



Online Dispute Resolution

A Digital Door to Justice or Pandora's Box?
Part 1

BY DOUG MCQUISTON AND SHARON STURGES

This three-part series takes a deep dive into the future of online dispute resolution in Colorado. Part 1 discusses how videoconference mediation can bridge geographic distances, address obstacles to gathering in the same physical location, and deliver a satisfying “face-to-face” experience.

Litigators and their clients know the power of mediation as an efficient and effective tool to resolve disputes. Colorado courts have likewise embraced the idea that almost every dispute can and should be referred to mediation.¹ Traditionally, mediation is held in person or telephonically. But current technology allows mediation participants to choreograph the mediation dialogue using a wide array of electronic media and online tools.

This series explores online dispute resolution (ODR) tools currently used in U.S. courts and other countries. Part 1 discusses using videoconferencing, with a focus on web-based videoconferencing, to deliver traditional-style mediation, with mediators, clients, and attorneys participating “live” in virtual videoconference rooms.² Part 2 will discuss artificial intelligence assisted ODR, online settlement tools derived from e-commerce and now offered by the private sector to facilitate quick resolution of conflicts. Part 3 will discuss ethical considerations for practitioners who use these technologies, given the introduction of ODR tools, a “fourth party,” into dispute resolution.³

Why Use Videoconferencing?

Attorneys and self-represented litigants in the Front Range have access to a large number of professional and well-qualified mediators offering a robust menu of hourly rates and payment options. However, attorneys and self-represented litigants in smaller communities, such as Eastern Colorado, the Western Slope, Southwest Colorado, and the mountains, face logistical and geographic challenges in

scheduling and attending conventional mediations. First, the availability of trained mediators in rural communities is limited. Second, factors such as weather, long distances between parties, high mountain passes, and farm and ranching duties make dedicating one full day to mediation difficult. While some mediators are willing to travel throughout Colorado, the costs associated with such mediator travel can be significant. And third, compounding these issues, if expert information is needed for a full and fair evaluation of settlement options, parties are often pressed to resolve cases in one session. This latter factor can sometimes lead to “buyer’s remorse” and the potential unraveling of a negotiated settlement agreement.

At the same time, Colorado has taken initiatives to allow remote participation in court proceedings statewide with e-filing, telephone appearances for hearing and status conferences, and reduced requirements for in-person calendar calls or other appearances. These flexible practices facilitate the court’s handling of cases. Similar practices can assist parties with mediation as well; ODR can be used to expand the reach of mediation to more litigants, at lower cost, and with greater efficiency.

ODR Overview

ODR is a general term describing a variety of online platforms, programs, and systems. ODR can be loosely defined as “a digital space where parties can convene to work out a resolution to their dispute or case.”⁴ ODR thus describes any mediation or dispute resolution process delivered remotely.

The need for ODR, from simple videoconferencing to “smart” ODR, is apparent to any practitioner who has engaged in a statewide or regional practice. Courts have also seen the need for powerful ODR tools to help them manage overwhelming dockets of smaller civil, family law, and traffic cases. These tools are particularly effective where the parties or their decisionmakers are located in multiple states, or where the parties have difficulty taking time away from work or face transportation challenges.

ODR offers new ways to overcome these challenges. It also can facilitate access to civil justice for unrepresented litigants or those seeking resolution of smaller dollar matters. It is thus important to become familiar with these new tools, which promise to change the ADR landscape significantly.

Videoconferencing Generally

Even as recently as a few years ago, commercially available videoconference systems were not accessible to any but the largest firms or government law departments. Dedicated-line videoconference system costs and the unreliability of the technology made real-time mediation all but impossible for a general practice attorney or self-represented litigant. Today, both the cost and technology barriers have been overcome, and commercially available web-based videoconferencing software is readily available without the need for expensive hardware. Real-time, conventional, “everyone is there” mediations online, using simple, inexpensive web conferencing tools, are available to anyone with a laptop, tablet, or mobile phone and dependable broadband

or cellular data availability. And these tools are often available for free.⁵

Web-Based Videoconferencing

Web-based videoconference mediations aim to keep things simple and affordable. Participants are sent an email with an invitation to join the online conference, including a weblink. Participants click on the weblink a few minutes before the appointed time and “enter” the mediation room, complete with a face-to-face view of the mediator, parties, and counsel. The mediator, as meeting organizer, may begin by gathering everyone into a single “conference room” for preliminary discussions. After a joint preliminary discussion, the mediator can easily separate the disputants into separate, secure “rooms” in which the aligned parties and counsel may speak to each other privately. The mediator then has the ability to virtually shuttle between rooms to caucus with the parties individually. The mediator may also share documents through his or her screen.

