Creating Standards for ODR

Daniel Rainey[*]

My comments today will focus on three issues: (1) The various standards and ethics work being done currently as they relate to online dispute resolution (ODR); (2) some of the problems inherent in creating meaningful standards for a 'creative' field like ADR/ODR; and (3) the limitations of standards when it comes to opening up dispute resolution systems to those who have traditionally been unserved or underserved.

I won't be able to cover all of the efforts that are currently underway to establish ethical and practice standards that may have an impact on the development of ODR systems, but I do want to highlight five projects I think may have some significance in the long run.

First, the National Center for Technology and Dispute Resolution (NCTDR), under the guidance of Leah Wing, has been conducting a dialogue about ethics and ODR.[1] Leah has published an article in the *International Journal of Online Dispute Resolution* that introduces the major issues involved in the discussion of ethics and ODR,[2] which is defined for purposes of this work in ethics as "inclusive of any process or intervention used to handle disputes that employ electronic communications and other information and communication technologies."[3] That's pretty much in line with the definition of ODR that I've been using for some time – the intelligent application of information and communication technology to any form of dispute resolution.

The NCTDR has identified 17 ethical principles that should guide development of ODR systems and ODR practice. Taken at the highest level, these principles speak to creating the ODR environment to which we should aspire.

A second effort takes these aspirational goals and begins to move in the direction of standards for behaviour that may guide those involved in the creation of and application of ODR.

The International Council for Online Dispute Resolution (ICODR) is being formed now, and will probably officially 'roll out' at the International ODR Forum in New Zealand a bit later this year. A central feature of ICODR is the creation of an organization that can work with practitioners and developers across the spectrum of ODR to create standards and criteria broad enough to allow innovation but specific enough to provide real guidance. Additionally, the standards developed and managed by ICODR will be an important element for trust building

* Daniel Rainey is a Fellow of the National Center for Technology and Dispute Resolution, and a Member of the Self-Represented Litigants Committee of the Virginia State Supreme Court's Access to Justice Commission.

1 *See* the work on the ODR.Info site: http://odr.info/ethics-and-odr/.

2 L. Wing. 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field', *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29.

3 *See* 'Ethical Principles for ODR', available at: http://odr.info/ethics-and-odr/.

among potential parties who need ODR platforms and practitioners to guide them through the ever-increasing digital conflict environment being created by e-commerce, e-Justice and the near universal incursion of technology into our social relationships.

NCTDR and ICODR are working on ethics and standards that affect everyone in the ODR environment – third parties, applications (fourth parties), developers, service providers, etc. There are a couple of efforts underway that focus more specifically on standards of behaviour for third-party practitioners – mediators, facilitators, conciliators, lawyers, arbitrators, etc.

The International Mediation Institute (IMI), through an ODR Mediation Standards Committee, has developed standards for e-mediators, and standards for educators and trainers who prepare third parties to operate in the ODR environment. The IMI standards are presented in a manner that allows for the establishment of certification programs, evaluation and monitoring of training, and common areas of competency that should be addressed to prepare practitioners to operate responsibly in an ODR environment.

The Association for Conflict Resolution (ACR) and the American Bar Association Section of Dispute Resolution (ABA SDR) have undertaken a review of the Model Standards for Mediators adopted more than a decade ago by ACR, the ABA and the American Arbitration Association (AAA).[4] The ACR/ABA project does not seek to rewrite the model standards, and it does not aim to revise them with just ODR in mind. Instead, the product of the project will be a set of commentaries attached to each of the 10 standards that will address updated approaches to each standard based on changes in the ADR environment over the past decade or more, including the rise of ODR. Like the IMI project, the ACR/ABA project will focus on third-party practitioners, not on platforms, developers or providers, although there may be some suggestions about standards for platforms.

In the United States, the National Center for State Courts (NCSC) is working on a set of standards very different from the ones being discussed for practitioners and providers. The NCSC is putting together guidelines and standards that can be used to write requests for proposals by court systems that want to use ODR as an integral part of their court processes. Essentially, they are setting up standards for the courts that answer the question, "for what should I ask when seeking bidders for ODR systems?"

The fact that all of these efforts are going on in an environment that is only loosely organized is an issue I'll return to later in this presentation. But first, let me speak very quickly to a trend that is making the creation of workable standards for ODR even more important: the adoption of ODR/ADR as a formal adjunct to justice systems.

4 Introductory comments regarding the status of the ACR/ABA/AAA model standards can be found in two publications. D. Rainey, 'Model Standards of Conduct for Mediators', *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 30-40; and S.N. Exon, 'Ethics and Online Dispute Resolution: From Evolution to Revolution', *Ohio State Journal on Dispute Resolution*, Vol. 32, No. 4, 2017, pp. 606-659.

We are all familiar with the 'big bang' birth of ODR in the explosion of e-commerce in the late 1990s and early 2000s. All of a sudden, it seemed, we were creating disputes in an environment unlike any we had before, and we were creating them in numbers that made them impossible to handle in a traditional, face-to-face manner. We had to create ODR, and Ethan Katsh, Colin Rule, and others did so with what has come to be the 'poster child' for e-commerce ODR – eBay.

