

THE AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION ADOPTS GUIDANCE FOR ONLINE DISPUTE RESOLUTION (ODR)

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New technologies have been disrupting many established industries and institutions, continually testing our imaginations and expectations.¹ Accordingly, it is no surprise that technology is disrupting the fields of law and dispute resolution. Consistent with this evolution, alternative dispute resolution (ADR) processes that have been conducted in person are now quickly transitioning to online dispute resolution (ODR). Moreover, the Covid-19 pandemic accelerated the growth of ODR as parties sought socially distanced means for resolving their disputes.² Because ODR is being adopted so quickly and widely, this is the perfect time to offer helpful guidance regarding best practices for ODR.

ODR is flexible and adaptable, and can be used for negotiation, mediation, arbitration, or integrated into court systems.³ In a more advanced form, it also can incorporate automated decision making, using data analysis or artificial intelligence (AI). The efficiency, accessibility, and ease of ODR

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¹ For more information see the MIT Technology Review annual additions that have been published between 2001 and 2020.

² RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE*, (Oxford: Oxford University Press, 2013); Amy J. Schmitz, *Reviving the "New Handshake" in the Wake of a Pandemic*, 5 *MEDIATION THEORY & PRACTICE*, 32–54 (2021).

³ See David Allen Larson, *Designing a State Court Small Claims ODR System: Hitting a Moving Target in New York During a Pandemic*, 22 *CARDOZO J. CONFLICT RESOL.* 569 (2021); David Allen Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2019 *J. DISP. RESOL.* 77 (2019).

open new avenues to remedies and access to justice.⁴ When properly constructed, ODR allows individuals to resolve disputes more quickly, cheaply, and hopefully, fairly—using technology to facilitate communications and decision-making that lead to resolutions and solutions. For example, when individuals can resolve their disputes using technology as simple as a cellphone, they save significantly on the costs and inconvenience of in-person processes usually associated with court cases.⁵

For more than two decades, significant work has been done regarding ODR principles and standards, including by the American Bar Association (ABA) Task Force on Electronic Commerce and Alternative Dispute Resolution, formed in September 2000.⁶ In light of the continuing growth of ODR, the ABA Section of Dispute Resolution (“Section” or “Section of Dispute Resolution”) formed the Online Dispute Resolution (ODR) Task Force in May, 2019. An important purpose of the Task Force was to determine ways that the Section’s credibility, expertise and thought leadership might advance the availability, use and quality of ODR. This included exploring ways to promote ethical ODR, and specifically the feasibility and efficacy of the Section adopting, endorsing, or promulgating best practices, guidelines, or standards for ODR.

The Section action forming the Task Force appointed David Larson, Amy Schmitz, and Alan Wiener as its Co-Chairs; authorized the Section Chair to appoint Task Force members; and authorized the Co-Chairs to form and appoint the members of Working Groups. As the Co-Chairs, we determined that it would be beneficial to establish three Working Groups to consider and make recommendations to the Task Force regarding: (1) general ODR

⁴Amy J. Schmitz, *Measuring “Access to Justice” in the Rush to Digitize*, 88 *FORDHAM L. REV.* 2381–2406 (2020). *See also* AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* (American Bar Association Section on Dispute Resolution 2017); AMY J. SCHMITZ, *Building on OArb Attributes in Pursuit of Justice*, in *ARBITRATION IN THE DIGITAL AGE: THE BRAVE NEW WORLD OF ARBITRATION* 182–208 (Maud Piers, Christian Aschauer, Karl-Franzens eds., Cambridge University Press 2018).

⁵Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 *S.C. L. REV.* 329, 330. *See also*, ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 1–25 (2017).

⁶American Bar Association’s Task Force on Electronic Commerce and Alternative Dispute Resolution in Cooperation with the Shidler Center for Law, Commerce and Technology, University of Washington School of Law, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 *BUS. L.* 415 (2002).

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guidance; (2) guidance regarding court ODR; and (3) guidance regarding private ODR.