Indeed, one of the key benefits of the web-conference model is that the parties and mediator retain a great deal of flexibility to design the process to cater to party needs. One highly useful feature is the chat format, which parties can use for one-on-one correspondence with the mediator. Parties can also send confidential chat-based text messages through the tool to counsel or allied parties, even outside the session hours. Or the mediator may control the chat by only allowing chats to occur during working hours or during a session.

Web-based videoconferencing also offers screen sharing tools, which make it easy for mediators, parties, and counsel to share key pieces of evidence, such as videos, documents, and proposed agreements, all with just a click of the mediator’s keyboard authorizing the screen share. Settlement agreements can be drafted, exchanged, signed, and filed electronically. Adjourning and reconvening is also easy because the web conference link can be scheduled to remain active as long as necessary, or it can be rescheduled.

The ease and accessibility of the web conference format lends itself to quick rounds of mediation to deal with discrete matters, such as

preliminary issues and information exchange.

Web-based videoconferencing tools offer the typical scheduled mediation model, guided by a professional human mediator, that practitioners are already familiar with. The only difference between the online web conference experience and the brick-and-mortar mediation experience is that the meeting occurs entirely online, supported by text or other communication tools.

Useful Applications of Videoconferencing

Videoconference tools are useful in almost any case type but may be especially helpful in family law matters, because 80% of Colorado courts require mediation before setting a contested hearing in pre- and post-decree matters.⁶ Moreover, parents often live great distances from each other and have a difficult time missing work or paying for travel. And where appropriate, the parties can consent to allow for the online participation of ancillary professionals, such as guardians ad litem or financial experts, who can log in, render feedback, or provide background, and then log out of a session after providing the information sought. This saves the parties money and the professionals time.

Cases involving intimate partner violence may also be appropriate for a videoconference mediation, which allows the parties to remain unaware of their physical locations. But similar to in-person mediation, if there is a protection order in place, care must be taken to ensure that an exception exists to allow contact for the videoconference mediation.

Videoconference tools can also be used with traditional in-person mediations. For example, in many personal injury or other insurance disputes, the defendant’s claim professional may not be located in the state where the claim is pending. By using a quick, web-based videoconference connection, the mediator can bring the claim professional (or remote client) “into the room” whenever needed to discuss the case, meet the other parties, have confidential discussions with counsel, view on-screen presentations or evidence, and otherwise efficiently immerse themselves in the mediation as they would if they were there in person.

Likewise, the plaintiff may live out of state and be unable to attend the mediation in person. This format will accommodate any party or participant.

Arguably, trying to mediate with parties remotely may introduce obstacles to settlement. There are tangible benefits to being in the same physical space: seeing and speaking with the mediator, meeting the other parties, and hearing all of the discussions. Moreover, parties may find it easier to maintain a rigid position if they are not in person with the other party and mediator. Some mediators maintain that body language informs a large part of their practice and unless the parties are physically in the room, they are unable to do their best work to facilitate settlement. But videoconference mediation mitigates these obstacles by allowing the parties to have a virtual presence. And the mediator and counsel often find that nonverbal cues are just as easy to pick up on in the virtual world.

To be sure, there are benefits and obstacles to in-person and videoconference mediations. The biggest practical obstacle when considering videoconference mediation, especially in rural communities, is bandwidth.

Technology Challenges

As recently as a few years ago, many attorneys were reluctant to embrace electronic and data-driven practice tools. Some regarded themselves as not tech-savvy and feared they would lack the time or inclination to learn how to use and manage these often complicated new tools. When videoconferencing first emerged, the same resistance was common. In fact, the challenges were even greater, because the videoconference products available when the technology first emerged were not as sophisticated.

