

# Online Dispute Resolution and Ombuds: Bringing Technology to the Table

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## ABSTRACT

People in industrialized countries now conduct most of their professional and personal communication using technology. Whether Skyping home from a business trip to tell the kids good night, conducting a twenty-person conference call with teams around the world, or wading through the endless stream of e-mails from coworkers, technology is almost unavoidable in modern life. Some of the capabilities that technology enables border on the miraculous, like the newfound ability to reach anyone around the world with just a few swipes on a tablet. As a result, many now work more closely with teams on the other side of the planet than teams across the hallway. But, of course, people are just as complicated via computer-mediated communication as they are via face-to-face communication, so technology doesn't erase conflict. Disputes and misunderstandings occur with or without technology, but the proliferation of technology introduces new wrinkles in the fabric of workplace conflicts. Ombudsmen are increasingly called upon

to respond to disputes arising in these new contexts, and it's simply not feasible to jump on a plane to handle all of them in person. Virtual "visitors" to an ombudsman's office and other stakeholders now speak the language of technology, and they increasingly expect to use technology to help resolve workplace disputes. As a result, ombudsmen are also called upon to be more versatile with their toolbox to ensure that they can provide support in the ways that are most helpful to their constituents. In this article, the authors, one a practicing ombuds and the other an online dispute practitioner, discuss how technology is changing the work of ombudsmen, offering both challenges and opportunities, and share some lessons learned and new capabilities gleaned from the field of online dispute resolution (ODR).

## KEYWORDS

online dispute resolution, ODR, technology, communication, negotiation, virtual, conflict resolution, computer-mediated communication, mediation

Technology is transforming the way in which people live and work. Individuals all over the world now communicate effortlessly with each other via powerful computers they carry in pockets all the time, wirelessly connected to the Internet (which, by habit, are still called "phones"). These devices have eliminated a lot of the geographic barriers that previously constrained interpersonal communication, and, as a result, daily working relationships now stretch around the globe and cross multiple time zones. But people are just as complicated on either side of an Internet connection as they are face-to-face, because computers don't erase all the things that make humans complex and emotional. Disputes can still arise between coworkers even if those coworkers have never met each other in person; technology now enables those disputes to transcend time and space. If the services

of ombudsmen are to stay relevant in this newly wired world, and tackle the phenomenon of conflict in cyberspace, ombudsmen must learn how to leverage technology to transcend time and space in a similar fashion.

Ombudsmen are in the communication business. The reality, for many ombudsmen, is that they already work across offices; time zones; countries and regions; administrative field, and other types of organizational operations—and with populations that have diverse communication needs and styles. Although they may not be able to meet every single need, to be effective they must be able to diagnose root causes of conflict and miscommunication, then identify what can facilitate communication in a given situation. It is an important time to ask where technology falls in the scope of the organizational ombudsman's work, including whether ombudsmen are aware of—and can make (better) use of—the technological tools that can improve dispute resolution processes, reach, and services. These questions also highlight the reality and impact of technology on workplace communication. As advocates for improved methods of communication and conflict resolution within their organizations, and as communication channels themselves, ombudsmen must develop a greater understanding of how technology can positively affect conflict resolution.

## Communication, Relationships, and Technology

When a dispute arises between two individuals or within a group, the first thing that comes to mind for most ombuds is communicating with the person who raised the concern, carefully evaluating options, including whether it may be possible to have the parties sit down and work out the problem through direct communication. It is safe to say that most people who gravitate toward ombudsman work are people who are good at facilitating this kind of in-person interaction. As such, the idea of using technology to convene a discussion can at first seem impersonal and strange. Common questions may include: How can we be effective in our role if we can't see the parties or read the emotions in the room? How will I earn trust from the person without the intimacy of an in-person meeting? Won't technology make facilitating the conversation more difficult, or serve to dehumanize the interaction between the parties? How can I ensure that the parties remain engaged with the process? How will I be able to ensure confidentiality? How can I be sure that technology will not become an additional hurdle to overcome?

