary period, maybe even a revolutionary period - a time when the boundaries between Alternative Dispute Resolution and Online Dispute Resolution are more blurred than ever – and the boundaries are getting “fuzzier” by the day.

I'll talk a bit more about the origins of ODR later, but before I jump into ADR and ODR, let me give you a shorthand definition of ODR so you can understand where I fit in the spectrum of practitioners and educators who deal with the interface between technology. For lack of better terms, think of the relationship between information and communication technology and dispute resolution as being embodied in “classic” ODR and “evolved” ODR.

Classic ODR, for me, is best described as the online dispute resolution that developed out of the need to find ways to deal with conflict created online, for which there was no reasonable traditional avenue for dispute resolution. We are now at the point where ODR has evolved, in my mind, to really be simply the intelligent application of ICT to the various functions that we as dispute resolvers must fulfill as we work with parties in conflict.

There may still be resistance to the use of online technology for what has traditionally been a face-to-face enterprise, but the times, and the society in which we work, are a'changing.

A couple of examples . . .

The Fairfax County School System in Northern Virginia (just outside of Washington, DC) where I live had one of the first peer mediation programs in the country. The school system hired an ADR specialist – a graduate of George Mason University's Institute for Conflict Analysis and Resolution – and developed a very comprehensive and very good peer mediation program that operated across all of the schools in the county. In one school, two young women were experiencing a conflict. When they were approached about the possibility of having a peer mediator help with resolution, they responded, “no, that's okay, we'll work it out on text.”

At the National Mediation Board I have been slowly working away at integrating technology into mediation, arbitration, and negotiation in an environment where, for over a century, the participants have insisted that they “have to look 'em in the eye” to be effective. The railroad industry has embraced technology for some things, but resolving disputes in the labor-management arena hasn't been one of them. For example, one of the labor contracts at a class one railroad has a ten cent per hour increase in pay for time spent on track that is in one of the more remote areas of the west. This special payment is memorialized in a side letter that was signed in the 1880's, and it is there because crossing this particular stretch of track constituted hazardous duty – because of hostile indian tribes.

Introducing technology to labor disputes in this industry has been, as you might imagine, a slow process, and one that at times has reminded me of an image from classic mythology – I see myself rolling a stone

up a hill, again and again.. To understand my mental state over the past decade, as Camus said, “One must imagine Sisyphus, happy.”

Not long ago, one of the senior practitioners in the railroad industry sought me out at a meeting to complain that we had not been fast enough in replacing a computer projector that we set up to facilitate web video negotiations – to my surprise, he was complaining because “we like to do all of our adoption sessions online now.” It turns out he's been using Skype and FaceTime to talk with his granddaughter, and he's now ok with web video. Who knew?

I said at the last International ODR Forum in Prague that I thought we had reached a watershed time in the attitude toward ODR. I won't belabor the point, but we've gone in just a few years from Ethan Katsh, Colin Rule, and I being on panels where we discussed ODR, and where we outnumbered the audience, to having the relationship between ADR and ODR as the keynote topic for this conference.

I have identified a couple of issues connected to the relationship between ADR and ODR that I think are critical for ADR educators, but in order to give some context for why I have chosen to focus on those particular issues, I need to spend a couple of minutes talking about my background as an ADR and ODR practitioner and as an ADR and ODR educator – so please bear with me through a bit of bio information.

My background is, as they say, “checkered,” and as both a practitioner and an educator I have had the opportunity to engage in a pretty wide array of dispute resolution activities. As a private practitioner I have done workplace and EEO mediation, group facilitation and problem solving, and even some community building and peacebuilding both in the US and in other countries. Since I've been with the National Mediation Board I have been primarily doing work in the labor-management arena (grievance mediation, contract negotiation, problem solving and facilitation), and managing others who do that type of work – but I have maintained a private practice outside labor-management, as approved by our ethics officer. Probably like many of you, I didn't plan my career in any rational way – opportunities just happened and I went with them, and that's given me a pretty broad perspective on the practice of alternative dispute resolution, or whatever we want to call this endeavor that we all share. For purposes of this talk I'll tend to refer to the field as “conflict engagement” since I think that covers a lot of ground

and at least partially describes the many approaches that we and our students can take in the pursuit of dispute resolution, conflict management, etc.

