ODR Ethics and Standards

The Revised NCTDR and ICODR Standards

*Leah Wing, Daniel Rainey, Moreneke Obi-Farinde, Alberto Elisavetsky & Pablo Cortes**

Abstract

The panelists present the latest edition of the online dispute resolution standards published by the National Center for Technology and Dispute Resolution (NCTDR) and the International Council for Online Dispute Resolution.

Keywords: ODR, standards of practice, ethics.

1 Leah Wing

Thank you very much, and welcome … my name is Leah Wing, I'm director of the National Center for Technology and Dispute Resolution and this discussion is going to be on the new ODR Standards that we are launching today – they come from a collaboration between the National Center for Technology and Dispute Resolution (NCTDR) which has 50 Fellows from around the world, and the International Council for Online Dispute Resolution. All the panellists today are Fellows of the National Center. They are co-founders, along with others of the International Council for Online Dispute Resolution which we affectionately call ICODR and they also either historically or presently are serving as board members of ICODR.

So, with technology being incorporated into the ways we handle disputes from prevention through resolution and follow-up it really has exploded the boundaries of what we can imagine and what we can accomplish – this we've seen over the last almost 25 years. Tech expands access to justice; we have proof of this; it's making an enormous impact on efficiency, convenience and expertise and I pull those three out in particular because the visionary that he is, the founder of the field Ethan Katsh, who's also the founder of the Center, created that idea and I suggest you check out his book with Janet Rifkin from 2001, the first book on ODR in the field. They created this triangle and talked about the importance and the value in the foundational aspects of convenience, efficiency and expertise. But now as Ethan

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mentioned in the opening today, we have AI to contribute to that expertise. We can see on the ground and in the research that it's reducing court backlog, it's making it possible, as someone in the audience there in Dublin already mentioned today, to handle disputes across jurisdictions and across cultures. I think it's incredibly exciting how it's increasing the multi-modal aspect and the multi-linguality of our ability to engage, particularly in multiparty disputes. But at the same time we also have proof again on the ground in real life experiences as well as in our scholarship proving that technology magnifies risks and inequalities. When we have poor data, whether that data are poor because they're insufficient, they're incomplete or whether they're biased (whether we're aware of that but we use it anyway or whether we're unaware of it), when we add that to limited transparency about data collection and management, when we have limited accountability all this leads to harm. When we don't have systems in place to research harm-doing and repair it. Maybe the participant knows that they've been harmed, but they were not able to access the process to complain about that or maybe they didn't even know that they were harmed, or we didn't collect data to find out the ways in which they experienced inequality in the process or an outcome. And we can have both unintentional and frankly, intentional design of the dispute handling systems using technology that benefits some more than others; whether it's designed purposefully to reward repeat players that participate in the marketplaces more often than others or whether it's inadvertent. If we're not required to identify and redress patterns of inequality, this leads to the magnification of risks. And, frankly, while there has been wonderful work around the world incorporating technology into some regulation and some legislation, arguably most court legislation that's not explicitly about ODR does not focus on aspects that are important to the use of technology and dispute handling such as artificial intelligence, machine learning and data transparency.

We would argue that ODR ethics is not just about trying to be a moral practitioner or living up to an abstract set of standards regarding good behaviour for systems. It's actually about answering questions that are dilemmas for practice as well. When practitioners become familiar with the use of tech, what questions are on their mind regarding new risks, not only for the parties but also for the third party? For example, let's say you take off-the-shelf software where AI bias is in existence, even if it's unintentional. Going back to the panel before, Chris mentioned the problem with facial recognition technology and how there's a racial bias, there's a skin tone bias, this is just one of many examples we can think of. Who is going to be held accountable? Is it the court or the law firm or the ADR practitioner who employed that software? Is it the software developer? I'd like to wonder out loud whether fundamentally the insurance industry is going to end up defining who is liable by who they're willing to cover and how that gets framed regarding AI bias. What new protocols are necessary when we employ technology? As a mediator I think about when I ask individuals to sign an agreement to mediate, which is a requirement under some legislation in some jurisdictions, what new protocols maybe need to be included? Do I need to double check with the participants to make sure that they are not only familiar with the technology but that they agreed to use the specific forms of technology? How can tech help us

