Technology and the Future of Dispute Resolution

By Colin Rule

Think back 10 years. That's not too long ago, right? You'd think not much has happened, but quite a few big things have emerged, particularly in the area of technology. Facebook was founded in a dorm room at Harvard in 2004. Twitter was started in 2006. Steve Jobs introduced the iPhone in 2007. The Android mobile phone operating system was released by Google in 2008. Although they are only a few years old, these innovations have sparked huge changes in our society, almost to the point where we can't imagine modern life without them.

Take the smartphone. These days most of us carry smartphones all the time. Without them, we'd feel lost (literally, because of our dependence on GPS and Google Maps). We still call them "phones," but in reality they are powerful computers we carry everywhere, connected wirelessly to the global cloud. Each individual cell phone has 100 times more computing power than all the computers NASA used to send a man to the moon. These devices are constantly patched and upgraded, and we get newer and more powerful models each year. We use them to talk to our coworkers, friends, and family almost every minute of the day. How did we get around before? How did we find each other at the airport? It's getting hard to remember. But one thing is for sure: we'll never go back to the way we used to communicate.

These technologies are changing the way we interact with each other in profound ways. We now routinely utilize computers for many of our most intimate communications, largely because smartphones and tablets have become so convenient, portable, and easy to operate. These devices also enable us to transcend distance like never before. We can now communicate with anyone in the world with a few swipes of our fingers. As a result,

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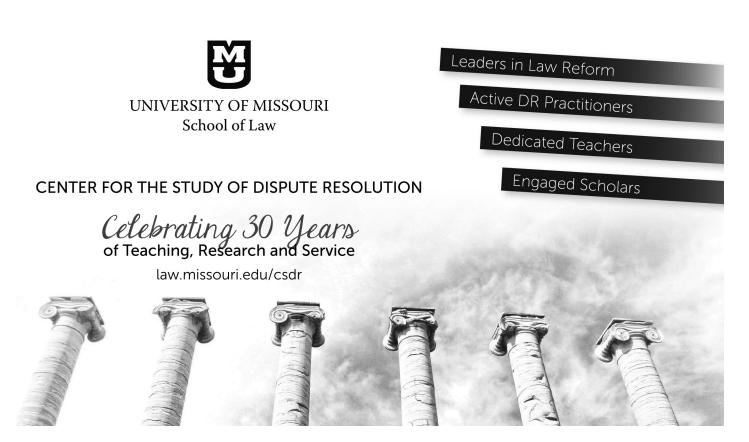we can stay connected to those we love without worrying about geography.

These developments will inevitably affect the practice of dispute resolution. Technology is changing not only the way we communicate; it is altering the way we disagree and the way we resolve our disputes. And it is generating new kinds of disputes, many of which grow out of all the new capabilities we enjoy. Technology is also changing people's expectations about how disputes should be resolved. People now believe that they should be able to report a problem at any time of day and get quick, round-the-clock support to resolve it transparently and effectively.

Now that society has embraced technology so thoroughly, the key question for dispute resolution professionals is, how can we leverage technology to best assist parties in resolving their disputes? Almost every industry, from medicine to finance to entertainment, has been transformed by the expansion of information and communications technology. A practitioner plucked from any one of those fields 30 years ago would have trouble recognizing it today.

All these changes are putting pressure on our dispute resolution field to adapt or risk a growing disconnect with the people we are trying to help.

This is the focus of Online Dispute Resolution, or ODR. ODR is the application of information and communications technology to the practice of dispute resolution. ODR is only about 15 years old, but it has expanded rapidly alongside the increasing digitization of our society. When ODR first started, our sessions at the ABA DR Section conference were populated by a relatively small group of technology enthusiasts who asked abstract questions about where things might be heading. But as the pace of technologic change has accelerated and more people have integrated the Internet into their daily lives, the ODR community has blossomed. There are now thousands of ODR neutrals, program managers, developers, and designers working across five continents. We have our own journals, books, web sites, conferences, and ethical standards. ODR is no longer a novelty – it is now arguably the future of ADR.

Many mediators initially resisted the encroachment of technology into dispute resolution, concerned that technology-based communication was not rich or robust enough to enable the kind of open, honest interaction that most mediators feel is essential to achieving effective resolutions. When I demonstrated ConflictNet, an early online resource for dispute resolvers, at a conference of the Academy of Family Mediators in 1993, the skepticism

was palpable. Senior figures in the field told me that technology was not just a bad fit with dispute resolution, it was dangerous, because it suggested that there was a shortcut to solving problems and that parties could just click their way out of disagreements. Computer-mediated communication, people thought, was dehumanizing, impractical, and overly prescriptive, a solution available only to the wealthy who could afford such expensive tools. This was the prevailing sentiment for many years.

Over the last decade, however, the resistance to computer-mediated communication has mellowed significantly. We now do things online that we never would have considered only a few years ago. Cell phones have democratized access to the Internet, so now many people can afford to be connected all the time. The younger generation, in particular, is comfortable with online communication in a way their parents may never be. Young people today make up and break up online and even find spouses via web sites. Because their children feel more relaxed and at ease through online communication, many parents have discovered that technology is the best way to talk with their kids. All this is drastically changing the way families and friends resolve disputes.

We've also come to understand that the distinction between online and offline is a false dichotomy. No one lives entirely online, and very few people live entirely offline. Most of us are comfortable using technology to communicate sometimes and at other times getting together face-to-face. We constantly navigate back and forth between our online and offline channels, sometimes in the space of just a few minutes. This is true in ODR as well. We may begin a process with an online filing form and move to telephone calls and then to face-to-face meetings before finalizing the agreement online. Joint sessions might be held in person, with in-between conversations happening over email. This is the way our parties live their lives, and they expect to be able to resolve their disputes with similar fluidity. We don't have to pick online or offline dispute resolution; we can choose both.