My background as an educator is also pretty checkered. I started my post-graduate-school career in 1978 as an assistant professor of communication at George Mason University. I taught there until 1990, when I left the university to pursue a consulting career. During that time I was marginally involved in the creation of the Center for Conflict Resolution, which became the Institute for Conflict Analysis and Resolution, and which, just last year, became the School of Conflict Analysis and Resolution. Its founding in the early 1980's marked the first graduate degree in conflict resolution in the world. I haven't had any official association with ICAR/SCAR for many years, but I still do guest lectures there every now and then. Since leaving GMU in 1990, I have continued to teach in the area of conflict engagement, and over the years I've regularly taught in the dispute resolution programs at the University of Massachusetts at Amherst, Southern Methodist University, Creighton University, and Dominican University, with a guest appearance every now and then at the Cornell ILR School, the Georgetown Law Center, and other institutions. And, again probably like most of you, I have engaged in training for corporations and mediation centers.

Now, I say all that not to ballyhoo my experience – volume does not equal quality – but to make two points. First, I have a very traditional background in conflict engagement - I am a classic “digital immigrant” - and second, issues related to the teaching of conflict engagement theory, skills, and practice have been a major part of my own practice from the beginning.

But I don't think that's why the organizers of this conference invited me to be here today – there are plenty of people who have been doing and teaching ADR for a long time. I think they knew when they invited me that I would not be able to resist talking about the place of information and communication technology, ICT, in the field of conflict engagement.



Starting when I was with GMU, I developed an interest in how information and communication technology related to conflict resolution. In the mid-1990's I began consulting with the National Mediation Board, where my initial focus was to integrate technology into the Board's work in a way that would allow a small number of mediators, working almost exclusively on the road, covering parties scattered all across the country, to do better work using ICT. Since then, both at the NMB and in my private practice, I have continued to do "traditional" work, but I have really focussed heavily on the integration of ICT into the mainstream practice of conflict engagement.

On the ODR education side, about ten years ago I started working with Ethan Katsh and Colin Rule, just as Colin came out to California to be the resident dispute resolution expert at eBay. Along with Ethan I taught, at UMass Amherst, the first online dispute resolution class to be offered by a university anywhere in the world. Working with Ethan and others at UMass-Amherst, I was then involved in two National Science Foundation research projects that had as their focus the impact of online technology on mediation. Since then I have continued to design and teach ODR courses and ADR courses for a variety of universities and mediation centers.

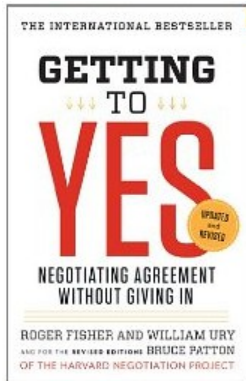
All of this has, again quite accidentally, placed me in a group of about a dozen academics and practitioners around the world who have been concerned with and focussed on ODR and the place of ICT in ADR for the past 15 years or so.

But don't get me wrong - even though I've been absorbed by conflict engagement and ICT for a while, I'm not an absolute champion of the use of technology in dispute resolution. In fact, most of my own practice still is conducted face-to-face with parties. I've been more involved with ODR in the evolutionary sense - how ICT can be integrated into conflict engagement in the larger sense to add value, and to make things possible that cannot be done using only traditional face-to-face modes. As time has passed, I have come to believe that the ADR/ODR distinction is meaningless in all but a few narrow venues - the use of ICT is, to me, simply the direction in which the practice of conflict engagement has evolved over the past couple of decades, and the direction in which it will continue to evolve.

That convergence between ODR and ADR is where I'd like to target my remarks about ADR education - I'm convinced that anyone who thinks about the future path of alternative dispute resolution and

conflict engagement without at least acknowledging the impact that ICT is having is doing a disservice to the students who come to us for education and training.

Now that I've put myself in some context regarding ODR and ADR, I'd like to talk for a moment about how I've seen the evolution of ADR as it relates to technology, and then finish with what I think are some challenges that we all face as we move ADR education further into the 21<sup>st</sup> Century.



So, to start – where did we come from, and where are we today?