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transform the way we handle disputes to be not only be cost-effective but also secure? And there's a tension there because probably the most secure processes potentially have the ability to not be the most cost-effective. So how secure is secure enough? How can we reduce risks for all but particularly for those most vulnerable? And I know what is exciting about the technological transformation is that it has really helped reduce the digital divide – but for people for whom it has not reduced the divide it is not a surprise that COVID helped reveal to the rest of us how the digital divide actually still exists. We've seen who does not have access to technological devices or for whom Wi-Fi or broadband are actually quite insecure – we've seen that very much regarding health care and regarding education, when people have needed to go online. How is that impacting us regarding attempting to have courts and ADR more available through the use of technology? And what additional infrastructure and training are needed on ethics to help people answer questions such as these?

We believe that to most effectively harness ODR's potential and to reduce risk, accountability measures should reflect a variety of things. They must reflect how tech actually functions across various jurisdictions and sectors. They must deal with the reality of the types of risks that actually occur, and we'd say look at those for whom the risks are most great as a way of considering how we need accountability measures put in place. And we don't want to just try to prevent the negative. How can we have standards which are frankly just the floor – they are not the ceiling, they are the floor of what is acceptable for practice – how can we have an expectation that the floor is actually working to support positive transformation of how we handle disputes? And importantly we need standards that respond to the fact that technology is rapidly changing and that people are increasingly using it.

So let me just very briefly and quickly highlight the relationship between standards development in the National Center and ICODR. In the late 1990s Ethan invented ODR and with Professor Janet Rifkin developed what is now the National Center for Technology and Dispute Resolution and by 2009 the Center issued its first ODR Standards. In 2016 it presented Ethical Principles for Online Dispute Resolution[1] which are a set of values like a GPS, more of an umbrella to help point us in the direction of continuing to develop both good practice and also ongoing standards and in 2017 the Center created ICODR for a dual purpose. One was to be a membership organization for the field, and if you're not yet a member we invite entities as well as individuals to please consider joining. The second purpose was to further standards development in the field. In 2017 ICODR issued standards that were based on the Ethical Principles for ODR and on the 2009 ODR Standards. And now five years later ICODR and the Center have jointly issued these standards – today is the launch. The scope for these revised ODR Standards is based on the notion that they are to be seen as interdependent, not to be cherry picked, but to be seen as necessary to apply together. They're not designed to replace other relevant ethical, legal or technical standards – those exist in various jurisdictions and according to various forms of dispute resolution and we just want to point out that they're also directly related to the Universal Disclosure Protocol for Mediation,

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1   See https://odr.info/ethics-and-odr/.

which Dan and another Fellow, Ana Maria Maia Gonzalves, are going to talk about tomorrow. So here are the nine ODR Standards. They have been revised since 2009 and I just want to point out a couple of the revisions.

So let's look briefly at two.

ODR platforms and processes 'must be easy for parties to find…and participate in and [must] not limit their right to representation'. They should be 'available in communication channels accessible to all the parties, minimize costs to participants, and be easily accessed by people with different types of abilities'.[2] We have sought purposefully to make this set of standards both thin and broad. What I mean by that is we know that they need to be interpreted in different cultural settings and different sectors – interpreted for use by courts, by mediators, arbitrators and other systems as well. So there needs to be flexibility and at the same time some set of standards, some rules to which we can hold people and systems accountable. So, if you think about just making access to ODR easy to find, where do we find it on the court website? Where do we find information if you go into a courthouse? If I think about an e-commerce use of ODR, where is it going to be found on the e-marketplace platform? These are questions that need to be interpreted, based on the setting.