The need for some coherent ethical principles and standards for ODR practice is being given more recent and urgent emphasis by the increasing adoption of ODR by justice systems around the world. The United Kingdom is perhaps the leader in this move, but others are quickly following the United Kingdom's lead.[5] At the recent Global Pound Conference, two of the strong recommendations from the participants called for the use of dispute system design to revolutionize the justice system by (1) formally integrating ADR into court systems, and (2) increasing education about ADR in law schools and other educational venues.[6] While the Global Pound Conference recommendations did not specify the use of ODR, the significance of this for ODR is that in most cases the energized injection of ADR into court systems is being accomplished through the use of ODR platforms.

If the need for standards is growing, and there are a number of groups working on establishing ODR standards, what are some of the problems we can expect to arise?

First, and probably most often cited as a reason for not establishing firm standards for accreditation is the 'creative' nature of ADR practice. In fact, the ABA specifically cited the desire to encourage innovation as a reason for not establishing certification criteria for lawyer/mediators. Establishing standards for manufacturing widgets is a lot easier than establishing standards that work equally well across the board for third parties engaged in child custody cases and third parties engaged in complex, multi-party environmental cases. The ACR/ABA project I mentioned earlier is focusing on creating commentaries connected to general standards because when the discussion about whether and how to rewrite the standards first began, the only consensus opinion among the group was that each of the areas of practice would need special and specific clarifications to the general standards. Unifying standards in a field that is, by nature, diverse will continue to be a challenge.

5 For examples of the UK interest and research in digital justice, *see*: Criminal Justice Joint Inspection, 'Delivering Justice in a Digital Age: A Joint Inspection of Digital Case Preparation and Presentation in the Criminal Justice System', April 2016, Criminal Justice Joint Inspection – HMCPSI, HMIC. (Arolygiad ar y Cyd Cyfiawnder Troseddol), available at: https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/delivering-justice-in-a-digital-age.pdf and Civil Justice Council. 'Online Dispute Resolution for Low Value Civil Claims', Online Dispute Resolution Advisory Group, February 2015, available at: https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

6 For a discussion of dispute resolution design, ADR and the Global Pound Conference, *see*: L.P. Love, L.B. Amsler, & M. Karol, 'Dispute System Design Can Help', *Dispute Resolution Magazine,* Spring 2018, pp. 15-19.

Second, the existence of multiple actors in the ODR world calls for not just one set of standards, but standards that address the separate activities of those actors. Standards for practitioners must tell third parties how to behave in relationships with primary parties. Standards for fourth parties (apps and platforms) must set parameters that describe how algorithms and AI must behave in relationships with primary parties. Standards for developers must address a number of issues, including the basic ADR/ODR knowledge that developers should have in addition to their coding skills. Standards for service providers must address issues of privacy and confidentiality in an online world where privacy is, some would argue, an illusion. The fractured nature of the actors and the standards they need will continue to be a challenge.

Finally, the very fact that so many organizations are addressing the ethics and standards issues will itself be a challenge. Some of you may remember the days when there were competing standards for broadcast television (NTSC, PAL and SECAM), and then competing standards for home video (in the United States, VHS and BetaMax). Ultimately, the advancing nature of digital transmission has made those standards 'battles' a quaint memory. But they were not quaint at the time – they meant that the things done in one format were totally shut out of use for formats that might be used literally right next door. The challenge for ODR ethics and standards development will be to find or create an organization that can speak to issues across all of the types of practice and the range of actors to establish credible, acceptable guidelines for development and practice, accessible to and used by all.

As a final note, I'd like to raise an issue that is perhaps only marginally related to standards, but which I think is one of the more important issues facing the worldwide justice system as ODR becomes more common.

Let's assume for the moment that we, as the ODR community, are successful in creating a standards environment that makes sense, is adopted widely and works. What that will do is apparent – it will make ODR systems more fair, efficient and inviting. But lacking any other actions, it will, in my opinion, make ODR access to courts and access to justice more appealing and easier primarily for those who already have access. It will not, I think, automatically mean that those who have been underserved or unserved will see standardized ODR as an open door unless we, as the ODR community, think about how to present our fair and open systems to those who have an inherent bias against entering the justice system.

In the United States, estimates of how many justiciable issues never enter the justice system at all range as high as 70%. Seven out of 10 who have experienced a dispute or trauma that would have standing in a courtroom never get so far as consultation with an attorney.

The most common ways to explain this phenomenon are pretty obvious to anyone who has ever had anything to do with the justice system. The perception, and most often the reality, is that even talking to a lawyer, much less engaging in a legal proceeding, is too expensive in terms of time and money. The perception, and the reality, is that, even if one could afford the initial approach, the system favours those with enough money to use the judicial system as a bludgeon. There

is, generally, a basic lack of understanding of the judicial process among those of limited resources: it is not obvious whether something that has happened is appropriate for legal action, and there is a basic lack of knowledge about how to proceed even if legal action is appropriate. Finally, and perhaps most powerfully, among many there is a basic fear of the justice system. Literature abounds that offers tips on how to overcome anxiety related to the justice system – and this literature is for licensed attorneys and experienced clients. For a great many, if not most of the general population, courts are where things happen *to* you, not *for* you.

In the United Kingdom, the recently released Justice report on digital exclusion raises a number of issues related to the impact of ODR systems used as a formal entry point into the justice system.[7] Our ultimate challenge as ODR practitioners, developers and providers is to create standards that offer fair and open treatment of parties entering ODR systems, and to go out and explain why that fairness and openness really are a reason to approach and trust the justice system.

7 Justice, 'Preventing Digital Exclusion from Online Justice', released 4 June, 2018. Available at: https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf.