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Online Dispute Resolution

A Digital Door to Justice
or Pandora's Box?
Part 3

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This three-part series takes a deep dive into the future of online dispute resolution in Colorado. Part 3 considers ethical issues surrounding the use of ODR.

Part 1 of this article discussed videoconference mediation, a form of online dispute resolution (ODR). Part 2 considered artificial intelligence (AI)-assisted ODR. This Part 3 expands on the ethical issues touched on in Parts 1 and 2.

Ethical questions involving videoconference mediation and AI-assisted ODR tools have both strictly legal and, more broadly, societal dimensions. An analysis of the issues begins with the Colorado Rules of Professional Conduct (Colo. RPC or the Rules).¹ But the Rules must be viewed in the context of broader societal issues posed by these new technologies.

The Technology Context

As computers begin to act more like humans (or more profoundly, in ways humans might not even recognize as “human”), some thorny ethical challenges immediately become apparent. Enthusiasm for new software tools must be tempered with critical thought about how to use these tools fairly and appropriately. The tools might have features that get in the way of their equitable use by negatively impacting privacy, fair use, and constitutional protections. For example, if your Amazon Echo is “always listening,” who else can access your data? Given that your Nest thermostat allows remote adjustment via its app, will users be required to connect their thermostats to the utility company so it can remotely adjust the settings on its own? And if your refrigerator can monitor how many beers you consume each day, will it also be able to call you doctor to report your over-consumption? These concerns involving the appliances and applications we use every day are similarly implicated in the use of ODR tools.

For Brad Smith, the president and chief legal officer of Microsoft, the societal question posed by “intelligent” machines is it’s “not just what computers *can* do, but also what they *should* do.”² (Emphasis added.) He further cautions: “We not only need a technology vision for AI, we need an ethical vision for AI.”³ Further, such ethical issues should not be the focus of only “engineers and

tech companies... because growing numbers of people and organizations are creating their own AI systems using the technological ‘building blocks’ that companies, like Microsoft, produce.”⁴ Thus, the use of AI-assisted tools in the law ought to begin with these fundamental ethical questions, which have profound implications for attorneys, policymakers, and the public.

As attorneys, we are uniquely positioned to advocate for building ethical limits into the source coding of AI-informed platforms. We can also advocate for using AI-assisted tools only when they out-perform functions that lawyers and legal systems already fulfill. We should not succumb to the notion that AI is necessarily “better” simply because it is new. When issues concerning legal rights are implicated, legal institutions should proceed prudently, despite the push to bring technological tools to the practice of law and court system as soon as they become available.

The Ethical Issues

The following broad issues face legal professionals and alternative dispute resolution (ADR) participants when using videoconference mediation and AI-assisted ODR:

Confidentiality, Privacy, and Safety

- How secure is the ODR platform?
- How secure is the medium, including both end-to-end and en route encryption?
- Can confidentiality of the result be maintained as it is in conventional ADR?
- When the mediator separates the parties into digital “rooms,” how sure can all participants be that the room is truly sequestered from the other parties? Are the attorneys sufficiently trained on the software to ensure clients full confidentiality in separate rooms?

Reliability

- Is the digital platform on which the tool is run (the internet service provider or broadband vendor)

sufficient to provide stable, understandable, reliable transmission and reception without undue interruption?

- Is the broadband bandwidth sufficient? If you recommend an ODR tool to your clients, what duties do you have to ensure clients have the necessary bandwidth, stability, and speed to handle the transmission without disruption? Does your office have sufficient bandwidth?

Competency

- How tech-savvy is your client? How tech-savvy are *you*?
- If your clients engage in AI-assisted ODR without your involvement but with your knowledge (or maybe following your recommendation), are you confident they can competently do so? What duties might you have undertaken to assist clients by recommending or knowing about their use of ODR, or your partial assistance in drafting documents for their case submission? Does your engagement letter on these matters cover these questions sufficiently?
- Have you taken the time to understand the tool your client intends to use and discussed its potential risks and benefits? Did you document your advice on the point? Should you offer to participate with the client?
- If you represent a corporate defendant or other party who is brought into an ODR process, will you be sufficiently up to speed on the tool to competently defend them?

Fairness

- What is your obligation to ensure your client will be treated fairly in using the tool chosen?
- What steps should you take to educate your client on how best to present the claim or dispute to maximize the likelihood of a fair resolution?
- Even if they decline your offer of full representation in the ODR process, should you offer to assist clients with completing forms or preparing documents?
- Is the result binding, or are there bail-out

points to go before a mediator or cease the ODR process altogether?

