

# The Evolution of ODR

## Mediator – Ethan Katsh

Aled Davies: Hi, everyone. My name is Aled Davies, founder of mediatoracademy.com, home of the passionate mediator. You know what we do on here. We interview the very best mediators and thought leaders from around the world. We find out how they've become successful, how they approach aspects of their mediation practice, and handle all sorts of challenges and dilemmas. It's also a chance for us to learn about new challenges and opportunities in our field.

In this interview, I want to delve into the world of online dispute resolution, understand its evolution as well as the direction it might be taking and what that means for practitioners in terms of opportunities and challenges. Who better than the founding father of online dispute resolution to enlighten me.

Now, my guest today is widely recognised as the founder of the field of online dispute resolution. Along with Janet Rifkin he conducted the eBay pilot project in 1999 that led to eBay's current system, that handles in the region of 60 million disputes each year. He's a graduate of the Yale Law School and was one of the first legal scholars to recognise the impact new information technologies would have on the law.

In the electronic media and the transformation of law and law in a digital world he predicted many of the changes that would come to law and the legal profession. He was principal dispute resolution advisor to SquareTrade.com and is chairman of the board of advisors of Modria.com. He's the director, National Center for Technology and Dispute Resolution as well as Professor Emeritus of Legal Studies, University of Massachusetts.

It's a real privilege to welcome Professor Ethan Katsh onto Mediator Academy. Ethan, welcome.

Ethan Katsh: Thanks. Thanks very much.

Aled: Right. There's no secret that you are acknowledged as the founding father of ODR. I won't say what Colin Rule says, the grandfather of ODR. Well, I've said it now. Look, how would you define online dispute resolution?

Ethan: I think most basically, online dispute resolution is dispute resolution that's supported, facilitated, helped by the use of technology.

Aled: Okay. Give us a brief journey through time back to the beginnings of ODR to where we are today. Where did it all start? How did you get involved in it? What's the journey been?

Ethan: I think largely I was lucky to be in the right place at the right time. I don't know when this love affair with ADR started in the U.K., but in the United States it began in the late '70s and evolved through the 1980s. Of course, since then, it's not alternative dispute resolution. It's really the primary form of dispute resolution. You mentioned my colleague Janet Rifkin. Janet was one of the mothers of ADR, one of the founders of that field.

My own interest during the '80s really was in the role of technology on law, on legal systems, on lawyers, not really on conflict resolution, but it was enormously helpful to me to have a colleague whose field was conflict resolution, and over time, we realised that the internet was not going to be the kind of utopian environment that some people in the early '90s actually thought it would be.

On the contrary, it was an active, emerging, developing, creative, transactional space. How you could you not have disputes? There are some people who make great inventions that are startling in their creativity. This one, to be frank, almost came to us. We were interested in conflict. We were interested in technology. We saw what was happening, and what was happening was not the creation of a utopia, rather it was the creation of marketplaces, creation of listservs, forms of communication that didn't really exist before.

At the beginning, one thought these would affect fields like intellectual property or free expression or privacy, but over time it became clear that the range of disputes would be extraordinarily broad. That was our feeling about disputes being created, but at the same time, what we did see was that all dispute resolution is communications process. What I learned from Janet was that mediators manage the flow of conversation, the flow of information.

Aled: Yeah.

Ethan: They have various techniques for doing that. Turns out that computers are machines that process information, used to communicate information. They're capable or have the potential for doing all of those things that dispute resolution professionals do. We train mediators. You do that. Mediation skills don't necessarily come naturally to human beings. These mediation capabilities certainly don't come naturally to computers. Nothing comes naturally to computers.

Over time I think we've seen that we can programme computers to manage communication between parties who are angry with each other. The eBay experiment was just that. I confess that was handled in a rather primitive way with a human mediator who handled the conversation with these angry parties via email.

Aled: Okay.

Ethan: That doesn't scale.

Aled: Yeah.

Ethan: You mentioned SquareTrade. SquareTrade developed forms for exchanging information between angry parties.

Aled: Yeah.

Ethan: One thing I learned from that experiment with eBay was that it didn't matter whether the amount in question was \$5 or \$15,000. Parties were just as angry at each other in either case. We needed tools to do what mediators do, build trust, allow people to converse without screaming at each other, and finally understand that, certainly in the eBay context, the vast majority of disputes were unintentional.

Aled: Okay. Just on that point, mediators learning to resolve conflict. These are skills that get taught on the assumption that they don't come naturally to us. I'm curious about that experiment.

You've got a mediator who is resolving disputes between buyers and sellers within a particular environment. You mentioned that's not scalable. As far as the buyers and sellers were aware, were they aware it was a human being? Or what were their expectations?

Ethan: Yes, they were aware it was a human being.

Aled: Okay.

Ethan: We were asked to do this, and we didn't know how many disputes to anticipate coming our way.

Aled: Right.