In addition, the equipment and software required to run the dedicated network connections and video/audio interfaces, even within the last five years, were priced out of reach for all but the largest firms or companies. Operating the systems required trained audiovisual professionals. Even then, the connections were often dodgy and unpredictable, different systems could not communicate with each other at different ends of the conversation,

and video quality was often poor. And as more affordable web-based systems emerged, they too suffered latency, connection, and dependability problems. If you've ever suffered through a "Skype" conversation with someone lacking sufficient bandwidth, you understand.

Thankfully, the technology and hardware that supports the latest versions of videoconferencing have made epochal jumps in power, dependability, cost efficiency, and ease of use. Today, videoconferencing can be as easy as reaching for an iPhone or dropping into a website. The financial barriers to entry for most of these tools have fallen so low as to have virtually disappeared. The personal resistance to the use of technology has faded too. And while there is yet a wide comfort range among tech users, most attorneys and clients are comfortable enough with Facetime, Skype, and Amazon "Echo" style AI personal assistants to effectively use web-based videoconferencing. Further, law office tech tools are now almost universally accepted as critical parts of every law practice, whether large, small, or solo.

But one frustrating ogre of underperformance and interference remains, especially for practitioners in many parts of Colorado outside the Front Range. Even the mention of the word causes shudders if you are the one in your firm charged with making sure you have enough of it: bandwidth.

Former CBA President John Vaught wrote an article considering the bandwidth problem in its historical context and the steps the CBA was taking to remedy the problem.⁷ The article pointed out that attorneys in Denver or Colorado Springs were enjoying electricity and telephone access in their practices in the early 1900s. But many practitioners in rural areas didn't see electric lights until the 1940s, and they waited for telephone access until well into the 1960s. Access to these basic systems was that generation's "bandwidth" dilemma, and it caused real hardship for rural practitioners.

Similarly, many Colorado attorneys today face frustrating shortfalls in cellular coverage; Internet access, reliability, and speed issues; and other roadblocks in the use of cutting-edge tech tools in their practices. While it is beyond the scope of this article to get into the weeds on

the intricacies of broadband Internet access, the fact remains that much of Colorado falls well short of even the low 2015 federal minimum expectations for broadband Internet access: 25 mbps (megabits per second) download and 3 mbps upload.⁸ As the Vaught article pointed out, some rural towns have *no* broadband access at all.

Even Front Range practitioners need to pay attention to bandwidth because more is better, and higher speed is better. The incremental cost of a high speed or, if available, gigabit connection is easily recouped by the increased productivity it can deliver. If you haven't upgraded your office's Internet service in the last two years, you may face a bandwidth roadblock when trying to use online videoconferencing. Speed that was more than sufficient to handle email, e-filing, or

general web research and browsing as discrete tasks may be incapable of processing those functions simultaneously with videoconference mediation. Fortunately, most videoconference tools are not bandwidth hogs, but obtain the maximum available bandwidth speed and size to keep office systems running smoothly.

Conclusion

Videoconference mediation, part of the breaking ODR wave, addresses obstacles participants face in trying to meet in the same physical space to settle disputes. Inexpensive web conferencing tools are available to anyone with an Internet-accessible device and dependable broadband. Practitioners should incorporate these tools to enhance the mediation experience for themselves and their clients. 