Twenty years ago, professional dispute resolvers were quite skeptical about using technology. The sense was that technology only enabled sterile, antiseptic communication, stripped of real honesty and emotion. Many people argued that online apologies, in particular, were not as effective as face-to-face apologies because of the lack of nonverbal communication. The oft-expressed concern was that overly simplistic software solutions would trivialize disputes and suggest that disputants could just click their way out of any issues they encountered. As such, dispute-resolution professionals were very slow to adopt technology into their practices, and many insisted that face-to-face communication was the only real way to conduct conflict-resolution procedures.<sup>1</sup>

Over the past ten years, however, technology has “humanized.” The tools used to interact with each other in the realm of computer-mediated communication have become far more intuitive and easy to use, while at the same time becoming more powerful. Devices like smartphones and tablets have made interaction as simple as pointing one's finger, which for many seems more natural and human than typing on a keyboard. Computers now play pleasing sounds and show pictures and video in stunning clarity and color. Technology has gotten much better at connecting with people,

and helping to connect people with people. In response, people have started connecting more with technology to facilitate communication and relationships in contexts from family to the workplace. Though it does not replace the need for in-person communication and nurturing, technology is adapting to evolving human needs and interests, making communication available and accessible where it may not have been in the past.

As a result, the times (and our culture) are changing rapidly. The purpose of this piece is not to judge whether such changes are “good” or “bad,” but rather to recognize that they are happening. Computer-mediated communication is now used in ways that would have seemed inconceivable a decade ago. Not only is videoconferencing used to say good night to kids when parents are on a business trip, some even text message spouses when that spouse is in the next room instead of just walking over to ask a question. Members of the younger generation, in particular, have become reliant on technology in almost every area of their lives. Not only do they use technology throughout their workdays, they’ve become comfortable using it in many of their most intimate personal relationships. As such, when a dispute arises, many people now expect to be able to use the same kinds of tools to address issues quickly and effectively. Technology is built into our daily lives so thoroughly that, for many people, *not* using computer-mediated communication to address a workplace dispute would seem weird. Yet many mediators and ombudsmen remain skeptical.

## Hesitation Versus Reality of Needs

Within the field of conflict resolution, there is still hesitation about integrating technology into informal dispute and conflict resolution processes. Often online dispute resolution, or ODR, is presented in a manner that suggests there is a bright line between online dispute resolution and face-to-face dispute resolution, and that a dispute-resolution process has to be either one or the other. But that distinction is something of a false dichotomy. In reality, many of us switch back and forth between online and face-to-face communication all the time. It does not feel strange to speak with someone face-to-face, then look down to send him or her a calendar invitation from one’s phone, then have him or her accept the invitation and send back a document while getting into a taxicab—all within the space of a few minutes. This is true within the workplace as well. Staff may choose to send e-mails to a coworker in the next cube—partially out of convenience, but also out of courtesy to not interrupt a coworker in the middle of a task he or she is focused upon. It may also be important to have a record of that communication (something that is not created with a phone call or in person). These approaches have become so common that they are not even noticed anymore.

Dispute resolution processes are not necessarily so different. Organizational ombudsmen may follow a policy of not creating records that identify the person who brings a concern, but in a truly party-empowered process, perhaps the parties to a dispute can decide themselves that they want to handle some of the issues over e-mail or via text, other issues over the phone or conference call, and other issues at an in-person meeting. In practice, an ombudsperson may initially engage with the parties over e-mail to coordinate a meeting, then shift to phone, then engage face-to-face, before shifting back to phone for follow-up and using an online feedback form for receiving feedback on the services of her office. Our parties balance between these different forms of communication every day in their working lives, and they will expect that their neutrals will be similarly comfortable moving between these different communication types. There is no need decide whether to handle dispute resolution work online or offline, because parties are already comfortable using both. In fact, individuals are already learning to sort their interactions into different communication chan-

nels based on the nature of the relationship in question. As ombudsmen work in more global and fast-paced organizational environments with diverse sets of constituents, they encounter different communication styles, relationships, comfort zones, preferences, available tools, and other practical needs. It begs the question of what tools can be provided to enhance communication for regular ombudsman practice, as well as tailoring to specific needs and preferences, and how technology can support such efforts. For example, how can technology facilitate communication in setting up and conducting a meeting with someone who has a hearing impairment and lives on another continent?

