
Review Essay

Online Dispute Resolution: Technology Takes a Place at the Table

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Dispute resolution practitioners and scholars have not been the fastest group to embrace technology: in fact, as compared to other professionals, they may have been one of the slowest groups. One can only speculate as to why this has occurred. Dispute resolvers may believe that the deeply personal explorations necessary to identify the true interests integral to established alternative dispute resolution models may be unachievable online. The neutrals themselves may have entered this field because they crave the physical intimacy of eye-to-eye contact in the resolution room even more than the disputants and are reluctant to lose that opportunity.

But regardless of why it has happened, the alternative dispute resolution field must recognize that a teenage (and particularly a preteen) generation is maturing that already has learned to use sophisticated nonverbal cues online. Even if you and I never feel entirely comfortable online, today's elementary school students use the Internet as easily as we use a ballpoint pen. Those students are comfortable making the most intimate of disclosures online, have learned a myriad of textual nonverbal clues (as simple as emoticons), and will expect neutrals to be able to help them resolve disputes online.

Whether we like it or not, disputes increasingly will be resolved online. What we have to decide is whether we want to be part of that migration. We only have to stop and watch our children to appreciate the cultural shift that is underway. Children are switching between cellular telephones, text messaging, e-mail, instant messaging, and Internet chat rooms seamlessly to

establish a constant presence in the universe. They are becoming always available, always connected. And they will demand that service professionals work in their world.

Two books can help us prepare for the advent of online dispute resolution. Ethan Katsh, Janet Rifkin, and Colin Rule recognize that technology is changing not only lives, but also entire cultures. In their books, *Online Dispute Resolution: Resolving Disputes in Cyberspace* (Katsh and Rifkin) and *Online Dispute Resolution for Business* (Rule), they explain how and why the Internet is changing the world of alternative dispute resolution.

Although both books are consistent in their optimistic predictions for online dispute resolution, Katsh and Rifkin differ in emphasis and perspective from Rule. Katsh and Rifkin are intent on communicating a fundamental premise: technology changes familiar alternative dispute resolution paradigms. Rather than visualizing alternative dispute resolution as a three-sided model (complainant, respondent, and neutral), Katsh and Rifkin ask us to accept the notion that the technology sits as a new “fourth party” at the dispute resolution table. Online dispute resolution converts what formerly was, in terms of visual images, an alternative dispute resolution triangle into a square or rectangle.

Some of the subjects in the Katsh and Rifkin book are discussed in a somewhat cursory manner (such as the honestly entitled chapter “A Brief History of ODR”). It appears, however, that certain subjects are covered lightly because the authors made a conscious and strategic decision to focus their efforts primarily on the idea: that technology is so powerful that it fundamentally changes dispute resolution dynamics and processes. The authors believe this idea is so critical, so revolutionary, that it demands to serve as a central theme for an entire book.

Katsh and Rifkin have taken a risk. Janet Rifkin is widely recognized and respected as a speaker and scholar, originally regarding traditional alternative dispute resolution processes and more recently regarding online dispute resolution. Ethan Katsh and I have crossed paths more frequently because we both work with current and developing online dispute resolution projects. Most people involved with online dispute resolution would agree that very few people are more experienced and knowledgeable than Ethan Katsh when it comes to online dispute resolution. In light of Katsh and Rifkin’s expertise, their book is a bit of a gamble.

Given their unique and complimentary experiences, one would expect that Katsh and Rifkin could easily produce a comprehensive analysis of alternative dispute resolution processes supplemented by a detailed discussion of the development of online dispute resolution. *Online Dispute Resolution* has only one hundred sixty-two pages of text. One of my first reactions to their book was that I wished they had shared more of their formidable knowledge concerning alternative dispute resolution and online dispute resolution. Readers may be very interested to hear, for instance, whether

Katsh and Rifkin believe online dispute resolution platforms can achieve the recognition and empowerment goals of transformative mediation.

Instead, they chose to present the narrower proposition that technology changes the way we should visualize dispute resolution. They offer the prospect of new dispute resolution paradigms while simultaneously extending an invitation to others to pick up this ball and run with it.

In the spring semester 2003, I designed and taught a full semester course entitled "ADR and Technology." I assigned *Online Dispute Resolution* and we analyzed and discussed one of the six chapters each week. After we finished the book, I asked the students to explain their reactions. One immediate response was that they felt that the book did not have enough ideas and information to warrant even one hundred sixty-two pages of text.

Yet this does not seem to be a fair assessment in the sense that the class did not so much read the book as dissect it. We poured over the text at an unusually slow pace, with a level of scrutiny that this book never invited or perhaps even anticipated. *Online Dispute Resolution* is a catalyst for further discussion, not a detailed comprehensive treatise.

Although the idea of technology as a "fourth party" is heart and soul of this book, the authors do provide additional valuable materials. The first chapter explains the difference between virtual spaces and tools observing that, while tools provide a means to perform specific tasks, virtual spaces provide an environment defined by the tools available, the manner in which those tools are coordinated, and the resources available. The authors provide examples of current online spaces (e.g., online auctions) followed by an outline describing the types of choices that must be made when building online space (for instance, image versus text versus numbers versus video).

