

In the Alternative

The newsletter of the Illinois State Bar Association's Section on Alternative Dispute Resolution

COVID-19 Sparks Renewed Interest in Online Dispute Resolution

BY JAY SCHLEPPENBACH

The resolution of disputes online is not a new phenomenon. Indeed, the advent of the internet was quickly followed by conferences on its use for arbitration, mediation, and litigation, as well as a "virtual magistrate" pilot program that actually arbitrated cases electronically.¹ In the years that followed, a variety of online dispute resolution websites sprang up and, often just as quickly, went dormant.²

While online dispute resolution made some significant advances in Europe and the Pacific Rim, the United States lagged behind.³ Here and there, online dispute resolution programs thrived. For example, in the Franklin County, Ohio courts, parties have used an online Negotiation Space to resolve city tax issues, small

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Reflections on Ethics, Morality, and Codes of Personal Conduct

BY BY J.D. JORDAN & JUDGE MICHAEL S. JORDAN (RET.)

Retired Judge Michael S. Jordan, Mediation & Arbitration Services, Glenview, Illinois.

I was reading the reflections of my son, Jeff Jordan, regarding ethics and having a moral compass which is essential for every lawyer, judge, or other person in a position of trust. I obtained my son's permission to share his thoughts with all of you and hope this article brings each of us insights into the path we each choose to take.

Jeff Jordan is a public arbitrator hearing securities and employment matters and has also been on the staff of Mediation & Arbitration Services, which is my arbitration and mediation company.

My personal code of ethics is extraordinarily important to me as a salient grounding force, an indispensable polestar by which I navigate the blizzard of daily life and a means to effectively resolve

cranial conflict when external factors are diametrically opposed or otherwise violate that which I think is righteous and honorable. I believe that an individual's personal code of ethics and associated perception of morality has components that are developed both intrinsically as well as via external forces including parenting, education, role-modeling, peers, social cuing, unique interpersonal or transactional

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claims, credit card debt, landlord-tenant issues, and other civil disputes worth less than \$6,000.⁴ Similarly, Washtenaw County, Michigan has allowed parties to plead their traffic violations online, a process that takes fifteen minutes and has become so popular that thirty other counties have moved forward with similar programs.⁵ But there have also been valid concerns about online dispute resolution, such as the privacy and security of information submitted through such a platform, the potential impact on the transparency of dispute resolution processes, and the problem of uneven access to digital platforms across different socioeconomic groups.⁶ In short, online dispute resolution has frequently been discussed as a potential solution to a variety of legal ills, but has not to date become a major factor in the legal marketplace.⁷

A major shock has recently hit the legal world, and indeed the entire world, with COVID-19 closing courts and making in-person contacts of all kinds more challenging.⁸ Many leading thinkers are speculating that the world may be changed forever by the impact of this deadly virus.⁹ In the legal world, some are looking to online dispute resolution as a fitting solution for legal problems in the era of social distancing.¹⁰ Others are providing how-to advice on, for instance, moving mediations to a virtual platform.¹¹ Indeed, some major dispute resolution organizations have stressed their online capabilities in the midst of this crisis, touting videoconferencing as “highly effective in both mediations and arbitrations.”¹² And in China, where some of the earliest cases of COVID-19 were found, a March 3 guideline issued by the Ministry of Justice called for accelerated development of the country’s online arbitration systems as a means of speeding the delivery of justice and getting people back to work.¹³ As it has before, it seems again that online dispute resolution may be on the verge of a breakthrough.

Of course, it is also true that, just as

they have in the past, obstacles remain to the widespread implementation of online dispute resolution.¹⁴ So only time will tell if the United States will embrace online dispute resolution wholeheartedly in a way that it has not before. ■

1. See Robert J. Ambrogi, *Cyberspace Becomes Forum for Resolving Disputes* (1996), available at <http://www.legaline.com/dispute.htm>.

2. Robert J. Ambrogi, *Is There a Future for Online Dispute Resolution for Lawyers?* (2016), available at <https://www.lawsitesblog.com/2016/04/future-online-dispute-resolution.html>.

