

# Virtual Virtues

## Ethical Considerations for an Online Dispute Resolution (ODR) Practice

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*Times change. Systems change. Should ethics change?*

**W**e live in turbulent times, especially where technology is concerned. Face-to-face conversations are increasingly giving way to communication over the Internet and mobile devices. As a result, the way we communicate with each other, whether personally or professionally, is constantly evolving.

Imagine two corporations' general counsels on different continents. Because of their geographic separation, they conduct all of their negotiations online as they draft a purchase agreement for steel girders. What happens when the steel girders show up and they're the wrong size? Time is of the essence, and the two general counsels are separated by thousands of miles. Clearly, they will prefer to resolve the situation using the communications channel they used to create the agreement: online.

Or take the example of a consumer, who likes to sit up late at night browsing the Internet for bargains. She relies on representations and warranties provided by the sellers she buys from, but after many successful transactions, an item arrives at her doorstep that is quite

different than what she thought she was purchasing. The seller is located in another country, and the item is only worth a couple hundred dollars. Filing a legal case in her local court would be a waste of time, and filing in the seller's country would be prohibitively expensive. How can she get redress?

Information and communication technology has made the world smaller and created new types of disputes that can be challenging to resolve. Many of the oft-touted benefits of dispute resolution—efficiency, flexibility, accessibility—are enhanced by technology, and parties are coming to prefer online communications for many of their resolution processes. But challenges associated with online dispute resolution must also be carefully considered.

In this short article, we describe several types of ethical dilemmas online dispute resolution (ODR) practitioners encounter and present solutions neutrals can utilize to ameliorate them, either through education or systems design.

### **Comparing Face-to-Face Dispute Resolution to ODR**

In a face-to-face setting, communication is enhanced by nonverbal nuances not visible in most types of ODR



These issues lead to interesting ethical questions. Although we understand that many areas of ethical concern exist in online practice, for the sake of simplicity we've bracketed our thoughts into four categories: impartiality, costs and fees, confidentiality, and systems design. These categories were suggested by discussion threads that emerged during Cyberweek 2009,<sup>2</sup> where we facilitated several discussions focused on ethics and ODR.

### **Impartiality**

Neutrality is a noble goal. But as many have noted—from Janet Rifkin to Sarah Cobb to Bernie Mayer to, most recently, Wallace Warfield in his Keynote at the ACR conference in 2009<sup>3</sup>—it is not only impossible but also potentially delegitimizing for our field to use it as a means of representing our work.

Every set of mediation standards of conduct we reviewed—including those of court-connected programs, those promulgated by professional organizations, and the Model Standards—require mediator impartiality. Some states also require the mediator to ensure fairness of the outcome. Yet as soon as the mediator aids the perceived weaker of the parties to ensure a balanced, fair outcome, the mediator has infringed on his or her ability to remain neutral. ODR systems can attempt to level the playing field in both the system design and the actions of the online mediators.

The digital trail of communication by and between the mediator and parties can serve as evidence of

techniques. For example, in meetings individuals are able to leverage the full array of communication techniques: facial gestures; voice inflection and intonation (which might reveal sarcasm); and body movements, including some that demonstrate signs of embarrassment, such as reddening of a face, a palpitating leg, or the squeaky chair as someone squirms with nervousness.

These nonverbal cues are absent in ODR settings. Email meant to be sarcastic may not come across with the intended tone when read by the recipient without verbal inflection. For example, others have noted that a number of additional modifications may be necessary when individuals transition from in-person negotiation to all communication by email.<sup>1</sup>

Another important distinction is the preservation of communication. Electronic communications such as text messaging, faxing, and email exist perpetually, stored on computer hard drives, unlike oral communications that are gone and forgotten. Does this everlasting communication affect parties' ability to settle a dispute? Access to this permanently maintained communication and its impact on confidentiality are additional considerations.



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inappropriate mediator conduct, particularly in allegations of impartiality and fairness.

For example, this issue represents a continuing challenge for ODR systems used by eBay. Although eBay is objectively “neutral” as to outcome between disputants in most eBay disputes, it also needs to delight buyers to keep the marketplace successful. Inevitably, eBay makes policy decisions to rebalance the marketplace between sellers and buyers. In any individual dispute, eBay may be neutral about an outcome, but eBay still runs the overall transaction environment. Is it a violation of neutrality if eBay runs the overall dispute resolution system while also deciding individual case outcomes? The company strives to build fair and open dispute resolution processes, but the fact remains that eBay will not offer a system it believes operates contrary to the overall objectives of the marketplace.

Should the standard for process impartiality be changed in ODR? Perhaps we should worry more about the overall appearance of partiality (the “kangaroo court” phenomenon) than obsessively trying to wring every last drop of bias that might exist at every stage in the process.