Ethan: There was a day in March, I think 1999, in which eBay put a link on their website to a dispute resolution process. That was ours. Over the next two weeks, we got about 200 disputes.

Aled: Okay.

Ethan: That was a lot. There hadn't really been any. It was the largest number of disputes handled online up until that point.

Aled: Yeah.

Ethan: Two hundred seemed like a huge amount. Compared to 60 million, it's a laughable amount, but more human effort probably went into the 200 than goes into, today, the 60 million.

Aled: Yeah.

Ethan: Yeah, the parties knew they were dealing with a human being.

Aled: Okay.

Ethan: The job of the human being was difficult because it was the same goal that he would have if the parties were in front of him, namely, manage the flow of information between the parties. Certainly, using email with 200 people, I'm surprised he was able to maintain his sanity. We actually ended the experiment a little early because it was overwhelming.

Aled: Yeah, sure. So you're able to manage the flow of information using technology. You also mentioned building trust with the parties, which is something that a mediator does. How does a system, a piece of technology, accomplish that?

Ethan: Well, the system has to be programmed, obviously, in a certain way. The goal is to encourage the parties to communicate with each other seriously or without yelling at each other. I'll give you an example. One thing SquareTrade did was it provided forms for the parties, questions that could be basically checked off yes or no or some other way, but it limited the amount of free text that the parties could use.

Aled: Okay.

Ethan: There was a text box, but you were allotted a certain number of characters. The more you typed, the fewer characters you were told you had left, so you had to be very concise about what you were doing. Gradually, by exchanging information in that way, parties would see finally, the thing broke in the mail or the thing was delayed, it was Christmas-time, U.S. Postal Service was not at its best. Once that happened, these disputes were fairly easy to resolve.

Aled: Yeah.

Ethan: No one wants to feel that they've been defrauded, and that's the initial feeling in almost all of those cases.

Aled: So by managing the flow of information, you're able to increase the levels of trust between buyers and sellers because they realise that there's no malice intended.

Ethan: That's right.

Aled: Right. Okay. It's interesting you're limiting the amount of free text. It reminds me of training as a mediator in the community context and the trainer saying, "Okay, give the parties two or three minutes to say what they need to say, but limit them to two or minutes, otherwise they'll take all the airtime." All right.

Ethan: I'll just add one more thing. The parties we dealt with had already tried to resolve the disputes via email. Email's usually an ineffective way of resolving conflicts online because there is no control. You can rant all you want. There are no limits. It's not going to contribute to a conversation or to build trust.

That was something else we learned. Even though we used email, that was the job of the mediator, to foster a conversation that the parties were calm, serious.

Aled: Yeah. Very interesting. From that experiment, from that pilot, what have been the main leaps throughout the course of the past two decades almost?

Ethan: I think one thing is that we saw that we would need to adapt the technology to deal with increasingly complex disputes. People are impressed with the eBay disputes. There's 60 million of them. Actually, they're simple disputes.

Aled: Yeah.

Ethan: They're actually only a limited number of categories of dispute. The thing broke, it wasn't what it was advertised to be, whatever. Five or six or seven or eight of those. If you can figure out what categories these disputes are likely to fall into, you can set up systems for them, but it's harder to do that with more complex disputes. I think that's one of the big challenges.

You want systems that can scale, that can reach large numbers of parties. You want systems that can handle cases that arise all the time. You want systems to be able to handle complex disputes. As a result, we have startups, Modria or Youstice in the Czech Republic that are investing large amounts of money in developing these kinds of systems.

Aled: Yeah. You referred to an article I read in "The Resolver" about conflict being a growth industry, something that the goal is from getting [sounds like 00:16:06] to yes.

Ethan: Yeah.

Aled: Are we likely to see, as technology develops and becomes more sophisticated, less disputes, more disputes? When you look into the future in your crystal ball, what do you see developing in the field of ODR and also the kinds of disputes that will arise?

Ethan: Well, if we don't do anything about it, if we don't set up systems to prevent disputes, we're going to have this growth industry of disputes.

Aled: Yeah.

Ethan: Even if we do try our best, I have a feeling we're going to see large numbers of disputes. It's an inevitable consequence of our creativity, entrepreneurial efforts. We are creating more ways to create things of value.

Aled: Yeah.

Ethan: We have more tools simply to create. Everything is more complex than it used to be. Complexity means there are more things that can break down.

Aled: Yeah.

Ethan: My car has a huge battery in the back because there's so much electronics in the car. That's great, until I can't open my window because, I don't know why I can't open my window. I used to be able to roll it down. There are hundreds of other things in my car, in my house, in my work. This computer is working fine now, so hopefully this connection will last for a few more minutes. We're deluded. One thing I emphasise is that we're deluded to think that some things are simple. This Skype connection seems simple.

Aled: Yes.

Ethan: And it's free. What could be better? It's actually highly complex. Think about how it's possible for us to be communicating like this. When things break down, we're annoyed. I don't know why we're annoyed. Complex things break.