The Relevant Standards

Existing ethical standards for dispute resolution professionals specifically inform the approach to engaging in ODR. For attorney and non-attorney mediators, the American Bar Association's (ABA) Model Standards of Conduct for Mediators,⁵ ABA Standards for Family Mediators,⁶ and Colorado Model Standards of Conduct for Mediators⁷ are all important to review before entering online territory.

There are specific standards for ODR as well. The International Council for Online Dispute Resolution (ICODR) has established standards of practice for ODR programs and practitioners.⁸ Though they are broad and not directed at practical guidance, the ICODR standards offer a workable baseline for best ODR practices and suggest that ODR programs be

- **Accessible:** ODR must be easy for parties to find and participate in and not limit their right to representation. ODR should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels.
- **Accountable:** ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.
- **Competent:** ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas. ODR services must be timely and use participant time efficiently.
- **Confidential:** ODR must maintain the confidentiality of party communications in line with policies that must be made public around a) who will see what data, and b) how that data can be used.
- **Equal:** ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard, and ensure that offline privileges and disadvantages are not replicated in the ODR process.

- **Fair/Impartial/Neutral:** ODR must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services.
- **Legal:** ODR must abide by and uphold the laws in all relevant jurisdictions.
- **Secure:** ODR providers must ensure that data collected and communications between those engaged in ODR is not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.
- **Transparent:** ODR providers must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or **used** out of context.

Relevant Professional Conduct Rules

Several Colo. RPC are particularly relevant for attorneys engaging in ODR. Though these rules apply generally to attorney representation, they should be given a fresh look for nuances in their application to ODR. Eventually, the Rules will likely be amended to specifically address ODR tools and AI in general.

Rule 1.1

Colo. RPC 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

For practitioners involved in a video-conference mediation or AI-assisted ODR proceeding, does this rule require both legal and technological competence? Based on the rule's comments and its counterparts such as the ABA Model Rules,⁹ the answer is yes. It is no longer sufficient to simply be up-to-date on the law; technological acumen is now every bit as important. Therefore, if you are not comfortable with the intricacies of online tech tools, *get*

training. If you lack technological competence, you risk misadvising your clients and setting them up for failure.

Rule 1.2

Colo. RPC 1.2 governs the scope of representation. Subsection (c) provides that “[a] lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to **pro se** parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).”

ODR is a great tool to help clients resolve issues that attorneys are otherwise not available to resolve due to factors such as the cost of representation and geographical limitations. Advice on the use of those tools can add value for both attorneys and clients. Thus, reticence to recommend ODR tools or advise clients on their use might be counterproductive and contrary to Rule 2.1, as discussed below.

The precise scope of legal representation must be explicitly stated for the attorney’s and the client’s benefit. So review your engagement agreement—does it cover your duties in limited or unbundled representation, such as you might offer in the ODR realm? It is good practice to clearly delineate any limitations in the scope of representation and consider adopting a specific engagement letter for use in limited-scope representation matters.

If you choose to render advice about how the client might use ODR independent from your legal representation, it is similarly advisable to delineate the services you will and will not perform. For example, in the ODR area, an engagement agreement should state that the attorney will assist with preparing supporting arguments or completing the initial online process screens, but will not manage the process in any ODR or similar applications the client might choose to use. Clear communication and documentation on this point are essential. As the **pro se** use of these tools becomes more common, clients may become involved in ODR systems without an attorney’s knowledge. A brief discussion in client communications of that possibility and its implications for representation will avoid later misunderstandings.

Rule 1.6

Colo. RPC 1.6, governing confidentiality, should also be consulted for videoconference mediation and AI-assisted ODR. Attorneys and mediators have an obligation to keep client communications and confidential documents confidential. This includes proprietary information and of course your own advice. It is crucial to ensure

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that clients understand which documents should, and should not, be uploaded or used in the ODR process.

Attorneys should set limits with clients, reinforce them, and document the client’s informed understanding and consent on how the client can and should use documents and information in the ODR process. Discuss with

your client that videoconference mediation should be considered every bit as private as an in-person session. Thus, they shouldn’t log in while sitting in a Starbucks or allow nonparties to be present when they are “in session.” The same applies to counsel; make sure you and your client are logging in on a secure connection, in a private setting, whether you are logging in together from your office, or separately from different locations. Whenever possible, the best practice for videoconference mediations is to appear together from the same location, either in your office or the client’s office, to maintain client control and easily have offline discussions.