## **ODR systems can attempt to level the playing field in both the system design and the actions of the online mediators.**

In one possible solution, ODR systems could substitute a mediator requirement to “serve in a balanced capacity” rather than an impartial capacity. Rather than just protecting one party, this protects everyone, including the system, thus upholding the notion of fairness. If the mediator balances the communication channels to ensure everyone has a chance to be heard—really heard—and confirmed, then the parties have increased their ability to make a better informed decision. Under this scenario, the mediator would not be impartial but would be balancing the communication between the parties, potentially helping create a more legitimate process because it appears more fair and objective. Neutrality and impartiality may be lost because the neutral has become an advocate for one party, violating the very essence of hiring a neutral third party.

If a mediator or online systems designer steps away from the neutral or impartial role, then additional concerns may arise. If the neutral assists a party’s presentation or provides information or advice, whether dealing with process or substance, isn’t there an obligation to be accurate? And what potential liability is the mediator now open to?

Another example is the independent review process that is offered for feedback complaints on eBay Motors

items. Both parties have an opportunity to “make their case” based on a defined set of decision criteria, and then a trained, independent arbitrator makes a final decision. By design, it’s quick and simple, but the ethical considerations continue to be critically important to eBay Motors to maintain the credibility of the process. Because the arbitrator does not engage in a dialogue with the parties, it might be argued many of the arbitrator’s conundrums are absent. However, arbitrators may still feel that their impartiality is being challenged, especially for the experienced neutral that might inadvertently start to slip in to viewing “categories” of positions or decisions. Maintaining an open mind takes deliberate and constant observation of one’s motives and perspectives.

### **Cost and Fees**

ODR presents a new set of questions relating to the money behind dispute resolution processes. Filing fees can be a barrier for individuals seeking redress. How should ODR neutrals be compensated? If the process is entirely automated, is conditional compensation, such as compelling the disputants to pay more if they reach a

settlement, ethical? Should both parties equally divide the fees, or is it acceptable for the complainant to pay the full cost? If the respondent refuses to pay, could the claimant be denied access to resolution?

Costs have an impact on not only access to but also perceptions of distributive justice. If ODR is less expensive than other alternatives, it enhances access. Outside big marketplaces, however, there are few business models for sustainable ODR systems. To curtail expenses, some advocate for volunteer third-party neutrals, but this option may be problematic in terms of consistency and quality of service.

Costs may impact neutrals through the creation of potential bias. In face-to-face settings, conditional fees have usually been considered unethical because a conflict of interest may be created if the neutral has an interest in the final outcome.<sup>4</sup> For instance, the neutral may encourage acceptance of an inadequate proposal by giving unduly pessimistic information to the other party as to potential consequences if they did not settle. Accusations could even approach mediator coercion, calling into question the mediator’s overall competence. But if an ODR system is just a computer program, is it immune to such a conflict of interest? Perhaps conditional fees are acceptable in the case of a

technology-only system, where discretion is absent.

Consideration of online arbitration processes raises other questions. When a party feels he or she has experienced “a wrong,” it can be challenging to convince the other party to come to the table. In these cases, if

data is collected in such a structured format.

Traditional ADR ethics operate with near absolute confidentiality, which may prove shortsighted in the ODR context. ODR providers face enormous challenges in becoming self-sustaining. Insisting on ethical require-

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the respondent also is asked to pay half the fees, he or she can effectively stonewall a resolution. In the arbitration process, the complainant is offered the possibility that the process will right a wrong or resolve his dispute. In such a situation, it's reasonable to design a system where one party opens the case and pays all the fees.

There will always be an argument that if the fees are not split, the neutral or systems designer has an added ethical challenge that could compromise neutrality. Perhaps other systems, such as having aggregated fees go to an impartial system administrator before being distributed to ODR providers and neutrals, can offer more creative solutions to these ethical challenges.

### **Confidentiality**

Technology facilitates the flow of information. That can create huge challenges in keeping dispute resolution processes confidential. What obligations do ODR systems have in protecting disputant information? Is it OK to sell aggregated data gleaned from ODR systems if the individually identifying information is removed? What challenges do third-party neutrals face in maintaining confidentiality? How important is confidentiality in ODR? And just what are the expectations of the participants?

Confidentiality poses complex issues. Technology can both address and exacerbate these issues. As Orna Rabinovich noted at the Cyberweek conference:

While the digital trail created in ODR poses a serious challenge to confidentiality, it also presents a real opportunity for enhancing the accountability and fairness of ADR processes, answering many of the critiques voiced against ADR. Given the dearth of empirical research on ADR, the vast amounts of data collected in ODR could offer a real opportunity for empirical insights on disputes and dispute resolution efforts.<sup>5</sup>

The data that can be extracted from ODR processes can be immensely valuable, far more valuable than data pulled from face-to-face processes, because of the volume of cases flowing through ODR and because the

ments with diminishing benefits may further limit providers, especially if those ethical requirements represent adherence to traditional models while ignoring the new realities of online practice.

This is not to say we no longer care about confidentiality. Rather, we advocate being open to thinking about the issue from a fresh perspective. For instance, in the consumer protection context, the complainants usually want information about their case to be shouted from the rooftops—the more exposure, the better. In cases in which the parties don't care about confidentiality, we shouldn't tie our hands with ethical standards that insist upon it.