Aled: Yeah. Well, I guess it's the expectation that we've become so accustomed to taking things for granting. I'm always assuming the Skype connection's going to be pretty good. When it doesn't work, I get frustrated without thinking about the complexity underneath the hood.

Ethan: Yes. As we talked about a little earlier before we started this, my image is moving back and forth. I don't exactly know why. I apologise to the viewers. There's this issue always of whether something's a feature or a bug. This was supposed to be a feature to focus in on me. It usually is a feature, but as I'm saying this, I'm seeing this going in and out, so I apologise.

Aled: That's all right.

Ethan: Blame it on the machine.

Aled: Blame it on the machine. Again, thinking into the future, what do you see as the main drivers behind progress in the field and what are going to be the biggest gains from ODR that we're going see?

Ethan: I think the field of ADR is coming to recognise that the future is ODR. Maybe that's a bit of an exaggeration, but I think it's inevitable that ODR technology becomes a part of all dispute resolution practice. It has to be. As I've said several times, we have these machines that can do things that skilled arbitrators or mediators have to do.

Aled: Yeah.

Ethan: That's not likely to put arbitrators and mediators out of business and lawyers. It is likely to challenge them because they won't be able to use simple techniques that might have been useful in the past, or simply to handle very simple disputes that lawyers might have charged for in the past. We're going to have more and more disputes. How mediators come to terms with this, how the mediation/ADR field comes to terms with this will be pretty interesting.

Aled: Yeah. One final question, Ethan. Professor Stephen Hawking, he's a mathematician, he's a theoretical physicist from Cambridge University, an altogether clever chap. He recently told the BBC that he worries deeply about artificial intelligence. He says that he believes that artificial intelligence poses one of the biggest existential threats. He says something so powerful and dangerous that it could put an end to the human race by replacing us with an army of intelligent robots. I'm guessing he's referring to the idea of singularity.

Putting the end of the human race aside for one moment and thinking about the survival of the mediator, right? Way more important. What sort of benefits could we expect as practitioners? How do we take advantage of potentially a whole avenue of new disputes opening up for us?

Ethan: Well, I worry that we're not taking seriously enough that line about conflict being a growth industry. Use of artificial intelligence, I can't second guess Professor Hawking, but I do worry that we create disputes without even thinking about it because we're put in environments where we're using technology in ways that we never did before.

Aled: Yeah.

Ethan: We don't have to do anything actually to generate disputes. We just have to live and adopt technology. On the other hand, to respond, we need to design systems. The whole field of dispute systems design isn't prepared really to figure out how to deal with large numbers of disputes. That's why I'm happy that in the U.K. you're engaged in trying to figure out how ODR can be adopted in different segments of the economy. I'm appalled that in the U.S.

there are no online small claims courts. Again, the technology for ODR works better with simple disputes than complex disputes. We have these courts in every state, small claims courts. When you think about it, that's what eBay has is a small claims court. They can do it. Government can't do it. It's appalling.

Aled: Why aren't they utilising what probably is quite primitive technology? It's there, it's available, it's scalable. Why aren't they tapping into it?

Ethan: There are probably multiple reasons. They would argue it's cost. I would say you just don't take these things seriously.

Sorry about that.

Aled: That's all right.

Ethan: This is another example of the unanticipated. Since it's ringing, let me just see who this is.

Hello? Hello?

Well, that's even better. It's nobody.

Aled: It's a computer calling you. You were saying that you don't think government's taking it seriously.

Ethan: It's very frustrating to me. I've talked to many state officials over the last six, seven, eight years about having online small claims courts. They would scale. They would be not a piece of cake to put together, but certainly doable. We have systems in place that provide more and more services over the web so that if you have a problem with a parking ticket, you can pay online.

Aled: Yeah.

Ethan: If you have a problem with some other kind of car-related thing, registering your car, so forth, you can do those things online. My hope is that we'll do enough of those things online, somebody in authority will finally realise, "Hey, we can provide dispute resolution services online". Because we're providing a lot of other services online. You asked me about history. It used to be we only provided information online. That was in the early days. That was extraordinary, but we now provide services, interactive services online, and that's what dispute resolution is. So why not? I think it's a matter of time. This issue of conflict as a growth industry. I understand that more than Professor Hawking's statement about AI.

Aled: It sounds like, I think it's Steve Blank's, product adoption life cycle. You've got the early adopters, mainstream market, and the laggards. It sounds like



the small claims courts in the U.S. are the laggards in terms of being really, really slow and resistant to adopting that technology. Whereas in the U.K. things are moving along in the context of small claims. It'll be interesting to see next year when the European directive, ADR directive, ODR regulations come in, to see how that changes things up.

Ethan: Yes, we're looking forward to seeing a great success there.

Aled: Well, we'll definitely keep you posted.

Ethan: Okay.

Aled: Ethan, look, you've been incredibly generous with your time once again. I can see Emma is waking up in the background, so I think that's definitely time to press pause on this interview. Thanks very much, Ethan.