Under the ODR Standard 'Accountable' we have added in this revision auditability, so let me point towards that. 'ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve. ODR platforms must be auditable and the audit made available to users. This must include human oversight of i) traceability, of the originality of the documents and of the path to outcome when artificial intelligence is employed, ii) determination of the relative control given to human and artificial decision-making strategies, iii) outcomes, and iv) the process of ensuring availability of outcomes to the parties.'[3] So here I just want to highlight one thing. This requires a kind of transparency. We'll need far more guidance and we want help from all of you as you work in your particular sector or jurisdiction to be putting out guidance for what is relevant regarding traceability, regarding human oversight. This again is the floor but we need guidance about how to achieve that. It also relates to transparency which is another one of the ODR Standards—beyond being Accessible and Accountable, the ODR Standards articulate that practitioners and platforms must be Competent, Confidential, Equal, Fair and Impartial, Legal, Secure and Transparent.[4] And let's just look at the last line under Transparent: 'Users must be informed in a timely and accessible manner of any data breach and the steps taken to prevent its recurrence.'[5]

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2   Quoting from the ODR Standard, Accessible, see https://icodr.org/standards/ and https://odr.info/wp-content/uploads/2022/05/NCTDR_and_ICODR_ODR_Standards_2022.pdf.
3   Quoting the ODR Standard, Accountable, see https://icodr.org/standards/ and https://odr.info/wp-content/uploads/2022/05/NCTDR_and_ICODR_ODR_Standards_2022.pdf.
4   See all nine ODR Standards at: https://icodr.org/standards/ and https://odr.info/wp-content/uploads/2022/05/NCTDR_and_ICODR_ODR_Standards_2022.pdf.
5   Quoting from the ODR Standard, Transparent, see https://icodr.org/standards/ and https://odr.info/wp-content/uploads/2022/05/NCTDR_and_ICODR_ODR_Standards_2022.pdf.

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I hope that you will find these useful – on behalf of the leadership of the Center and of ICODR we're excited to be launching this today. We have related recommendations that we'd like to encourage people to consider.

One is self-certification. This could be something that inside your own jurisdiction is shared and announced, but we also encourage you, if you're an ICODR member to live up to the ODR Standards that now can be found on the Center website, odr.info. On our website we list ODR providers and if you're an ODR provider and we don't have you listed please be in touch. We're not endorsing anyone but we try to list all that we know about and there's a section at the top for those who self-certify as complying with these ODR Standards. We hope that people will consider incorporating them inside their entities, whether they're public or private. And importantly, we encourage those who are doing systems design or procuring the services of others to do systems design to consider the ODR Standards in design requirements as well as in the definition of success when a system is implemented. And lastly, we hope that folks will be actively examining the impact of designs and their use across disputing demographics and case types and using the ODR Standards to help measure what success is and where dilemmas still need to be faced.

2   Daniel Rainey

We are going to ask a few people to comment specifically on the 'so what' question. Now that we know about the standards, what difference does it make to your particular practice? Pablo Cortes is here in the room, and online we have Alberto Elizavetsky and Morenike Obi Farende and so if you add me to the mix we'll have four different ideas of what this means for dispute resolution practice.

My take on this may be a little different from some of the others. I don't deal in e-commerce and I don't deal in courts. I deal in problems between people. I am a practitioner. I do mediation, I do some arbitration, I do facilitation, I do a little bit of organizational development. I am not working with millions and millions of cases, although, in some cases I'm working with millions and millions of dollars. And so for me, one of the things that stands out about the idea of a set of standards is the idea of competence. What does competent mean to a practitioner whose basic job is to stand between people who have differences and try to figure out what to do about those differences. It's hard enough to talk about what competent means when you are talking about non-ODR. When are you competent as a third party? So I've done 1,000 cases. Well maybe I did a 1,000 cases badly – volume doesn't mean 'competent' necessarily. I took a course. Well okay. Did I just barely get by or was I at the top of the class? Depending on who you talk to, there are up to 50 different identifiable types of mediation around the world. And so if I'm doing one type of mediation very well and my parties are very happy with me taking that approach I may be quite competent. But if I take the same approach with a set of parties whose expectations or needs are different then I may in fact by doing the same thing be incompetent. So when I talk about competence from a practitioner's point of view, one of the things that I firmly believe is that if you're

going to operate as a third party you ought to be competent to not just understand the elements of ADR, but you ought to be able to understand all the elements of ODR and you should incorporate those into your practice.