Recently, the advocacy group Public Citizen has made the argument that the confidential nature of ADR processes and agreements hurts consumers. The organization pointed out that court decisions are public information that provide a valuable service to the general public. Having access to published decisions means we all have the opportunity to compare the court's decision against our own or against conventional thinking. Public Citizen argues that the confidentiality agreements prevent the general public from having an opportunity to know the facts, the reasoning, and the decisions. On the other hand, businesses, which quite often are the repeat consumers of dispute resolution services, may expect privacy.

Collecting and publishing statistics continues to be controversial and full of challenges. As an example, California requires reporting whether the consumer prevailed. A review of the reports gives the impression that awards often are split between the parties and therefore don't fit in either category. Businesses argue that listing the number of disputes against them gives consumers a false picture of their product, service, and business practices. That said, collecting and reporting administration information, such as the aging of cases, can provide valuable information for the parties when choosing a provider.

Confidentiality is a central feature of mediation, written into mediation standards of conduct as well as many (perhaps most) state statutes. It's the primary subject of the Uniform Mediation Act. Yet the larger

question is how to maintain confidentiality in ODR proceedings, and when it is appropriate not to do so.

How can neutrals maintain confidentiality when communication takes place in a permanent written form? Even more importantly, what happens to all of the written communications once the ODR is concluded? It's possible a website can be removed, but written communications received by and between all of

factors can be overlooked or ignored. Keeping in touch with the users, neutrals, and system administrators will always be important.

### Structuring Online Practices

Technology will profoundly influence the practice of dispute resolution in the coming years. We don't have all the answers to the questions posed in this article,

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the disputants and the neutral may remain accessible. What if the disputants have acquired and maintained written communications on their private computers? Unfortunately, during the last few decades when issues of regulation, specifically in ethical issues, have been considered in both mediation and arbitration, little thought has been given to online work.

A deeper question relates to how ODR participants can assure that the information is not shared with anyone. How does a mediator, for example, know that another person is not also at the computer with one of the parties, or *instead* of the other party? Does it matter? This quandary parallels the right to retain legal counsel or a language interpreter to assist in presenting one's case.

### Systems Design

What concerns exist when an online dispute resolution platform is being coded? How does the lack of transparency into underlying code create ethical concerns? How can the programming of a platform create biased outcomes? What requirements should be placed on ODR platforms to ensure they are not subject to systemic bias?

Graham Ross, the founder and CEO of ODR platform TheClaimRoom.com, has shared nuanced thinking about these challenges, which he has experienced firsthand: "Platforms that are difficult to operate without a level of online technology expertise that is significantly above the average may give an advantage to, or at least appear to favor, those with that higher expertise. Gamesmanship may apply."<sup>6</sup>

The systematic review of ODR systems is an essential requirement for management and overview of the adherence of those systems to ethical standards. Appropriate design is an essential first step. Working with available knowledge to formulate the initial criteria is critical, but continuous evaluation of the process is equally important. There is always the risk of becoming so self-contained in our focus that external

but we think we've made a good start. The discussions that took place as part of ADR Cyberweek 2009 surfaced a wide array of compelling topics, as well as some very inventive and informed possible solutions.

As ODR and dispute resolution ethics professionals, we urge the wider field to participate in the ongoing dialogues about how ethics should, and to what extent can, play a part in the development in ODR processes. Just as efforts are under way with the ABA Ethics 2020 Commission to consider the impact of technology on law practice, and in particular, ethical issues, so too must the dispute resolution professionals recognize the differences encountered in ODR, and structure practices, including ethics, accordingly. Only then can we build on the firm foundation of offline practice to ensure that we can maintain our field's standards of quality as we increasingly begin to offer our services online. ♦

### Endnotes

1. Noam Ebner, Anita D. Bhappu, Jennifer Gerarda Brown, Kimberlee K. Kovach, & Andrea Kupfer Schneider, *You've Got Agreement: Negotiating via Email*, in *RETHINKING TEACHING NEGOTIATION* (Coben & Honeyman eds. 2009).
2. ADR Cyberweek is a web-based conference focused on the practice of online dispute resolution. It has been convened by the National Center for Technology and Dispute Resolution annually for the past 12 years. The 2009 ADR Cyberweek program is accessible at <http://cyberweek.umasslegal.org/program>.
3. Available at [http://icar.gmu.edu/warfield\\_acr\\_keynote.html](http://icar.gmu.edu/warfield_acr_keynote.html).
4. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VIII.B. (2005).
5. Orna Rabinovich's comments were made at Cyberweek 2009, accessible at <http://cyberweek.umasslegal.org/forum/?vasthtmlaction=viewtopic&t=19.0>.
6. Graham Ross comments were made at Cyberweek 2009, accessible at <http://cyberweek.umasslegal.org/forum/?vasthtmlaction=viewtopic&t=18.0>.