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NOTES

1. See, e.g., <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr>.
2. This is also referred to as "hybrid" mediation. Exon, "Ethics and Online Dispute Resolution: From Evolution to Revolution," 32 *Ohio St. J. on Dis. Resol.* 609 (2017).
3. Rainey, "Third-Party Ethics in the Age of the Fourth Party," 1 *Int'l. J. Online Disp. Resol.* 37, 40 (2014).
4. Joint Technology Committee, JTC Resource Bulletin: ODR for Courts at 1 (Version 2.0 Nov. 29, 2017), <https://www.ncsc.org/-/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>.
5. There are many such tools out there, including Zoom, <https://zoom.us>; Skype, <https://www.skype.com/en>; and proprietary tools such as Google Hangout, hangouts.google.com, and Apple's FaceTime, <https://support.apple.com/en-us/HT204380>. The authors do not endorse any particular tool.
6. See https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Court%20Programs/ODR/Mediation%20Guide%20for%20Colorado%20Courts/Mediation%20Guide%20for%20Colorado%20Courts%20as%20Posted%20on%20Intraweb.pdf.
7. Vaught, "Access to Justice—One Fiber Optic Cable at a Time," 48 *Colo. Law.* 4 (Feb. 2019). The CBA supports efforts to resolve "last mile" issues, and Governor Polis has also made statewide last mile high-speed broadband infrastructure development a high priority. See also Vaught, "Saving the Practice of Law in Rural America: CBA Heads to Congress for Broadband Funding," 48 *Colo. Law.* 4 (Dec. 2019).
8. <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2015-broadband-progress-report>.

Online Dispute Resolution

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Part 2

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This three-part series takes a deep dive into the future of online dispute resolution in Colorado. Part 2 discusses ODR applications that use artificial intelligence to facilitate quick resolution of conflicts.

Part 1 of this article discussed video-conference-based mediation, a form of online dispute resolution (ODR). The next jump in sophistication when using ODR is artificial intelligence (AI)-assisted ODR, which is the focus of this Part 2.

Why Use AI-Assisted ODR?

For conventional mediations, web-based videoconferencing is an excellent solution to the logistical challenges of trying to assemble all participants in one physical location. But conventional and videoconference mediation aren't appropriate for all types of disputes. For example, the amount at stake may be insufficient to justify the cost of a human mediator, even the lower cost of a human mediator who appears via videoconference. Pro se litigants, who commonly appear in small claims, county court, and family law matters, might be reluctant to proceed without counsel at a mediation, and thus not see a conventional mediation as an option. And scheduling a mediation presents the same challenges, whether it occurs in brick and mortar or virtual conference rooms.

AI-assisted ODR offers an efficient, user-friendly dispute resolution solution for such litigants. It offers benefits such as time asymmetry, which allows parties to log in any time they are available, post their position or request, and get a response from any other party or the mediator at their convenience.

The tools discussed here are currently used extensively in Canada, and elsewhere, including in some U.S. state court systems. They are coming to Colorado too. The Colorado courts statewide Office of Dispute Resolution recently obtained a Pew Charitable Trust grant to develop



a package of ODR applications that will include AI-assisted ODR. These applications will be designed for use in smaller damages disputes (county court and small claims money judgment matters) and domestic dockets throughout the state. Thus, if you represent commercial or family law clients, you will likely find yourself handling a dispute funneled into one of these tools. And the use of these tools will likely be expanded to other types of disputes within a few years.

“Smart” Systems Guide Litigants

Several centralized, court-sponsored ODR applications are already in commercial and public use or will be onboarded in the near future. Some of the more powerful ODR tools use “artificial narrow intelligence” features, which have user interfaces that apply algorithmic progressions for “smart” question-and-answer dialogue. Like TurboTax® and other software packages, these AI-assisted tools provide easy and secure web login and ask users detailed questions about

their dispute, collecting data points about the case along the way. The “smart” part of the tool then uses this data to steer participants toward appropriate procedural tools, display pop-up information guides, and offer forms such as demand letters, response letters, and court documents. The tools even guide negotiations. When the negotiation results in a resolution, the tools assist the litigants in completing the necessary settlement agreements and court dismissal paperwork.

These ODR tools are already in use in British Columbia courts for both domestic and smaller-dollar civil disputes, as discussed below. Several jurisdictions in Australia use these tools extensively with domestic dockets and traffic matters. The tools are commonly designed for pro se litigants, to improve their access to civil justice. But when a pro se litigant sues a party represented by counsel, the represented defendant can involve his or her counsel in the online tool as they would in court.