As far as ADR education is concerned: In the beginning was the Word, and the Word was Getting to Yes. Probably more than any other single book or article, Getting to Yes has given ADR and ADR education a vocabulary, a framework, and a basic grammar, fixing an Interest-Based approach as at least a loose norm for a wide range of ADR activities.

Many, if not most, basic mediation courses use Getting To Yes as a text, and certainly use the principles of interest-based dispute resolution in what has come to be known as the “North American Model.” This model, and our subsequent approaches to teaching ADR, developed at a time when information and communication technology was, beyond telephones and fax machines, largely a non-factor.



There are some assumptions that drive our basic model of ADR, and the way we teach our students – we should begin by naming the issue and letting parties tell their stories related to the issues, we should deal openly with party interests, we should be “neutral” (I’ll spare you my usual rant about neutrality – if you are really neutral in any social interaction, I think you are suffering from a psychological disorder). Many of our basic assumptions are quite culture-bound and are increasingly challenged by practitioners in other places, but that’s another discussion.

One of our basic assumptions about ADR has been that dispute resolution is done face to face. Dispute Resolution theory has been driven to a great extent by reliance on what can generally be called “contact theory” – you can see, and argue with, that assertion in one of the articles that I’ve given to the conference planners to put in your registration packet.

In 1981, when Getting to Yes was first published, society was still more than a decade away from the advent of online commerce and the new disputes it would create.

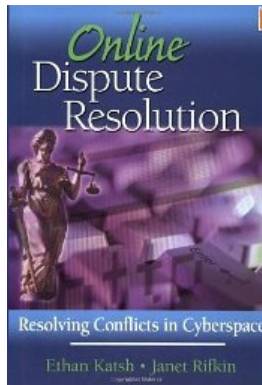


In 1992, when the National Science Foundation lifted the ban on commercial activity on the Internet, the stage was set for creation of a new kind of conflict. In the beginning, Pizza Hut was the first company to experiment with online commerce – in selected Pizza Hut stores you could order a pizza online. You had to go pick it up, but you could order it. Early on, this was available to a very few people, and we don’t talk about Pizza Hut as the poster child for online commerce. We save that distinction for eBay.

In the mid-1990’s, eBay developed an online platform that allowed buyers and sellers in remote locations to engage in commerce in a way that was impossible before the Internet. And it created new



dispute resolution problems related to legal venue and physical location. This new commercial environment prompted a simple but profound observation: we were creating conflict in which the parties could not directly interact, in which there were often no controlling legal venues in which to resolve differences, and at a volume that would overwhelm traditional dispute resolution systems. For a walk through history, I suggest you have a look at Ethan Katsh and Janet Rifkin's book – Online Dispute Resolution: Resolving Conflicts in Cyberspace, or the chapter on ODR History in ODR Theory and Practice, published by Eleven International Press in 2012.



From 1992, through the mid-1990's, e-commerce continued to grow, and growing from the demands of dispute resolution in the e-commerce world, some “pure” ODR approaches were developed – completely online dispute resolution systems for conflict created online. Those “pure” online dispute resolution systems have grown and have become a standard element of online commercial interaction – eBay routinely resolves 60 million disputes every year using online dispute resolution tools. That part of the ODR world is interesting, and it's still developing, with algorithm driven applications that resolve issues without a human third party, and projects underway to “build a better mediator” using artificial intelligence.

But what's most interesting to me is that the social environment in which “traditional” conflict is generated and resolved, completely outside the context of e-commerce, has greatly changed since we developed our fundamental notions of what ADR, and ADR education, should be.

Here are some statistics you may know, but of which I think ADR educators and practitioners should take note.



In October, 2012, Twitter passed the one half Billion tweets *per day* milestone.



In that same month, FaceBook passed the 1 Billion level for what they call MAU's (Monthly Active Users).



In 2012, consumers spent 226 Billion dollars online – and we are headed within the next couple of years to the time when ten percent of all retail sales will be done online.

So what? Any set of statistics about online use that you choose to examine will indicate that ICT is becoming more and more an integral part of the way we communicate and do business as a society. Even leaving out e-commerce, the advent of social media and the increasing use of ICT as a basic part of life has changed the way we should think of alternative dispute resolution. No longer is it defensible to

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think of ADR and ODR as separate, with ODR off in the e-commerce ether and disconnected to the larger world of ADR. Instead, ADR has evolved to include the use of technology in ways that are often transparent to practitioners themselves.

