

Is ODR ADR?

A Response to Carrie Menkel-Meadow

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Whenever I get a chance to present to an audience of dispute resolvers, I like to ask this question: “Do any of you have experience with online dispute resolution?” Invariably, only a couple of hands go up. But then I ask: “Have any of you used email with your parties?” More hands go up. “Have any of you done a teleconference with your parties?” More hands. “Have you sent out calendar invitations to your parties? Have you sent Word documents with tracked changes? Have you done a videoconference, like Skype or Facetime?” Almost all the hands in the room are then up. “Congratulations,” I say, “you have experience with online dispute resolution.”

Online Dispute Resolution (ODR) is the use of information and communications technologies to help parties resolve their disputes. Many dispute resolvers presume ODR is synonymous with the internet, and it is true that the internet is the defining information and communications platform for our age. But other, less sexy technologies also fall into this definition of ODR: telephones (both wired and unwired), LCD projectors, spreadsheets and word processors all fit as well. These technologies have become such a part of our lives that we do not even notice when we make use of them. That many mediators and arbitrators use these technologies every day goes unmentioned because technology has become the new normal.

Our parties live their lives both online and offline. It is not uncommon to send an email, make a phone call, visit in person, send a text message and post to Facebook all within five minutes. Is there a distinction between our online and offline lives? Absolutely not. It is all part of the same continuum, just different channels. And to try to divide one activity from the other is almost impossible. Our practice as dispute resolvers must similarly flow between the different communication types if we are to deliver services in a way that is helpful to disputants. To separate ODR from ADR, or to suggest that resolutions must play out in either one or the other, is to perpetuate a false dichotomy.

ODR and ADR are fundamentally the same thing. Doctors practice medicine. When they introduce technology into their work, they do not consider that a new field – it is still medicine. When psychologists provide counselling over a Skype videoconference they do not consider that a wholly new discipline – it is still psychology. I believe that dispute resolution processes administered through technology are a similar extension: adding tools to the dispute resolver’s toolbox, but not creating a fundamentally new activity. ODR does open new opportunities for dispute resolution, but essentially it is the same activity as ADR, just using different tools.

The field of ODR shares the same practice, theory and ethical foundations as ADR. The early ODR platforms were exact copies of offline ADR processes, just coded into software instead of managed by human mediators. We chose the name ODR at the beginning of the field to reflect this close relationship between online and offline practice. ODR has grown directly out of ADR, and the leaders who have driven the growth and refinement of ODR all began with the ADR field. As Jim Melamed, CEO of Mediate.com, has observed: "If you squint your eyes a bit and look out into the future it's very hard to tell ODR and ADR apart. That becomes truer with each passing day."

The goals of the ODR field mirror the goals of ADR. As Carrie summarized the goals of ADR in her reflection piece (and she would know, as the mother of ADR), they include access to justice, efficiency and transparency of dispute resolution, quality of solutions, satisfaction and justice. I have attended the ODR Working Group meetings for more than fifteen years and I am confident in saying that each of those topics have been front and centre at each gathering. The National Center for Technology and Dispute Resolution says as much in the Principles posted on odr.info/ethics-and-odr. We have covered similar topics in UNCITRAL's ODR Working Group and in the various books and articles published on ODR over the years. Paralleling Carrie's role as the mother of ADR, Ethan Katsh has used his position as the Father of ODR to make sure we have never strayed far from these core objectives.

Carrie notes that the ADR movement was based on three pillars: quantitative improvements (more efficient), qualitative improvements (better quality) and expanded participation. She notes that ODR seems focused on the first and the third, but she is not certain about the second. Well, I cannot speak for everyone in the ODR field, but I have observed a broad-based commitment to improving the quality of resolutions achieved within the community of ODR practitioners. When Frank Sander introduced the concept of the Multi-Door Courthouse at the Pound Conference in 1976 he gave the example of a courthouse with different doors, each providing a customized resolution process to meet the needs of particular kinds of disputes. With ODR we now have the potential to offer an online Multi-Door Courthouse with not just a couple dozen doors, but potentially hundreds or thousands of doors, each enabling us to 'fit the forum to the fuss' by providing a process customized to meet the specific needs of parties. In fact, we can even build new doors 'on the fly', assembling appropriate resolution flows even as the parties are explaining the specifics of their situation. The promise of ODR in improving the quality of resolutions is enormous, and we are just getting started in exploring its full potential.