The second chapter offers a short history of online dispute resolution, including descriptions of existing online models such as blind bidding (offers/counters exchanged blindly result in settlement automatically if within predetermined percentage of each other), SmartSettle (sophisticated negotiation software), Domain Disputes and the Internet Corporation for Assigned Names and Numbers, and SquareTrade.

The third chapter then focuses specifically on online dispute resolution systems, suggesting that a successful online system has three fundamental building blocks: convenience, trust, and expertise. An online dispute resolution system must be convenient to use, must inspire trust and confidence, and must offer expertise. The authors explain that one can imagine these three criteria as representing the three sides of a triangle. Depending upon whether one believes it is important to emphasize one criterion more than the others, or to give equal weight to the three criteria, the triangles can assume different dimensions. The authors give particular emphasis to the challenge of creating trust in cyberspace.

The fourth chapter introduces and develops the notion of technology as a “fourth party.” The authors suggest that while technology rarely replaces the neutral (third party), it can displace the neutral by requiring skills, knowledge and strategies that may not be available to that person. The authors offer suggestions for promoting confidence, trust, and delivering expertise for the first party complainant at the initial stage and strategies for overcoming the problems of engaging the second party respondent. Their personal experiences dealing with online dispute resolution processes and platforms are described in this chapter, lending credibility to the suggested strategies.

Someone with significant offline alternative dispute resolution experience may find the fifth chapter most helpful. The authors explain how to create a web site that complements one’s traditional offline skills and methodology. The way in which one acquires a web site, the functions of a simple web site, the nature and value of a more sophisticated web site, and the power of visual images are all discussed, albeit briefly.

The final chapter is intended as a primer for nascent online dispute resolvers. The authors identify the computer monitor’s screen as the “key” to nonverbal online communication that controls how messages are received and interpreted. For example, visual images can grab one’s attention, clearly delineate options, clarify data and chronologies through graphs and timelines, and spark sufficient interest to create positive relationships and personal commitments to the process. The authors offer insights as to how an online neutral can build and maintain trust, actively listen, manage emotions, and generally, improve nonverbal communication. Online neutrals must educate the parties as soon as possible concerning the online process and fees, transparency impartiality, confidentiality/privacy, and accessibility.

The five appendices offer offline and online reference materials; a list of online dispute resolution web sites; and transcripts or slides from an online mediation, negotiation, and domain name dispute.

More than a primer, *Online Dispute Resolution* offers a challenge to embrace a new way of thinking. Katsh and Rifkin extend an invitation to others to further develop the idea of technology and the fourth party. The power and potential of technology have not received sufficient attention from dispute resolution practitioners and this book is something of a gentle call to arms.

In some respects, *Online Dispute Resolution* is reminiscent of *Getting to Yes* by William Ury and Roger Fisher. The impact and popularity of *Getting to Yes* is undisputed. Like Ury and Fisher’s book, *Online Dispute Resolution* asserts a fundamental concept that can dramatically change dispute resolution practices.

Katsh and Rifkin’s, however, book has not been embraced by the current culture in the same manner as *Getting to Yes*. Interest in alternative dispute resolution was beginning to build in 1983 and the time was wonderfully ripe for Ury and Fisher. In contrast, Katsh and Rifkin’s book is

laboring in the aftermath of the dot.com collapse. Rather than having absolute and unrestrained faith in technology, we are fighting our way through computer viruses and worms that lead us to question the value and reliability of the online environment.

As Colin Rule states in his book, *Online Dispute Resolution for Business*, it is important that those who understand the potential of online dispute resolution “keep the fires burning so that the momentum can grow.” While the possibility exists that Katsh and Rifkin’s book temporarily will be relegated to campfire maintenance, the Internet will recover from its current ennui and Katsh and Rifkin’s notion of the fourth party will become integral to any discussion of online dispute resolution.

While professors Katsh and Rifkin may be more recognizable within academic circles, Colin Rule has been significantly involved with online dispute resolution for more than a decade. In fact, only a handful of people in the U.S. have comparable practical online dispute resolution experience. As a cofounder of Online Resolution (one of the first online dispute resolution providers and one of the relative few providers to survive the dot.com industry shakeout), he has been involved with online dispute resolution from the time it was first perceived as a viable business model.

Taking a less theoretical approach than Katsh and Rifkin, Rule wrote *Online Dispute Resolution for Business* both to get business people thinking about how they might use online dispute resolution and to help companies get started. Almost twice as long as Katsh and Rifkin’s book, *Online Dispute Resolution for Business* provides a more detailed, practical guide to the use of online dispute resolution. Like Katsh and Rifkin’s, Rule’s book is very readable and he frequently provides road maps along the way.

Rule’s book is presented in three parts: Part I describes the origin and evolution of online dispute resolution; Part II reveals how online dispute resolution can be used in different industries; and Part III describes in detail how online dispute resolution works. Rule’s commitment to online dispute resolution quickly becomes apparent as he shares personal stories that serve as a wonderful source of the industry history that he helped create.