**Communication**  
**Information**  
**Group Dynamics**

Think of it this way – as third parties we routinely do three things: 1) we facilitate communication, 2) we help the parties handle information, and 3) we manage group dynamics. These are all things that ICT is designed to do or to enhance, and it is these things that the dizzying array of online platforms is doing for billions of people every day. If our core activities in the ADR world are the core activities of the ICT world, and if the communication channels created by the widespread acceptance of social media are now ubiquitous, it seems to me inevitable that ICT will impact ADR. It is imperative that we recognize this as educators preparing practitioners to go into an increasingly wired (or wireless) world.

ICT and ODR pose some challenges for those of us who teach dispute resolution courses. Let me talk first about ODR courses, then about ADR courses generally.

There are now a number of courses in online dispute resolution being taught around the world. I teach an ODR course for Creighton (in their online program) and for SMU (in their face to face program). The course at Creighton is the first ODR course to be required as part of a graduate degree program in dispute resolution – there is one other required ODR course of which I am aware, at the University of Maryland-Baltimore (Michael Wolf, who is now with the Federal Labor Relations Administration designed and has taught that one). I do ODR training for the Northern Virginia Mediation Service that is the only ODR training of which I am aware that tries to blend online tools with the traditional 40 hour court mandated mediation training.

**Theory**  
**Skills**  
**Practice**

Putting together an ODR course offers some of the same choices that putting together an ADR course offers. One of the initial choices has to do with what focus the course will take: theory, skills, or practice.

Doing all three in one course is pretty difficult. My courses tend to be focused on practice, with a smattering of skills. Students in my ODR courses discuss the ethical impact of using technology, they discuss how to engage in intake, how to choose platforms that help blend online work with face to face work, and they have a go at mediating using one synchronous platform and one asynchronous platform. When they leave the class they have a good idea of how to use technology, and they have a good idea of the special problems using technology can offer, but they don't really get very far into the theory of dispute resolution and how it may be affected by the use of technology. My choices result partly from the fact that the classes are abbreviated in time frame (7 weeks for Creighton, 2 weekends for SMU, one day for NVMS).

When students complete the ODR classes I teach, they are able to recognize some areas in traditional practice where technology can add value: gathering information and handling intake, information sharing before and between sessions, brainstorming and mind mapping, joint editing of agreements, etc. In the courses I teach, the message is that technology does not replace or radically alter the basic ADR process, but it does add value at any step in the process where the third party chooses to use online tools.



On the other hand, Bill Warters at Wayne State University has the luxury of a 13-week course in which he investigates social media and communication/dispute resolution theory in much more depth.



The real problem in ADR education, however, is that generally we tend to still approach teaching and educating about ADR and ODR as if they are somehow different and isolated from each other. I'm currently as guilty of this as anyone. It is my opinion that in order to do an acceptable job of teaching students about dispute resolution we have to integrate the use of and the impact of technology into every ADR class we teach – from full length university courses, to short courses, to ADR training. If we don't do that for our students, I think we are sending them out as ADR practitioners into a world that increasingly assumes that ICT will be a part of all communication and group dynamics, but which we will have ignored. Bluntly put, if we don't teach them about ICT and its relationship to ADR, we are prepping them to fail – or at the very least to be out of sync with the society in which they are working.

There are obviously many ways to integrate ODR into ADR education.



At Dominican University in Chicago, my colleagues and I teach a very traditional mediation skills course as the introductory course in a dispute resolution graduate program. In that course, we use one segment of the class to discuss and illustrate how various online tools can be used to perform any or all of the basic functions that make up our standard mediation model. They don't get any hands-on work with ODR platforms, but they are at least aware that there are ways to use technology to add value to their work as mediators. And our discussion of communication in that course highlights the fact that any evaluation of the communication environment today must consider that ICT has added many highly used channels for communication, all of which may have an impact on how we deal with conflict.