## What ODR Can Offer Practitioners

Many lessons about how to effectively marry technology and conflict resolution come out of the field of ODR. When ODR first began about 15 years ago, many providers just replicated face-to-face processes in software. But those of us who experimented with those software tools quickly realized that some face-to-face dispute-resolution processes work well online, but others do not translate at all. The discovery of software algorithms opened up exciting new possibilities to assist parties in resolving their disputes. Ethan Katsh, a professor from the University of Massachusetts, Amherst who is widely regarded as the “father” of ODR, described these possibilities in his book *Online Dispute Resolution*, labeling them the “fourth party,” where technology earns a seat at the table alongside the human neutral (the third party) and the disputants.<sup>2</sup> This idea of technology as a fourth party has become a foundational concept in the practice of ODR.

The fourth party can assist parties in a variety of ways as they move toward resolution. For example, a fourth party can provide information and set expectations for the parties in an impartial way that a third party cannot. Software algorithms can also enable a variety of different types of communication, from text-based asynchronous conversations (such as e-mail) to text-based synchronous conversations (such as chat). Software can also enable audio and video conversations via tools such as Skype and Google Hangouts. These tools can enable participation from individuals anywhere in the world, saving them the time and expense of travel, and increasing the participation and engagement of disputants. Fourth-party tools can offer online joint-document editing (such as Google Docs), where parties can collaboratively author documents, or online “wizards” that help parties explore their options or provide early resolution for issues—sometimes before the complainant even informs the respondent about their concerns. Software tools can quickly address simple misunderstandings before they escalate or offer a library of creative possibilities to help parties craft their ideal solutions. Every year technology gets more powerful and more intuitive, making the fourth party an increasingly helpful presence at the negotiating table. There is little doubt that more advances are just around the corner.

## Technology as a Tool for Facilitated Processes: Asynchronous Communication

One of ODR’s greatest capabilities is its ability to enable text-based asynchronous processes, such as in mediation processes, to accommodate the needs of certain types of conflicts and dispute-resolution processes. Asynchronous communications such as e-mail open up some exciting possibilities in conflict resolution. Let’s consider the arena of negotiation. In an asynchronous dispute-resolution process, technology is a tool that gives access to the process to parties; they can participate from different locations and at different times, rather than participating in real-time interactions. For instance, in a mediation process, sessions are often held jointly with both parties sitting at the same

table. If the neutral wants to have a private conversation with one of the parties, the neutral needs to pause the joint session and begin a caucus session, sending the other party out of the room for a certain period of time. There are often sensitivities around how much time the mediator spends in caucus with one party versus the other party. If the mediator sends Party A out into the hallway and talks to Party B for twenty minutes, and then switches parties and speaks to Party A for only five minutes, that can create concerns in both parties. Is the mediator showing favoritism to one side versus the other? Is the mediator putting more pressure on one side to ease his or her demands versus the other side?

In contrast, in an online asynchronous process, three conversations can take place at the same time. One conversation is a joint discussion between both parties and the mediator; the second conversation is private conversation between Party A and the mediator; the third conversation is private conversation between Party B and the mediator. The parties can post messages into each conversation at any time. This ability is sometimes referred to as “concurrent caucusing.” It may be that Party A is not interested in having extensive private conversations with the mediator and does not post very much in his or her private caucus conversation. Party B, on the other hand, may want to post lots of messages in the private conversation, perhaps because he or she has never been in a dispute resolution process before and has many more questions about what is going on. Because Party A and Party B have equal access to the mediator, they have no concerns about asymmetries in the amount of time the mediator spends with each of them in caucus conversations. However, the mediator is free to spend as much time as is required for the effective administration of the resolution process with each party in their private channels.