If you look back over the past two years, there's what I call the second big bang for ODR – which is the COVID crisis. The first big bang being back in 1992 when commerce was made available on the internet. That obviously was the first big bang for disputes online and for dispute resolution online. But when COVID hit, everybody started using technology and at that point if you were doing training in ODR you were in great demand because people all of a sudden panicked. Well as we've gone on and everybody now in the world uses Zoom and they've been using it for two years, the assumption a lot of people have is I can use Zoom confidently so I know everything I need to know about ODR, which is of course not true. There are things that one needs to know about communication theory and what happens in communication when you use technology as the channel of communication.

So there are many things we need to know that are not essential parts of normal mediator, arbitrator, facilitator, training. So my final argument here that I would say from a practitioner's point of view is I would hope that the standards that we're talking about here as well as some of the things that Chris and Leah were talking about before would get incorporated into the mandatory training for any certification process for any practitioner and if we could do that I think we would have much better practitioners and I think ODR would be better understood by most of the people who are now using it sort of de facto.

3   Pablo Cortes

Thank you. Well above all I want to give credit to Leah and Dan because they were the main drafters of these standards. When I first looked at the European legislation for consumer ADR, because there are some standards in that field as well, I was quite surprised to notice that our standards have already been incorporated in the initial draft. And actually it's quite timely because currently the European legislation consumer ADR that applies to resolving consumer disputes between consumers and businesses are currently being evaluated by a consultancy firm which has been appointed by the European Commission, I'm actually working as a consultant for them, in order to produce a report that will help to identify which changes in particular for the ADR directive and the audio revelation are required. I think these standards provide very helpful information on issues like artificial intelligence and the requirement for transparency. So I think it could also help to develop even hard law in order to set standards in particular when there are concerns regarding the imbalance of power between the parties, like consumers and businesses, when we know that typically the business chooses and pays for the ODR process at least in the consumer context. So it is crucial to have this set of standards that ensures not only efficient but also fair processes for users. I guess. I think it is crucial that we see the standards as a living document. So it is important to identify these emerging best practices and technologies in order to identify the standards necessary to ensure the ethical provision of all ODR processes.

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4   Morenike Obi Farende

Africa is a large continent, the second largest and probably the second most populous after Asia; we have different languages. But despite the digital divide in Africa, we have seen in the last couple of years that internet use in Africa has increased and because of that we see that litigation is now seen as less suitable. There has been a move to move the resolution of disputes online. So for cross-border within the continent we've seen that consumer protection agencies in Africa have risen to that challenge. If we apply the standards to the Federal Competition and Consumer Protection Commission (FCCPC) in Nigeria to see how that works, we can have an idea about whether these standards can work in the developing world. The standards are actually adaptable, regardless of whether it is for the developing or the developed world. The FCCPC is the competition and consumer protection authority in Nigeria and prior to the development of an ODR app, they had 700 to 1,000 complaints in one year. Now they have about 1,000 complaints in one week. And the key element is that now you can actually see for yourself, you the complainant, the progress of your complaints. The businesses are also in the knowhow and so they know when there is a dispute, and they can immediately get on it. FCCPC has oversight. Previously they used to get complaints only by complainants physically visiting the offices. So in reviewing I looked, of course, as I have said, at increased accessibility. There might be the argument that says not everyone is on the same side of the digital divide in Nigeria. But then, if you look at it, the office is located in Abuja, in the midsection of Nigeria. Complainants from other parts of the country would never have travelled that far, but with some internet access now at least the consumer that would have been too far away to lodge a complaint has the opportunity to complain online. It might not be perfect but it is way better than before. It is competition, it does what it's supposed to do, and the beauty of it is that where the business does not resolve a dispute, FCCPC can use its oversight function to step in and make provision, including sending the dispute to a third party. I know *Maria* had talked about the issue of security and people using non-ODR platforms for ODR, but the FCCPC app is built specifically for ODR so it gives secure room for everyone to be on the same level playing ground. Of course it's legal because it is within the confines of the law of a country. As I said it's secure and of course it's transparent. So in conclusion, we see that with faster complaint resolution, more responsive business and more assertive customers now use the app. We see that it's a tool that we must embrace and which we can use irrespective of the side of the divide that we are on. So the standards are not designed only for the developed countries but even for developing economies or systems like we have in Africa. We should emphasize that irrespective of any similar platforms that come up or are developed across the continent, the FCCPC app meets at least that basic standard. And when we design systems, we must ensure that they meet the needs for which they are designed. So if for instance this is a consumer protection platform, we see that it meets that particular need. It will be a different case even to us who designed to meet the needs of maybe smart contracts or AI or that kind of thing. *Dan:* What is your answer to the so what?