The more powerful AI-assisted ODR tools use algorithmic data mining of all disputes in their system, completely anonymously. They gather data on offer and demand progressions, case settlement ranges, and court judgment ranges in all of the disputes that use the tool, based on the facts input by the users. They “learn” from this data to determine how typical disputes with similar fact patterns are being resolved.

The tools solicit input from each user on the range of amounts they are willing to pay or accept to resolve a dispute. The parties can change these numbers as the case progresses. The tools offer users pop-up suggestion boxes in real time, based on learned data on how other cases have been resolved, telling users whether

their numbers are consistent with resolutions of similar disputes. A “real world” version of similar AI-assisted software is AI-assisted data-aggregating and algorithmic systems, such as online car buying services. Many of these tools gather detailed information from the user about make, model, options, color, mileage, etc., then state what consumers in a given area code are paying for similar cars.

AI-assisted tools rely on user input throughout to steer the online process, first through negotiation and later through mediation with a human mediator, if the parties request it. They use familiar alternative dispute resolution (ADR) techniques by pointing litigants to information clouds educating them on the legal elements of their claim, or document-generation tools to assist them in crafting a demand letter, complaint, or other document, all while retaining the ability to “go back” to the other tools whenever the user wants. They learn from each case, whether resolved or not, to gain deeper insight into case values, likely settlements, pinch points that derail litigants, or other issues the system encounters. The software developers (and court system end-users) can then use this information to update or modify the tool’s approach to keep it current, user-friendly, and efficient.

Some ODR tools can even generate an AI-derived suggested range, the tool’s algorithmic calculation of a reasonable settlement amount, bond amount, traffic ticket fine, or property division, all without a human mediator’s intervention unless a user calls for it. The numbers suggested are, for now, merely algorithmically derived “median” numbers, and the systems clearly caution that they are intended as suggestions only.

Navigating System Limitations

Even the most sophisticated tools have their limitations. They cannot know whether a user is technologically proficient or legally astute. And AI cannot read or deliver emotional cues. AI-assisted ODR tools simply lack the emotional acuity professionally trained human mediators use all the time to understand and deal with human emotions and work through emotional responses. For example, try raising your voice or yelling at Amazon Echo when it delivers

the wrong search result. It will neither recoil in horror nor ask, in a wounded tone, “why are you angry?” Instead, it might deliver its standard eerily calm response, “Hmm . . . not sure about that.”

But that may change in the not-too-distant future. The folks who created Alexa, Siri, and “Hey Google” are currently spending billions of dollars

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to develop next-generation AI tools that will not only understand and relate to, but also *display*, a wide array of human emotions. These new features will inevitably find their way into ODR tools. (We’ll pause now to collectively shudder at the notion that friendly online assistants will soon display emotional acuity.)

Another limitation of AI-assisted ODR tools is their tendency to deviate to the mean. These tools use data aggregation and algorithmic cues to develop “steps” in their processes. They

simply aggregate data and spit out what they conclude is the most likely or most relevant result. AI systems cannot discern shades of gray in disputes, nor can they evaluate the fairest, best, or most sustainable solution for a specific dispute. This is in contrast to a human mediator, who can guide and shape a mediation using a variety of methods that work best for particular parties at each stage of a specific case. Many conventionally mediated cases hide the key to their resolution in the very shades of gray that current generation AI tools cannot see as clearly as trained human mediators.

Of course, even with these limitations, the tools can work effectively to guide parties to a resolution, moving volumes of cases to an effective conclusion without trial, especially those with discrete but ongoing family law issues, such as temporary changes in parenting time agreements. They also work well in cases that lend themselves to a “deviation to the mean” solution, such as smaller dollar commercial or consumer disputes.

Off-Ramps

AI systems designers understand the limits of AI with respect to ODR tools and have built in flexibility to remedy the shortcomings mentioned above. They counterbalance the machine-based shortcomings with multiple “off-ramps” allowing litigants to access a human mediator, either online by videoconference or in person, at any point.

Pop-up information guides are another off-ramp innovation. Litigants who need assistance navigating a tool, or who have questions about how to present a claim, can click on pop-up buttons that open small information balloons explaining, for example, what the jurisdictional limits of the court are, how to structure a demand letter (including a link to a sample fillable demand letter), or other information needed to keep moving a dispute toward a resolution.