Another benefit of concurrent caucusing is the ability to get private feedback from the parties, even when it appears the conversation in the joint discussion is going well. In face-to-face dispute resolution processes, the mediator is often reluctant to caucus with the parties while progress is being made because of the risk that such a caucus would slow down or derail the joint problem solving that is occurring. However, one of the parties may have misgivings or concerns as the process moves quickly toward a proposed resolution, and the lack of a private communication channel may make it difficult for that party to raise those concerns. An asynchronous conversation with concurrent discussions enables the mediator to check in with the parties even when the joint conversation is going well, which may enable the mediator to be more aware of concerns that may potentially derail a resolution or interfere with further adherence to an eventual agreement.

Asynchronous communication is not only helpful to parties; it can also benefit conflict resolution practitioners. One of these new capabilities is to enable the mediator to dynamically reframe negotiation communication between the parties. In some of the face-to-face mediations the authors have conducted, emotions run high and parties have made comments that were intentionally hurtful, which served to significantly complicate the conversation and undermine trust. When such an incendiary comment is made in an asynchronous communication environment, the neutral can see the comment prior to the other party viewing it and discuss it with the party who originally posted it, in order to learn more about what the poster is aiming to achieve. For instance, a neutral may put an angrily worded post into a comment “holding bin,” which creates a window of time in which the mediator might ask the poster how he or she feels this comment will be received by the other party, and whether he or she feels it will help move the process toward a mutually satisfactory solution. Upon reflection, the party may decide that redrafting the comment is advisable because it might have a negative impact on the negotiation. This type of precommunication reframing is only

possible in an asynchronous interaction because, in a face-to-face interaction, a comment uttered by one party is heard by the other party as soon as the comment leaves the first party's lips. Then the neutral is put into a difficult situation where it is impossible to "unring" the bell that has just been "rung" by the provocative comment.

## ODR in Ombuds Work

New capabilities make ODR a very useful option for ombuds to use in dispute-resolution processes. Workplace environments have struggled with the challenge of resolving disputes for decades. Part of this is because confronting conflict can be very unpleasant. For instance, people in some cultures find it quite embarrassing to admit to having a dispute, and those in other cultures may find it difficult to have direct face-to-face communication with someone of a different status. Resolution processes that rely exclusively upon face-to-face communication can sometimes find themselves "stuck" or ineffective in contexts like these. In the first example (embarrassment), if an ombudsperson approaches an individual in a situation like this and asks that person about the existence of a conflict, the party will often deny it. The person may feel that experiencing a conflict is shameful and an indication of selfishness or personal weakness. However, even if the party refuses to acknowledge the existence of a conflict, it still may exist—and potentially worsen over time. Online communication channels can sometimes provide a way for the matter to be addressed without requiring an embarrassing face-to-face confrontation. The change of communication type afforded by online dispute-resolution mechanisms can help the parties get a bit of distance from the disagreement, which can create space to brainstorm effective ways to resolve it. The parties engaged in the online communication may in fact act like nothing is going on, in their face-to-face interactions, but the online channel enables them to communicate openly and brainstorm solutions. One cannot assume that the optimal informal conflict-resolution process is always direct face-to-face communication, once one knows about cultural considerations and the different needs of those who contact an ombuds office.

Asynchronous communication can be beneficial when an ombudsman is working within an organization populated by individuals who speak different languages and dialects. Disputes possibly arising from cultural miscommunications or language difficulties may require a process that supports and helps the ombudsman bridge the resulting communication challenges. Face-to-face interaction, particularly if the process is conducted in a second or third language for one of the parties, can be complicated by misunderstandings and inaccurate translations. Text-based asynchronous communication can enable the parties to be more reflective and thoughtful in the messages they exchange, which can moderate the potential for further misunderstandings because they have an opportunity to review and edit their messages before sharing them with the other side. Asynchronous communication can also enable the parties to do research in the midst of the negotiation, potentially empowering them with important data that can help achieve a more robust and fair resolution. It can also enable the parties to consult with other experts or supporters to ensure that they are fully informed of applicable rights and are equipped with accurate information instead of presumptions and guesses. Asynchronous communication can also be prioritized against other obligations, because it does not require immediate response to every message. In this way, asynchronous interaction can help parties be at their best in a resolution process, which leads to better resolutions.