Similarly, ODR is not limited to any one technology or application. ODR can provide video links between geographically separated parties. ODR can support text-based, asynchronous conversations that help parties be more reflective in their communications while enabling them to access information relevant to their dispute in real time. It can enable participation from individuals anywhere in the world or support real-time joint single-text negotiation with collaborative editing. ODR can

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offer "wizards," software tools to help parties explore their options or to provide early resolution for issues, sometimes before the complainant even has informed the respondent about his or her concerns. It can quickly address simple misunderstandings before they escalate or offer a library of creative possibilities to help parties craft their ideal solution. It can even use software algorithms to keep communication focused on key issues that need to be addressed while structuring negotiations to keep them moving toward resolution. The range of ODR tools and approaches will undoubtedly continue to expand alongside the expansion and evolution of technology (see the article by Ethan Katsh and Orna Rabinovich-Einy on the "sharing economy" and ADR in this magazine).

Unlike our traditional legal system, ODR is not tied to geography or jurisdiction. A technology-empowered consumer in Brazil can purchase an item from a seller in France off of a marketplace based in the United States, and the item may be shipped directly to the buyer from a warehouse in China. If a dispute arises, to resolve the dispute through a traditional legal system, the Brazilian consumer would need to navigate jurisdictional as well as cost and access barriers. In contrast, ODR mirrors the design of the Internet. ODR systems are designed to be global from inception, so there is no need to resolve issues of jurisdiction. And ODR systems can be built directly into software to provide fast and fair redress at the point where the interaction first took place.

Many national governments and international agencies have examined the challenge of cross-border redress over the past 10 years and concluded that ODR is the future. UNCITRAL, the UN agency responsible for harmonizing global laws, has a Working Group on ODR, and the European Union recently adopted a regulation requiring all member states to implement ODR for cross-border consumer cases by the end of 2015. These designs were inspired by the ODR process implemented at eBay and PayPal, which resolves more than 60 million disputes per year.

ODR is also becoming an accepted forum for disputes that don't cross boundaries. The provincial government of British Columbia recently adopted a law, the Civil Tribunal Act, which aims to move most low-dollar-value civil disputes from the courts to online dispute resolution systems. British Columbia has been on the cutting edge of ODR for some time, and the British Columbia Legal Services agency has announced that it will construct an online system that will leverage ODR to expand services to low-income families in the province. The Dutch Legal

Aid Board also recently launched a system for online family mediation and plans to expand it to address neighbor and landlord-tenant issues. (See the article by Jin Ho Verdonschot about the Dutch online system in this magazine.)

When ODR began, the first platforms simply replicated face-to-face dispute resolution approaches online. Experience, however, quickly demonstrated that online dispute resolution required new approaches to reach its full potential. For example, ODR is pushing practitioners to break down some of the silos we have constructed within the face-to-face dispute resolution field. Instead of bright lines between diagnosis, negotiation, mediation, arbitration, and ombuds (terms parties often don't understand), many online disputants prefer a seamless progression from communication to evaluation, perhaps within hours.

At the Pound Conference in 1976, Frank Sander envisioned a courthouse with many doors, each leading to a resolution process appropriate for a different kind of dispute. A modular ODR approach extends Professor Sander's vision, building an infinite array of online "doors" that can be customized to individual disputes on demand. For example, a low-value e-commerce resolution process may be wholly online and powered by technology-assisted negotiation, but a high-value or emotionally complex matter may leverage online intake and case management while keeping the joint sessions face-to-face, supported by online scheduling and secure document management.

Today's users have become comfortable with the online "wizards" available on the Internet, programs that guide them through online processes and educate them about their options. These online wizards can provide a variety of helpful and impartial services to parties in a dispute, sometimes enabling early resolution without requiring the involvement of a human third party. (In another article in this magazine, Daniel Rainey notes that Ethan Katsh and Janet Rifkin have described this phenomenon as the "Fourth Party," with technology assisting the parties as if it were another participant in the resolution process.) If the parties do want human assistance, however, the wizard enables them to invite a trusted neutral into the conversation with a single click at any time, day or night, either to facilitate the discussion or provide an expedited decision to resolve the case. Parties can even consult an online directory of neutrals located all over the world to pick out a third party whom they feel will best meet their needs.

ODR is not a good fit with every dispute. Some may not feel comfortable with technology, and in some cases computer-mediated communication may perpetuate power differentials or enable parties to avoid difficult but important emotional conversations. Dispute resolution professionals should know how to use technology when it is appropriate and avoid using it when it is not. All mediation trainings, therefore, should cover ODR tools and ODR ethical guidelines so that new dispute resolvers know technology's advantages and disadvantages and can determine when ODR approaches are likely to add value to the process. Because best practices are always changing and new tools are emerging, practitioners must also stay abreast of developments in ODR (see the articles by Becca Brennan and Susan L. Brooks in this magazine for discussions of ODR in family cases).

ODR simultaneously presents the biggest opportunity and the biggest challenge for the practice of dispute resolution. Our field is being transformed by technology, and the only uncertainty that remains is whether this transformation will take one, two, five, or 10 years to play out completely. If my predictions are correct, online resolution of issues will become the new normal: not controversial at all, or even seen as particularly innovative. In the interim, we must work together to design systems that leverage the historical lessons of ADR while supporting the needs of our modern global, connected, online world. A successful ODR system will improve access to justice, provide speedier and better outcomes, maintain our relevance in the lives of our customers, and live up to the promise of our field. ◆

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