ADR/ODR: Are we at an evolutionary moment?
(Or, a Revolutionary Moment?)

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"ADR and ODR: Are we at an evolutionary moment?" as a topic was given to me by the organizers of the California 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, 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 and conflict engagement. For lack of better

1

terms, think of the relationship between information and communication technology (ICT) 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 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, "they are a-changin'."

A couple of examples help make the point.

The Fairfax County School System in Northern Virginia (just outside of Washington, DC) 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.   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 burned out 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 2012 International ODR Forum in Prague that I thought we had reached a watershed time in attitudes 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 ADR conferences.

I have identified a couple of issues connected to the relationship between ADR and ODR that I think are critical for ADR practitioners. Probably like most of you, I have a very traditional background in conflict engagement – and I am a classic "digital immigrant." Probably unlike most of you, issues related to the blending of technology into the practice and teaching of conflict engagement have been a major part of my own practice almost from the beginning.


When I was with George Mason University, from the late 1970's until about 1990, 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 focused heavily on the integration of ICT into the mainstream practice of conflict engagement.

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 focused 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 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 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.

I'm convinced that anyone who thinks about the future path of alternative dispute resolution and conflict engagement without at least acknowledging the impact of ICT is taking a buggy whip into an electric automobile environment.
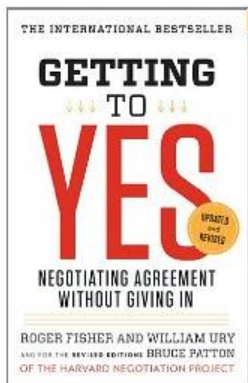
Leaving technology aside for a moment, where did ADR come from, as a field, and where are we today?

As far as ADR training and 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.

4

Many, if not most, basic mediation courses use <u>Getting To Yes</u> 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 – we should begin by letting the parties tell their stories, move to a definition of the issue(s), and then to options for resolution. 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 meaningful 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 chapters that my co-author Leah Wing and I did for the recently published ODR Theory and Practice book.[1]

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[1] Mohamed Wahab, Ethan Katsh, and Daniel Rainey, editors, <u>ODR Theory and Practice: A Treatise on Technology and Dispute Resolution</u>, Eleven International Publishing, The Hague, 2012.

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 online. Early on, online commerce 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.
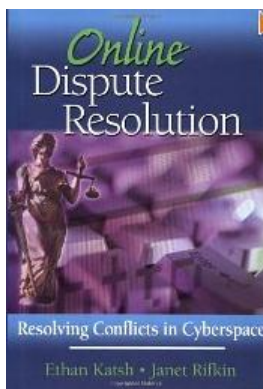
From 1992, through the mid-1990's, e-commerce continued to grow, and growing from the demands of dispute resolution in the e-commerce world, some "pure" ODR approaches were developed – completely online dispute resolution systems for conflict created online. Those "pure" online dispute resolution systems 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 should be.

Here are some statistics you may know, but of which I think ADR 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 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.

7

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 practitioners going into an increasingly wired (or wireless) world.

ADR ⟵⟶ ODR

The real problem in the ADR community, however, is that generally we tend to still approach teaching and practicing ADR and ODR as if they are somehow different and isolated from each other. We are going 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 as a field generally have ignored. Bluntly put, if we don't learn about ICT and its relationship to ADR, we are preparing to fail – or at the very least to be out of sync with the society in which we are working.

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

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. Those of us who pay attention to this, and adapt to the new environment, will, I think, have an advantage over those who do not have that perspective.

8

Second, I'd suggest that we consciously integrate the use of ICT into our practices in dispute resolution. Our clients will be using ICT all the time, and I think we can offer them an important service if we can think about how those communication channels can be adapted for use by parties in conflict. From intake and case development, to online filing of documents, to secure workspaces where parties can exchange information and explore options, online platforms offer many options for easy and seamless integration into traditional practice.

Third, I'd suggest that we not think of ADR or ODR as mutually exclusive. Rather, we should think of the knowledge and skills we gain in the study of dispute resolution – ADR *and* ODR – as fundamental tools that help us facilitate communication, handle information, and manage group dynamics in any situation, with or without technology.

Finally, I'd suggest that we, as practitioners in this field, think very carefully about the practice implications of using ICT to work with parties, and that we think even more carefully about the possible ethical ramifications of using ICT to handle communication, store data, and conduct very personal discussions using online media which have been described as places where "data never dies." Perhaps the most immediate ethical consideration is what it means to be "competent" as a practitioner using ICT. We have established standard training courses for mediation and ADR, but almost none of them address the changes that using ICT brings to the practice of conflict engagement.

As I noted earlier, I am a digital immigrant. Digital natives may tend to embrace new technology without blinking, but I am still quite conscious of the fact that the explosion of ICT and social media brings along upsides *and* downsides. Ethan Katsh has noted that online technology can generate far more conflict than it can resolve, and a colleague of ours who deals with transformative work in conflict zones, Sanjana Hattotuwa, quickly noted during the "Arab Spring" that the bad guys can use online tools just like the good guys can. (That's a very crude translation of Sanjana's comments, for which I apologize.) Using technology for conflict engagement brings a new layer of complexity to interactions, forces us to deal with the loss of nonverbal cues, challenges our notion of time and space, and introduces changes the nature of which we are probably still ignorant.

9

Even with all of the potential changes, problems, and challenges, the fact remains that the current and developing ICT environment, from e-commerce to social media, has changed the world in which we work, and will continue to push new changes. We can acknowledge the changes and incorporate them into our work, or we can become interesting fossils in a conflict resolution museum display case.