It is most important to determine whether the ODR tool a client intends to use can maintain confidentiality. Some questions to consider in this regard include:

- Are negotiated resolutions confidential? Is the ODR tool less secure if it is hosted by a private company who retains ownership of the data?
- What data does the system retain after resolution?
- Does the ODR system aggregate data from proceedings and retain it for its own use or sale?
- How does the system remove identifiable information?

Rule 2.1

Colo. RPC 2.1 covers attorney duties as a client’s counselor. It provides that a lawyer advising a client during or before litigation must also “*advise the client of alternative forms of dispute resolution* that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.” (Emphasis added.) That implies a duty to become informed about, and to advise clients on, the availability and use of all ODR platforms. Thus, the failure to reasonably advise clients about ODR tools could raise issues under Rule 2.1.

Ethical Issues Involving Attorney Neutrals

ODR tools may involve neutrals at some point in the process. For example, some AI-assisted ODR tools allow for contracts with neutrals

who can enter disputes that are underway in the system. How this is accomplished may raise ethical questions for mediators. Mediators who offer videoconference mediation face similar ethical issues.

In addition to an attorney-mediator's need to comply with all Colo. RPC applicable to attorneys in general, Rule 2.4 pertains to an attorney's work as a neutral. Thus, attorney-neutrals must clearly define the scope of their function in these new venues and scrutinize contracts with ODR providers to be sure the contracts are consistent with their ethical duties under the Rules.

Contracts for services as an attorney-neutral should spell out that the attorney is acting as a neutral and is not affiliated with the operation or management of the ODR platform other than through the contractual arrangement to act as a neutral. And if a private mediation entity deploys its own version of an ODR platform, the financial arrangement by which the neutral receives remuneration from the vendor should be disclosed in the agreement to mediate. Finally, as in any dispute resolution matter, attorney-neutrals must clearly communicate that they do not and cannot provide legal advice to either party, even if the ODR tool provides data regarding average settlement amounts for a given case.

Ethical Issues Involving All Neutrals

The Colorado Dispute Resolution Act, CRS §§ 13-22-301 *et seq.* (CDRA), applies to any matter with venue in Colorado. Thus, any neutral who signs up to mediate disputes through any ODR tool should apply the same general approach they use in a face-to-face mediation to the online services they provide. For instance, neutrals should ensure that parties to ODR who take an off-ramp to conference with them understand that the neutral is not going to decide their dispute. And depending on the ODR platform used, the neutral may have an obligation to explain the ODR platform's process and answer questions about how it works.

A neutral must also screen for potential conflicts and necessary disclosures. Before agreeing to serve, the neutral should ask the vendor about how the ODR platform ensures

confidentiality of the process, documents, communication, and outcome.

In addition to these steps, a Colorado neutral who contracts with an interstate or international ODR platform may want to research the participants' home state rules and statutes involving neutrals to determine if any agreement would be enforceable.

In Colorado, CRS § 13-22-307 governs neutrals and the confidentiality of the process they play any part in. It provides that:

- (1) Dispute resolution meetings may be closed at the discretion of the mediator.
- (2) Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, unless and to the extent that:

- (a) All parties to the dispute resolution proceeding and the mediator consent in writing; or
- (b) The mediation communication reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of eighteen years; or
- (c) The mediation communication is required by statute to be made public; or
- (d) Disclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization.

(3) Any mediation communication that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding.

(4) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a mediation service proceeding or dispute resolution proceeding.

(5) Nothing in this section shall prevent the gathering of information for research or educational purposes, or for the purpose of

evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

These confidentiality requirements raise some tricky ethical questions, including:

- If the mediation is conducted online and asymmetrically, how can a mediator guarantee full confidentiality of the process?
- How can a mediator ensure a party is alone and not accompanied by a friend, spouse, lawyer, or other person?
- How can the mediator make certain that no party records the session? The mediator could explain to the parties that the process needs to be treated as confidential throughout, despite the online format. Again, this should be addressed in the agreement to mediate.
- How does the ODR platform document any settlement reached? CRS § 13-22-308 specifies that upon request of the parties any settlement reached must be "reduced to writing and approved by the parties," and if approved by the court, it will be "enforceable as an order of the court." Does the ODR platform "reduce to writing" any settlement reached? Is an electronic document sufficient to constitute a "writing," and is an "e-signature" sufficient to constitute a "signed" document? While most commentators on the topic would likely opine that electronic documents and e-signatures suffice for a "writing," CDRA does not define the term "reduced to writing," and there are no reported cases on the subject in connection with ODR.