3. Joint Technology Committee, *Case Studies in ODR in the Courts: A View from the Front Lines* 1 (2017), available at <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20case%20studies%20revised.ashx>.

4. *Id.* at 2-3.

5. *Id.* at 4-5.

6. Joint Technology Committee, *ODR for Courts* 15-16 (2017), available at <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>.

7. See Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 *Tulane J. Tech. & Intell. Prop.* 55, 60-65 (2001).

8. Paul Hastings, U.S. Court Closings, Cancellations and Restrictions Due to COVID-19 (2020), available at <https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events/u.s.-court-closings-cancellations-and-restrictions-due-to-covid-19>.

9. *Coronavirus Will Change the World Permanently: Here's How.* (2020), *Politico Magazine*, available at <https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579>.

10. Yvette Durazo, *In an Era of Chaos with the Coronavirus: The Solution to Support our Leaders is Online Mediation* (2020), available at <https://www.mediate.com/articles/durazo-coronavirus-online.cfm>.

11. Clare Fowler, *Mediating with Zoom* (2020), available at <https://www.mediate.com/articles/online-mediating-zoom.cfm>.

12. JAMS Mediation, Arbitration, ADR Services, *Coronavirus (COVID-19) Advisory for JAMS Visitors* (2020), available at [https://www.jamsadr.com/news/2020/coronavirus-\(covid-19\)-advisory-for-jams-visitors](https://www.jamsadr.com/news/2020/coronavirus-(covid-19)-advisory-for-jams-visitors).

13. Vincent Chow, *China Pushes for Increase in Online Dispute Resolution as It Reboots Economy*, *Law.com* (2020), available at <https://www.law.com/2020/03/19/china-pushes-for-increase-in-online-dispute-resolution-as-it-reboots-economy-292-63799/>.

14. Graham Ross, *Challenges & Opportunities in Implementing ODR* (2003), available at <https://www.mediate.com/Integrating/docs/ross.pdf>.

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Reflections on Ethics, Morality, and Codes of Personal Conduct

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interactions in addition to philosophical introspection mediated by both direct and indirect catalysts.

My career as an arbitrator mandates that I pay particular deference to social responsibility by way of adhering to externally prescribed codes of ethical conduct in conjunction with the global positioning system of moral imperatives that remain steadfastly cemented deep within the recesses of my cerebral cortex. As I will contemplate below, I hold no moral attributes in higher esteem than the eminent concepts of integrity and empathy; I believe this moral tandem represents the umbrella under which all other moral components dynamically cascade and interact amidst a perennial onslaught of situational responsibilities that require ethical decisions.

I resolutely believe that my personal, ethical disposition was primarily influenced by the curiosities and peculiar whims of genetic happenstance and — far more notably — exceptional, outstanding parents who journeyed to the farthest reaches of the universe in order to teach me about the importance of treating everyone with as much courtesy, dignity and respect as possible. Moreover, my parents concurrently instilled the significance of habitually applying integrity, honesty and responsible deliberation to all personal and professional aspects of my daily interaction with individuals and entities.

For your edification I must preface the following statements by informing you that I was adopted at birth. My parents' delightful fiftieth anniversary celebration occurred two years ago and in their honor I crafted a two-sentence statement on a commemoration card that encapsulated my profound appreciation of their ceaseless efforts that continue to this day to foster and continuously emphasize behavior that is consistent with integrity; the words I chose prompted my mom and dad to emote tears of joy: "If I could have hand selected my parents I would have chosen both of you. How fortunate for me that you chose to

adopt me."

My dad is a retired circuit court judge who enthusiastically continues to work full-time as a mediator and arbitrator, my mom is a retired Chicago Public School System teacher who passionately continues to serve as a social worker, my older sister is an incredibly gifted special needs educator who taught me how to read when I was four years old, my younger sister is an exemplary office manager and master multitasker and my younger brother is a courageous and noble firefighter.