The off-ramps also allow litigants to leave the settlement mode altogether and present the dispute as an online claim, which will then be placed on the court docket and litigated (in some cases, while remaining within the online tool) by a court magistrate. If online litigation doesn’t appeal to the parties, either party may

bail out of the online process altogether and go old-school to a brick-and-mortar courthouse with their dispute. A single party can elect this; agreement is not required. And even the tools with built-in decisional authority allow for conventional court appeal of any results.

Unbundled Legal Assistance

AI-assisted ODR may help clients save thousands of dollars in litigation costs. Counseling against these tools may be counterproductive for both attorneys and clients.

The more practitioners understand AI-assisted ODR, the better positioned we are to offer clients unbundled legal assistance with their disputes. Practitioners who add this knowledge to the range of legal services they offer may attract and keep more clients. Further, access to justice has become a critical and growing priority for Colorado courts, and attorneys are being called on to be part of the solution. Knowing how to use AI-assisted ODR, and how to help clients access and use these tools, is a way to help clients resolve their disputes efficiently and to streamline the practice of law by reserving litigation for cases that cannot be resolved otherwise.

Use the Right Tool for the Job

AI-assisted ODR is a powerful dispute resolution tool, but attorneys, judges, and other dispute resolution professionals must evaluate its propriety for use on a case-by-case basis. For example, as with conventional mediation, power imbalance issues may impact the decision to use these tools. And AI-based ODR tools don't work well for parties who have technology limitations or who have difficulty clearly describing their dispute in terms that fit within the algorithm's boxes. Finally, these tools aren't yet suited for complex, high-stakes cases; cases requiring extensive discovery; or cases with complex legal issues, such as serious personal injury, professional negligence, complex, commercial, or multiparty litigation. And the tools likely would not work well for contested dissolution proceedings involving complicated property division, maintenance issues, or pension claims.

The current generation of AI-assisted ODR tools do not pick up on nuance, and the con-

troversies mentioned above are drowning in nuance. They turn on the ability of the attorneys and decision makers to discriminate among very close shades of gray, which AI is unable to comprehend or act on. But where AI-assisted

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The British Columbia Experience

As stated above, AI-assisted ODR solutions are in use right now in court systems in Canada and Australia.¹ British Columbia's Civil Resolution Tribunal (CRT) is a good example.²

The CRT is used to resolve smaller, simple disputes, such as consumer money disputes, basic landlord-tenant disputes, and employment and pay disputes. It offers more than ADR; while it has negotiation and mediation portals, it also provides a decision portal for rulings on a dispute by human magistrates.

British Columbia is a massive province with few large cities and many smaller towns, villages, and settlements scattered throughout. Many towns and villages are more than a full-day's drive from each other. It used to be that a disputant in one of the more remote towns or settlements who, for example, made a purchase from a Victoria or Vancouver business was essentially left without a remedy if a dispute arose—it would be impractical, if not impossible, for the purchaser to spend days driving to court, filing the dispute, and then returning a few months later to try it.

The power of AI-assisted ODR in such situations is clear. Disputants who face geographic or time obstacles, or those who cannot find or afford an attorney to handle their smaller disputes, are now only a click away from “court.” They can log onto online systems with familiar-looking user interfaces, answer some questions, upload relevant scanned documents, and handle the process of negotiating, mediating, and resolving their disputes, on their own. A traffic ticket recipient can log on and navigate her way through negotiating a plea agreement and pay the fine online using a credit card, thus avoiding the loss of time spent in court waiting for a turn in front of the judge. Canada has spent hundreds of billions of dollars in recent years on public-private partnerships to extend speedy broadband and 4G LTE wireless coverage throughout their far-flung provinces, which greatly facilitates systems such as the CRT.

Further, litigants can use these tools on their own schedules. And if they don't have a computer or lack bandwidth at home, they can access a local library's internet service, desktops, and scanners.

The CRT employs private mediators (called “facilitators” in the British Columbia system) who contract with the courts to be placed in a queue to handle CRT disputes according to their availability. Facilitators can thus maintain their in-person practices while using the online systems to turn slack time into productive time by jumping in when it is convenient.

