

Ethical Issues Related to the use of ODR Technology

At one point, not so long ago, most lawyers would have said that there were no ethical issues involved in the use of online technology for legal or dispute resolution work – because no one was going to use online technology in the first place.

Times have changed.

Let me give you just a couple of examples of how online technology has begun to surface in legal and ADR environments.

- UNCITRAL (The United Nations Commission on International Trade Law) is holding ongoing meetings in Vienna and New York to try to work out an agreement for using ODR technology to handle international, cross-border commercial disputes.
- The EU (European Union) has decreed that by 2015 the use of online technology will be mandatory for all high volume, low value commercial disputes in the EU.
- The Attorney General of British Columbia is aggressively integrating online technology into the work of the courts in BC – Darin Thompson, Director – Court Reform, Business Transformation and Corporate Planning, Court Services Branch, BC Ministry of Attorney General, is the Canadian delegate to the UNCITRAL negotiations.
- The Spring 2013 edition of the ABA Litigation Journal will include an article by my two co-authors, Jeff Aresty and James Cornie, and me about the extent to which ODR technology is making inroads in state and federal courts in the US.

- The ABA Section of Dispute Resolution has set up a task force – The Task Force on Interdisciplinary Approaches to Complex Dispute Resolution – that will, among other things, set up a portal for US lawyers to link them to online tools useful for complex litigation and negotiation.

Online technology *is* coming to your practice, and it's probably going to go far beyond e-discovery.

So, what are some of the ethical challenges presented by the use of online technology the legal and ADR arenas? Let me briefly mention four, and let me note that there are differences in the ethical considerations when one is operating as a lawyer and when one is operating as a mediator.

1. Competence – the essential requirement that practitioners be basically competent suggests that it is incumbent on the practitioner to adequately prepare for the differences in practice and in process that technology brings. There are basic questions – what does “competent” mean when it comes to ODR? – How does one demonstrate competence? – Who certified your competence? The ABA recently backed away from accreditation for mediators, so it's not likely there will be a rush to accredit or certify ODR competency.
2. Confidentiality – how do we describe to clients and parties what is reasonable in the way of confidentiality assurances? Getting info off of a hard drive or server is nigh impossible – what does that do to the need to maintain confidentiality when there are external factors beyond the control of even the most competent practitioner?
3. Identity – how do we know, for sure, who is acting

online in a text environment?

4. Information Gathering and Analysis – with the advent of online apps, it becomes possible to gather data, strip it of identifying markers, and use it to plot trends (both trends of disputes, and trends of acceptable outcomes). The fact that one can do it means that sooner or later someone will do it (it's already being done in the e-commerce dispute resolution world).

For six years I worked on an NSF research effort designed to look at the impact of technology on mediation and other forms of dispute resolution – the biggest initial mistake we made was to assume that online DR is simply an analog of offline DR – it's not. Using technology brings changes in party/third party relationships, process, and, I think, in the range of ethical issues pertinent to the practice of dispute resolution, in a legal or in an ADR context.