At SMU, I teach the stand alone ODR course, but I use technology as part of the classes I teach in “International Dispute Resolution” and “Integrating Dispute Resolution Theories.” In both, I have set up an online workspace where the students get used to information sharing and online communication between classes, and I have guests come in via web video who discuss how they are using ICT in their practices. Again, there is no skills component beyond the skills they pick up by doing coursework, but there is an awareness of how ubiquitous technology has become and how they can adapt it to their practices, particularly as those practices cross cultures and national borders.

My point here is that we should not, as educators, leave talk of ODR technology, or technology generally, to the ODR classes – it belongs in any class that prepares students to practice conflict engagement in the 21<sup>st</sup> Century.



Of course another unavoidable problem for ADR and ODR educators is how to handle “The Question” – you’ve all heard it – “how can I make a living as a mediator/facilitator, etc.?”

I regularly teach dispute resolution in one law school, one business school, one counseling program, and one labor and industrial relations program, plus one community mediation center – I get “the question” from students in all five venues. Law schools like the one we are in today have, in one sense, an advantage – they teach ADR as an element of a well-established professional degree. But even there, in a recent review of DC based law schools, fewer than 50% of graduates are working as lawyers two years after graduation, so doing ADR as part of a law practice doesn’t work if you don’t have a law practice.



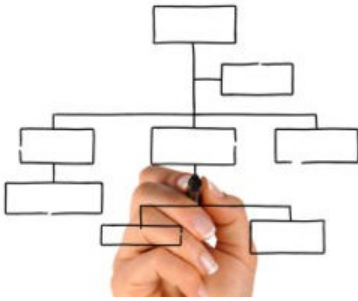
As educators we have the twin dilemmas of deciding what to tell students about ADR, and then deciding what to tell them to do with their knowledge and skill once they have it.

I'd suggest a few things that we should be doing as ADR educators.

First, I'd suggest that we all be mindful that the social environment in which conflict is generated and resolved has changed forever with the increasing use of, and impact of, online technology – and that we integrate into all ADR education the awareness of technology, highlighting the barriers and opportunities it offers. Students who complete our courses and who are armed with at least a basic awareness of the place of technology and use of technology in ADR work will, I think, have an advantage over those who do not have that exposure.

Second, I'd suggest that we consciously integrate the use of ICT into all of our classes in dispute resolution. Our students will be using ICT all the time, inside and outside the classroom, and I think we can help them develop an important skill if we can get them to think about how those communication channels can be adapted for use by parties in conflict. That means, for us as educators, educating ourselves about the interface between ICT and its communication channels and the traditional world of ADR.

Third, I'd suggest that we encourage our students not to think of the study of dispute resolution, either ADR or ODR, as a linear path to work. Rather, we should encourage them to think of the knowledge and skills they gain in the study of dispute resolution – ADR *and* ODR – as fundamental tools that help them facilitate communication, handle information, and manage group dynamics in any situation.



One of my students (I feel funny saying that – he is as old as I, and a very accomplished professional in the health care industry) held a high level job in one of the major health organizations in the United States. He applied for an even higher level job – President of the organization – and in the interview he used the language and approaches to communication, information, and group dynamics that he learned in the graduate program in dispute resolution where I met him. He got the job. In a conversation later, he indicated that he was sure he was chosen by the panel because of the approach he was able to bring to the interview from his dispute resolution education, particularly how he could use ICT to resolve issues and bring some efficiency to their customer relations work. He’s not a mediator, probably never will be. He doesn’t hold a position that would in any way fit a traditional definition of ADR, but his ability to address organizational conflict, and his ability to talk about how technology could add value in the conflict environment faced by his organization, means first that he’s employed, and second that he’s involved in conflict engagement at the highest level.

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So, in conclusion, I'll leave you with two thoughts.

First, we have to, as ADR educators, develop a good working relationship with information and communication technology in order to understand the social and conflict environments in which our students exist.

Second, we have to find ways to integrate the use of online communication channels in what remains a largely face-to-face process. That means continuing to offer ODR classes, including skill building classes that parallel the skill building classes that we teach as ADR classes. It also means that we need to find



ways to integrate the existence of information and communication technology into what have traditionally been seen as non-technology related classes.

If we can do so, I think we'll be serving the best interests of the students who come to us for guidance.