5   Alberto Elisavetsky

Okay, thank you very much for giving me the opportunity to share with you some ideas regarding what's our point of view in, let's say, Latin America. Today was interesting. One of my colleges when he was speaking before, said 'we in America' and to tell you the truth 'we' in South America, in Latin America are in a different situation with you in America (North America) because we are living with situations like high poverty levels, low per capita income, that is regarding the impacts of the new technologies in the conflict resolution field.

I'm sure you remember The Jetsons (1962), when everybody thought that this Hanna–Barbera cartoon was something belonging to a crazy guy; today, or one year ago, we are living with these kind of activities, online classes, working at home.

Figure 1   Cartoon The Jetsons (1962)

And we focus in all the possibilities for reaching social inclusion because it is very, very important for Latin America, using the technology to help people who don't have access to technology and that's why I tried to take three of the nine brand new standards from ICODR in order to talk about this.

Accessible, equal fair and impartial are part of the nine standards that we must push. Why? Because Latin America is a region with around 650 million inhabitants. Basically 450 speak Spanish and 250 speak Portuguese. And usually, I was talking with most of the ODR providers around the world and they don't care about now

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platforms which included our languages, the new brand platforms and all those start-ups in Spanish or Portuguese, at least not in this point, since it does not allow practitioners and citizens, public in general, to have the possibility to access to those platforms. And of course, we have a lot of legislation pending to be produced in the region All the legislations are very confusing, trying to jump into ODR without taking care of what's going on and of course that Zoom is the king of the ODR in the area. The people who have easy access to technology perhaps will be there, I don't know. 30% of the population I'm talking about has the last one cell phone, but we focus and help people to solve their problems without going from one city to the other and make them understand that the remote mediation, distant mediation or distance ODR system is a solution. Why? Because we have a lot of discrimination, lack of support, stability, resources, advice and for those cases we are dealing with the governments because usually we have a public system where we need that the platform belongs to the government. Because the government is responsible to keep the data of the citizens and not the mediator using Zoom, asking the parties to put their email when they start a session. Basically, everybody should be able to reach a mediation office in the neighbourhood, with the necessary equipment to perform online mediation. That's part of our main programme of ODR. We launched one of our pilot projects in 2017 and now we will apply those standards to spread out the voice through the region. Because we think that cybermediators should follow ethics and standards recommended for online mediation to get new job opportunities in the region and around the world.

A small example of what we do here. We have the face-to-face mediation, the full online mediation and the one party without technology sitting together with a mediator and the other party with technology alone, remote. And, if both parties could sit together, they could go to a government office and the one person online is the mediator. He will provide information regarding the standards because in our postgraduate study in ODR at the National University of Tres de Febrero, we have one year programme of ODR and we will include the standards in our activities with the support of the Minister of Education. And now in Argentina we have the first platform in Spanish to a full mediation process. The most important features are face recognition and electronic signature providing the mediator a full platform including audio and video.

Thank you very much. I think that this is a short idea about what we are doing.