Carrie also notes that ODR may help with access to dispute resolution, but the 'justice' part may be limited. This is an excellent point, and one worthy of further discussion. I have found that online and offline dispute resolvers are sometimes loath to shroud their efforts in the shimmering robe of 'justice' because that mantle has already been claimed by the lawyers and the courts. At Modria, we talk about 'fast and fair resolutions', and the hallowed image of Lady Justice holding the scales is nowhere to be found on our website. We have learned that most of the disputants who use our systems are looking for a trustworthy, fair,

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transparent process that can provide a solution to their problem quickly and cost effectively. We do not build processes that block access to legal remedies, so if a party wants to pursue the matter further (all the way to Lady Justice) that is their right – but 99.9% of the time the resolution options we provide are adequate for our parties' needs. Some within UNCITRAL have referred to ODR as 'rough justice', essentially redress without all the procedural protections of the courts. But if the cost of those procedural protections makes redress processes inaccessible to parties, I believe it is worth rethinking their necessity in some contexts.

One difference between the development of ADR and ODR has been the role played by the private and public sectors. ADR was largely developed by academics, lawyers, judicial officers, government agencies and non-profits. There have been some for-profit organizations that have led the charge (e.g. JAMS and Endispute), but they have primarily focused their efforts on higher value commercial matters. Because technology moves fast and is expensive to build and maintain, much of the innovation in the ODR space has come from the private sector. Even the use of 'pitch sessions' and 'hack-a-thons' to showcase ODR at conferences highlights the private, entrepreneurial framing for these innovations within the ADR field. I sense that some in the ADR field suspect the motivations of ODR providers because of this profit motivation. I remain optimistic that the revenue-generating opportunities within ODR can coexist with the social benefit objectives described above (and in fact, I believe this private orientation is beneficial for the ADR field as a whole), but it is important that we name this tension around the expansion of ODR platforms.

It is true that technology brings difficult questions to the practice of dispute resolution, as Carrie notes. ODR raises new ethical dilemmas that are not adequately addressed in existing ADR ethical standards and trainings. ODR service providers are going to need to learn new skills and new tools in order to be effective. We need to create and continually audit the software platforms that undergird ODR to ensure that they live up to our procedural requirements and ethical obligations to our parties. Also, ODR is generating opportunities that will bring in outsiders who do not come from the ADR field, and we need to regulate and certify ODR initiatives to prevent abuse.

As Carrie notes, the digital divide is still a problem. But the last decade has shrunk that divide considerably. A few years ago MIT was trying to get the cost of a laptop below \$150 through the One Laptop Per Child project; now we have tablets a hundred times more powerful being provided to school children in rural India for \$7 apiece. There was a time when telephones were available only to the rich; now telephones are considered to be ubiquitous, and we do not think of telephone-based services as perpetuating the digital divide. We are just around the corner from ODR being seen in the same way.

There is a lot of work left to do. If we want to build a new justice system for the internet based on ODR, then we are really just getting started. We cannot imagine all the challenges that will emerge along the way. We need to be open to the concerns (expressed eloquently in *The Hague* by Nancy Welsh and Leah Wing, and further developed in an excellent new article in *Negotiation Journal* by John Zeleznikow and Noam Ebner), much in the same way the ADR field needed to lis-

ten to the constructive criticisms of thinkers such as Laura Nader, Susan Silbey and Sally Merry during its development.

Personally, I believe that ODR is the future of ADR. That definitive statement may make some ADR pioneers uncomfortable, and, of course, there will always be a place for offline dispute resolution. But I believe that ODR offers the strongest opportunity for ADR to expand and deliver on its fullest potential. Dispute resolvers should learn about ODR tools and experiment with ODR platforms, and training programmes should make ODR a core component of ADR education, so that we can all work together to ensure ODR lives up to the mission and vision of the ADR movement. Working together as a field, we can manage the development of ODR so that it expands the availability of fair resolutions and improves access to justice.