The CRT system sends facilitators a notice, usually by text or email, that they have been assigned a dispute. They can then log into the system, navigate to the dispute via the texted link, and instantly see all the documents, the status of prior negotiations, and the logjam that prompted their assignment. They can then speak with the parties via web chat, text, or email. They can also use the tool to schedule a videoconference or telephone conference to keep the process moving to a resolution, or even conduct an online mediation if desired.

The CRT system offers easy access to off-ramps (called “pull-outs”) with information about applicable law, procedures, limitations, and other issues, so users can best assemble their documents and data to maximize their dispute resolution experience.

The goal in Colorado is to deploy a tool at least as robust as CRT. The intent is to take pressure off Colorado county courts that presently handle smaller cases but will be managing more complex disputes following the recent increase in jurisdictional limits, and to relieve pressure on overworked family law courts.

AI-Assisted ODR in Australia

Australia has begun to develop ODR for property division, custody and visitation agreements and disputes, and other family law matters that often ensnarl litigants in protracted, costly litigation. While most of its tools are still in pilot phase or development, there are also nonprofit “community organizations” developing ODR tools in the family law arena focused on resolving parenting, property division, and financial issues. One such nonprofit-based tool is being developed by “Relationships Australia,” a non-court-affiliated nonprofit group that has provided family law advisory services in Queensland for 60 years.³

As these Australian state court (and nonprofit) systems roll out, the plan is that litigants

will be able to log into portals in the Australian provincial courts and access ODR tools to craft separation agreements, financial and property settlements, custody and visitation plans, modification stipulations, and orders.

The tools will guide the litigants through each step, formulating the issue at stake, identifying the parties’ desired outcomes, and offering pop-ups to highlight legal requirements. The tools will then place negotiated agreements before a human magistrate for review and ruling. Like the British Columbia CRT system, the Australian provincial courts’ tools will provide pull-outs for parties to get before a magistrate or mediator, either conventionally or online, if they hit a roadblock in negotiations.

One privately operated ODR site in Australia, “Immediation,”⁴ has been developed by Melbourne, Australia-based barrister Laura Kelly. It is designed primarily for resolution of commercial disputes and can be used by lawyers and nonlawyers alike. The tool is a hybrid AI-assisted ODR and videoconference mediation platform that allows users to create a dispute, invite the other party to participate, and access “experts” (the site’s term for its contracted attorney/mediator specialists) to either guide negotiations or provide specialized early neutral evaluations, then continue with the online process to a full videoconference mediation if needed. Online arbitration is also available, with decisions enforceable via contract.

Immediation is currently in use but is still in the beta phase. It is a fee-based system and not connected with any court system. The company promises full confidentiality in the process, and (as the name implies) offers companies and disputants the possibility of quick dispositions (in as little as 30 days) if the dispute lends itself to such quick determination.

As similar systems (both court-based and perhaps private fee-based) come to Colorado, attorneys will likely appreciate these tools. Far from taking their business away, practitioners, especially family law attorneys, may find that the tools allow clients, on their own, to quickly resolve many smaller issues that pop up. The clients gain by having lower cost assistance while attorneys avoid client calls for minor

issues that are often not billable. Therefore, practitioners can better manage their practices.

The Secret Weapon

AI-assisted ODR is coming to Colorado. When it gets here, it will be here to stay. Used properly, these ODR tools will offer a powerful way to deliver justice effectively and efficiently to more people.

And therein lies a hidden secret: ODR tools will *not* make attorneys or mediators obsolete, but may well liberate us to focus on what we do best. By learning what AI-assisted ODR tools have to offer, practitioners can render a service that clients will surely remember when a need for dispute resolution arises in the future. CL



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NOTES

1. Other countries using these tools include the United Kingdom and New Zealand.
2. <https://civilresolutionbc.ca>.
3. <https://www.raq.org.au/services/online-dispute-resolution>.
4. <https://www.immediation.com>.

iStock
by Getty Images™

iSt
by Ge

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>.