Online dispute resolution can also alter the ombudsperson's access to information within their organization. Online communication can be anonymous, and anonymity can be a powerful tool in getting people to be honest about their perspectives; anonymity can drive trust in an environment

where there may be a lack of perceived or actual safety in speaking up. In the face-to-face context, anonymity is often infeasible if not impossible. For instance, an ombuds might create an online form to collect concerns and feedback anonymously, enabling the ombudsperson to further research specific areas or provide supporting information for making recommendations gathered through these channels. As ombuds practitioners understand well, for situations where individuals may be afraid of retaliation or stigmatization, an anonymous forum can give them a way to share information that they want to share without fear. In many ways, ombuds serve as that forum, but an online tool overseen by the ombuds office can enhance this ability and be instrumental in allowing such information to surface.

ODR tools can also be used creatively in raising awareness about an ombuds program and conducting outreach to constituents. Ombuds offices typically make outreach efforts to ensure that those who have access to the office know about the program, the people involved in the program, how the office can help, how to contact the office, etc. Most ombuds offices already use websites to provide such information; some also take advantage of online intake and calendaring tools. It is a natural next step to extend these tools to make the information more accessible. In addition, since many ombuds offices also provide training and education, there are opportunities to think about how ODR can help support these efforts through online forums, boards, webinar sessions, virtual town halls, etc.

Online dispute resolution can also be very helpful in the reporting-upward context. Ombudsman programs typically collect data to share a picture of the types of issues received and feedback the organization should be aware of, and many use a case-management system. ODR tools can make the collection and management of data, monitoring of issues, and follow-up of reports transparent and thoroughly documented. It is plausible for an ombuds office to have a tool for an ODR system that not only assists with the resolution process, but also supports the larger case-management system, assists with the awareness and outreach efforts of the program, and automatically generates reports (including trend analyses and red flags), sharing them with appropriate audiences. In this way, ODR tools can become a partner for an ombuds office and its staff; they can even help improve coordination, the sharing of updated information, communication, and discussions between ombudsmen in a common office.

## Downsides to Technology in Dispute Resolution

It must also be noted that integrating technology is not always a good thing, when it comes to dispute-resolution processes. Sometimes the lack of nonverbal communication can make engagement between the parties more complicated, or perpetuate misconceptions and misunderstandings. In some disputes, one party may be much more comfortable with technology than the other party; as a result, the use of technology may perpetuate power imbalances. For example, if one party is able to type much faster than the other party, and the dispute is being resolved in an asynchronous, text-based chat-type environment, the faster typist may have a significant advantage and may leverage that advantage by getting in two or three words for every word that the other party types. Or, if one party has a powerful computer with a fast internet connection and the other party is relying on an older computer with a slow dial-up connection, it can also generate imbalances between the parties. Equal access to the right tools for the process can affect actual or perceived fairness in a process. Of course, it is important to remember that conflict can signal a rupture in a relationship, and technology may not play a role in helping to soothe and heal the harms caused by that rupture. The authors do

not advocate the integration of technology into every dispute-resolution process. Instead, they urge ombudsmen to incorporate these tools and techniques into their toolbox of approaches, so that the tools can be appropriately deployed in situations where they can add value to the process—but avoided in situations where they are likely to be a distraction or further complicate matters.