These questions illustrate the need for professional conduct rules to catch up to emerging legal technology.

Ethical Issues Confronting Courts

The Colorado Judicial Branch's mission is to provide a "fair and impartial system of justice," which, among other things,

- protects constitutional and statutory rights and liberties;
- assures equal access;

- provides fair, timely, and constructive resolution of cases; and
- enhances public safety.¹⁰

The use of ODR in the courts arose out of the need to resolve high volume, low value cases using a proportionate dispute resolution mechanism. When considering the use of ODR in other types of cases, courts must balance the need maintain a system that provides due process with the provision of dispute resolution tools that allow parties self-determination and efficiency in resolving their disputes.¹¹ To promote a robust online democratic process, courts and private providers must consider developing choice architectures that optimize a litigant’s fast understanding of legal rights and options, yet a process that then slows to allow thoughtful decision-making.¹²


Courts should establish an ethical framework before adopting ODR wholesale that incorporates the underlying purposes of mediator standards, which are to guide conduct, inform parties, and promote public confidence and transparency in a process for resolving disputes.¹³ Ideally, online tools will provide the public with a general understanding of the type of legal dispute they may be facing; provide referrals to legal clinics, attorney resources, and resources such as court rules and statutes; and offer a platform for party-to-party communication (with or without a third-party neutral) to allow productive settlement discussions. Further, if settlement negotiations are successful, ODR systems must allow parties to e-file agreements to judicial officers for review and adoption in an enforceable order. All this must be done in a transparent, yet confidential, online setting in which data is protected and online security standards are met.

Conclusion

This three-part article took a close look at ODR and the broad implications for its use in Colorado. In many ways, AI-assisted and other ODR tools are merely the newest mechanisms for resolving existing legal problems. Typewriters led to the abandonment of the quill pen, and the advent of word processing, fax machines, email, laptops, tablets, and electronic document transmission revolutionized the practice of law.

We’ve adapted to these new technologies and will adapt to videoconference mediations and AI-assisted ODR in our practices. But like the other tools we now find indispensable, these new tools carry both promises and pitfalls.

As legal professionals, we have a duty to the communities we serve to advocate for the

safe, prudent, and well-governed development and deployment of ODR tools. With careful design and management, ODR can effectively contribute to the preservation of individual rights and civil justice. 



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NOTES

1. Colo. RPC, <https://www.cobar.org/RulesofProfessionalConduct>.
2. Spencer, “Technology, ethics and the law: Grappling with our AI-powered future” Microsoft (Apr. 9, 2018), <https://news.microsoft.com/apac/features/technology-ethics-and-the-law-grappling-with-our-ai-powered-future>.
3. *Id.*
4. *Id.*
5. ABA Model Standards of Conduct for Mediators, https://www.americanbar.org/groups/dispute_resolution/policy_standards.
6. ABA Standards for Family Mediators, https://www.americanbar.org/groups/dispute_resolution/policy_standards.
7. Colorado Model Standards of Conduct for Mediators, <https://www.courts.state.co.us/Administration/Section.cfm?Section=odrres>.
8. ICODR Standards, <https://icodr.org/standards>.
9. ABA Model Rule 1.1 cmt. 8 specifies that lawyers must know and understand “the benefits and risks associated with relevant technology.” New York Rule of Professional Conduct 1.1 cmt. 8 states: “To maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information.”
10. <https://www.courts.state.co.us/mission.cfm>.
11. In most civil cases, one or both parties are not represented by counsel, and the majority of civil cases are resolved without a contested hearing; based on calendar year data available from the Colorado Judicial Branch for 2012-18, excluding domestic relations cases, less than 1% of all civil cases in district and county courts result in a contested trial.
12. See Sela, “e-Nudging Justice: The Role of Digital Choice Architecture in Online Courts,” *J. of Dispute Resolution* vol. 2019, no. 2 at 127. For an explanation of “slow” and “fast” thinking, see Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux Apr. 2, 2013).
13. See, e.g., ABA, Model Standards of Conduct for Mediators, *supra* note 5, Preamble (“These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”). There are also National Standards for Court-Connected Mediation Programs that are voluntary but provide another lens through which courts can view the ethical issues inherent in providing online tools for court customers, <https://s3.amazonaws.com/aboutrsi/59a73d992959b07fda0d6060/NationalStandardsADR.pdf>.