Rule’s efforts to make his book instructive are generally successful. Although his short Part I descriptions of traditional offline alternative dispute resolution processes (such a mediation and arbitration) offer little new information to practitioners regardless of their experience, those descriptions do provide a basis for comparing and contrasting alternative dispute resolution with online dispute resolution. His decision in Part II to use free-standing chapters to present analyses of how online dispute resolution can work in different industries will please selective readers. This does result in some inevitable repetition for cover-to-cover readers, but Rule adds new material and observations when he returns to ideas introduced earlier.

Rule’s respect for the history and evolution of online dispute resolution is apparent as he builds upon existing literature and specifically

acknowledges Katsh and Rifkin's notion of the "fourth party." Echoing Katsh and Rifkin, Rule exhorts online practitioners to consider all the available online options and design a process that fits the parties and issues. And taking a more aggressive — or at least more adventuresome — position than Katsh and Rifkin, Rule suggests that someday our courtrooms may have a computer in the judge's chair.

Given his explicit goals, one would expect Rule to advocate what he sees as the advantages of online dispute resolution. In that sense, Chapter 3 is predictable. It offers approximately eighteen pages of advantages and four pages of disadvantages. Advantages for the disputants include speed, asynchronous interaction, power differential reduction, research during the process, reflective communication, and bias reduction (because certain personal characteristics can remain unknown). Advantages for neutrals include using asynchronous communication as a cooling device, opportunities to reframe, the ability to caucus simultaneously with each party, and the ability to reuse effective language easily. Most of the literature in the field describes the advantages of online processes from the perspective of the disputants, so Rule's thoughtful analysis of the advantages to the neutral is welcome and needed. And finally, advantages for businesses include early intervention, cost effectiveness, customer retention, better feedback loops, and a litigation safety net.

In spite of his genuine enthusiasm for and — as an online dispute resolution provider himself — vested interest in online dispute resolution, Rule does an admirable job of outlining shortcomings of online dispute resolution. Rule understands that characteristics presenting an advantage in one situation may prove problematic in another. His discussion of online dispute resolution disadvantages reveals some of those contradictions. While archived communications can clarify confused recollections, Rule reminds us that hurtful comments revisited also can prevent parties from moving forward. Fear that intimate statements will be preserved indefinitely, or forwarded to other individuals, may inhibit disclosure. Another of the listed advantages is distance combined with the accompanying opportunity to cool one's emotions. Although his observation that distance can prevent physical violence certainly is correct, his suggestion that name calling and accusations also are less likely to occur online may not be consistent with your own experiences. The speed with which a skilled typist can respond, and the sense of impunity that can exist online, can and does lead to rapid and unfortunate, albeit nonphysical, escalations.

Rule takes the additional step and suggests ways to overcome, or at least minimize, disadvantages. He notes that removing old discussion threads goes a long way toward overcoming the problem of revisiting unproductive exchanges. Because his target audience includes businesses and neutrals new to both alternative dispute resolution and online resolution, it might have been helpful to specifically remind the reader that archived material

should only be deleted if consistent with the parties' permission or resolution process agreement (even though full disclosure and transparency are important themes throughout the book).

Rule also notes that the online environment raises privacy and confidentiality concerns, allows parties to drop out and stonewall, and may make it easier for parties to lie. Additionally, online dispute resolution does not provide familiar nonverbal cues when purely textual, may make it more difficult to build rapport, and may subtly encourage neutrals to misuse their power to control the technology and thus the resolution process.

Even if one is not particularly interested in the history of online dispute resolution, Rule's recitations and reflections are valuable because he provides insights and information available only to a handful of people. Katsh, it should be noted, also belongs among that small circle, but he and Rifkin apparently made the strategic choice to limit their historical perspectives in light of their goal of establishing the concept of the fourth party.

As one of the principals who created an online dispute provider that has managed to survive in a harsh online environment, Rule has invaluable insights for the fledgling online neutral or service providers. His suggestions as to how one can use technology to build an online dispute resolution platform ('technology best practices') represent a generous sharing of wisdom gained through first-hand successes and struggles. That discussion, followed by his summary of the essential elements of online dispute resolution, can help neutrals and providers new to the online environment avoid numerous mistakes and false starts.

Among its many insights, *Online Dispute Resolution for Business* gives information about the author himself. Rule reveals that for years he was more comfortable interacting with new people online than face-to-face and spent up to ten hours a day trading messages online. I have seen Colin Rule speak publicly in his capacity as President of Online Resolution. He is such a highly organized and effective speaker that it is hard to imagine that he was not always comfortable in front of a crowd extolling the virtues of online communication.

This brief review cannot begin to relate the substantial amount of information in *Online Resolution for Business*. There is not room in these pages to describe Rule's general discussion of e-Commerce; the distinctions between Business-to-Consumer and Business-to-Business e-Commerce; and the ways in which online dispute resolution can be used in insurance, employment, government, health care, finance, and transnational disputes. Rule aspires to create a balance between the theoretical and the practical, and largely succeeds.