## Questions Ombudsmen May Have as They Incorporate Helpful ODR Tools

Ombudsmen may have several questions when incorporating technology into their practices. One of them focuses on confidentiality and record keeping. If, for example, an office adheres to the IOA Standards of Practice and Code of Ethics, an ombudsman does not keep records that contain identifying information on behalf of the organization (see standard 3.5).<sup>3</sup> However, tools and services such as encryption, deleting identifying records, using independent third-party services, and other security measures may help address this question. An online tool does not necessarily create or keep identifying records, but the ombuds profession many need to consider this issue. Many ombudsmen are already using tools such as company or external e-mail systems, Skype, Doodle, and SurveyMonkey, because they help them reach the right audience and have become indispensable in today's world—especially to those who have a dispersed constituency. However, confidentiality and security are issues that should be addressed, because many of these tools are not confidential. Some concerns are also due to the “unknown” about how technology affects confidentiality, which is a reason for ombudsmen to become more familiar with ODR tools. Much of this also depends on the agreement between the ombuds program and the organization, and the level of independence a program has around confidentiality.

Another question involves informality. Because an ombudsman is an informal resource, would using online dispute resolution make the process more formal or less formal? We think that it does not, if it is clearly for the purposes of informal dispute resolution. ODR can be used to facilitate both formal and informal processes without changing their character. It supports the facilitator as a “fourth party” and helps a practitioner use methods of communication that are already familiar to their constituents, when appropriate.

Ombudsmen likely have several questions about using technology in their practices, but a final question worth mentioning here is practitioners' fear of incorporating something new (and perhaps some self-doubt about their abilities to pursue, learn, and use new technology in their practices). Focusing on providing safe in-person places for visitors is invaluable; however, ombuds also need to find ways to reach those who may not be able to engage in in-person sessions. Therefore, the question this begs of practitioners is how to build ODR awareness and skills—or technology, more broadly. Technology cannot replace ombudsmen, but it can enhance their ability to reach others. The authors encourage others to learn what would be possible—not only for their offices and their practices, but also for themselves as practitioners who can be equipped with a new set of skills.

## Conclusion

New technologies often stimulate skepticism about their acceptability and worry about what will be lost if that technology catches on. In the 1980s, when banks were beginning to roll out automated teller machines (ATMs) for their customers, a common argument against the ATMs was that people wanted to have personal relationships with their bankers. The trust generated by shaking

someone's hand and looking into his or her eyes could never be established with a faceless machine just distributing cash. Think about your own experience, though. When was the last time you went inside a bank to withdraw money from your account? Do you miss the experience of standing in line and speaking to a teller in person? In modern times it is unusual for individuals to go inside a bank branch to take care of simple tasks regarding their bank accounts, but they will see a teller if they need to deal with complex problems beyond the capabilities of machines. In the last few years, ATMs have become even more powerful and flexible: taking stacks of checks all at once, scanning and reading them, and rarely making mistakes. Bank customers now trust the machines and, in many cases, prefer them to people for simple interactions. The tellers instead focus on the exceptional processes—the tasks that require deliberation and advice. Banks have transferred administrative tasks to the ATMs (who are kind of like the “fourth parties” of banking). These changes are good for consumers and good for the banks.

A similar change is coming to the practice of dispute resolution. Ombuds play an indispensable role in connecting and supporting people in their organizations, and the heart of that will always be face-to-face interaction. But technology is getting better at handling the administrative burdens of conflict resolution. Visitors to an ombuds office increasingly expect to be able to raise a concern or make a complaint at any hour of the day or night because they recognize the software is always there, continuously available, in a way that humans simply cannot be. As it improves, software will help ombudsmen provide relevant information to parties, improve responsiveness, expand transparency and accessibility, and provide continuous process improvement. It will also enable us to focus our efforts on the cases that most require a human touch, instead of spreading ourselves thinly over many cases that shouldn't demand equal measures of our attention. It will help ombudsmen reach more people and help more people reach the services of an ombudsman.

The increased sophistication of our technology tools will continue to transform the role of the ombudsperson, especially as the expectations of our parties change along with society's wider transformation. Ombudsmen should continuously educate themselves about newly available technology tools so their practices can evolve with the times. If done right, this expansion of technology will help to make us more effective in our organizations, and keep us relevant—no matter what new technologies emerge in the future and what role they play in creating or resolving workplace conflicts.

## NOTES

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