Perhaps, given the constitutionally unwavering ethical pedigree I was colossally fortunate to internalize, incorporate and subsequently employ, I have absolutely no tolerance for ethical predilections that transgress integrity in any perpendicular manner. Therefore, I stand tall for tolerance, kindness, inclusion, acceptance, respectfully articulated alternative viewpoints and, regally perched atop the zenith of ethical conduct, empathy. Conversely, I place no worth or practical social value of any kind on either actions or inactions involving corruption, fraud, dishonesty, manipulation, duplicity, abdication of responsibility or any behavior that knowingly and nefariously takes advantage of other human beings, animals or Earth.

The ethical framework I espouse for making decisions is an amalgamation of the aforementioned reciprocity of nature and nurture in addition to a kinetic, fluid journey of introspection, refinement and administration of my personal, ethical code that continues to bloom and bear fruit to this very moment in time; I expect such beneficial augmentation to persist until the frequently discombobulating roller coaster of life arrives at its final destination. With respect to the manner in which my ethical architecture informs my decisions, I find myself judiciously, contemplatively and vigilantly considering whether or not a particular course of action I ultimately select would make my parents, sisters and brother proud.

If I encounter so much as a gossamer, Lilliputian inkling of moral friction, which typically manifests itself as visceral, internal disharmony, I tenaciously reassess, reevaluate and reapply principled mathematics until Goldilocks locates the appropriate port of call. Although some situations are by nature fraught with tangential complexities or ride the inevitable social lightning of endgame uncertainty, I annex and embrace immense pleasure in my ability to sleep peacefully knowing that my circumspect, deliberated perception of virtue and subsequent implementation of actions consistent with integrity and empathy will, to the consummate vertex of my capability and in honor of my family, remain indispensable, imperative and inviolable. ■

Case Briefs

Chamber of Commerce of the USA v. Becerra, No. 2:19-cv-02456-KJM-DB (E.D. Cal. Feb. 6, 2020). California legislation that would ban mandatory arbitration agreements between companies and their employees must be enjoined from going into effect because it is likely preempted by the Federal Arbitration Act and businesses would be irreparably harmed by the changes it would make to the California employment market.

Bigger v. Facebook, Inc., No. 19-1944 (7th Cir. Jan. 24, 2020). Employees who have signed arbitration agreements waiving their rights to participate in an FLSA collective action need not be provided opt-in notice.

Abernathy v. Doordash, Inc., No. C 19-07545 (N.D. Cal. Feb. 10, 2020). Employer could not avoid arbitration based on large

filing fees where it had agreed to pay those fees in a valid arbitration clause.

Card v. Wells Fargo, No. 3:19-cv-01515-SI (D. Or. March 16, 2020). Genuine disputes of material fact as to whether credit card holder received the arbitration agreements in the mail from bank or agreed to arbitrate when applying for card online prevented summary judgment enforcing arbitration agreement.

Soaring Wind Energy, L.L.C., et al. v. Catic USA Inc., No. 18-11192 (5th Cir. Jan. 7, 2020). Arbitration award would not be invalidated simply because parties appointed an unequal number of arbitrators where agreed-upon appointment process was followed to the letter.

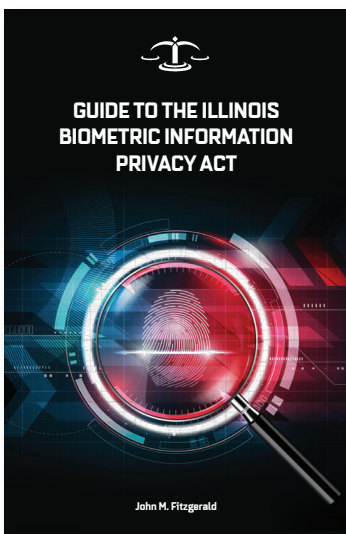
Monster Energy Co. v. City Beverages, LLC, Nos. 17-55813 & 17-56082 (9th Cir. Oct. 22, 2019). Arbitration award would be

vacated on the grounds of evident partiality where arbitrator failed to disclose that he had a direct ownership interest in arbitral institution, and that arbitral institution had administered 97 arbitrations for one of the parties over the previous five years.

Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019). Although absent class members didn't affirmatively opt into specific arbitration proceeding, by signing employer's employment agreement, they consented to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration. ■

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