The members of the Task Force and its three Working Groups, who are listed in Footnote 2 of the Guidance that follows, include some of the most prominent ODR innovators, technology developers, practitioners, court ADR staff, and self-help and legal services advocates, including leaders and Fellows of the National Center for Technology and Dispute Resolution (NCTDR) and the International Council for Online Dispute Resolution (ICODR). The Task Force worked in collaboration with NCTDR and ICODR in developing the Guidance, which substantially built upon the 2017 ICODR Online Dispute Resolution Standards.⁷ One or two members of the Task Force co-chaired each Working Group.⁸ The Task Force Co-Chairs and the former Section Executive Director (Linda Seely) each served as a “shepherd” of two Working Groups.

The Task Force and Working Groups efforts focused on developing guidance for ODR system developers, courts and other organizations offering ODR, and ODR practitioners. The Working Group members extensively discussed the provisions that would be helpful to guide these constituencies and, most importantly, to protect access to justice and promote fair resolutions for end-users of ODR.

The Working Group Co-Chairs submitted the recommendations of their members to us, the Task Force Co-Chairs, in a variety of formats. We consolidated these submissions into a single draft, solicited comments on that draft from the Task Force and Working Group members, met to discuss those comments, and revised the draft to address many of them. We then submitted the revised draft to Dispute Resolution Section Leaders,⁹ met to discuss their comments, and revised the draft to address many of these. Our meetings to address the Task Force, Working Group, and Section Leaders’ comments were numerous and often very long. During these meetings, we carefully considered the comments received and again revised the draft to address many of them. In reviewing the comments and revising the drafts, we regretted that we could not incorporate every suggestion or comment. Sometimes, for instance,

⁷ NCTDR, *Ethical Principles for Online Dispute Resolution*, THE NAT’L CENTER FOR TECH. & DISP. RESOL., https://odr.info/ethics-and-odr/#_ftn2. See also Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT’L J. DISP. RESOL. 11–29 (2016).

⁸ Chris Draper chaired Working Group 1, MJ Cartwright and Paul Embley co-chaired Working Group 2, and Daniel Rainey and Gary Doernhoefer co-chaired Working Group 3.

⁹ The revised draft was distributed to members of the Section’s Executive Committee and Council, and to Co-Chairs of the Section committees for their comments.

individuals suggested edits that directly contradicted each other. Nonetheless, we are extremely thankful to everyone who offered their comments and thoughts. The Guidance was considered by the Section Executive Committee and Council at various times during its development and was adopted by the Executive Committee on July 27, 2022, and by the Council on August 6, 2022.

The most significant subject of dissension among Task Force and Working Group members and Section leaders who commented was the form that the guidance should take (e.g., standards, model standards, best practices, or guidance). Those who favored promulgating “standards” asserted that anything less would “lack teeth.” Some members disagreed, however, and maintained that standards would be meaningless without an enforcement mechanism, which does not currently exist. Others asserted that the field of ODR is too nascent, burgeoning, and devoid of substantial research to establish standards or best practices. Ultimately, we and the Section of Dispute Resolution concluded that it would be most appropriate to promulgate general guidance at this time. We determined that we should wait until we gain experience using this guidance and have more detailed studies and data regarding ODR, and perhaps then consider promulgating model standards.

Nonetheless, we determined that some provisions of the guidance are truly mandatory, others are crucial, and others are very important, so we found nuanced ways of delineation. Not surprisingly, we concluded that an ODR system must comply with applicable laws, regulations, and rules. For example, in Section VI Confidential, paragraph (A), the Guidance states “An ODR system must be consistent with all applicable confidentiality and privacy laws and rules.” Similar “must” mandates regarding compliance with applicable law can be found in the sections addressing accessibility; accountability; conflicts of interest; marketing, solicitation, and promotion; and court-connected ODR.

Because this is a guidance rather than a promulgation of standards, we determined that we should resist mandating design and conduct that is not required by law, and not easily enforceable. There are design elements and conduct, however, that we believe are extremely important. We decided to describe and identify those important considerations as “essential.” Although we now had the two distinctions of “must” and “essential,” that still was not sufficient.

Accordingly, most of the Guidance is framed as what an ODR system designer, developer, host, or practitioner *should* do. Where the term *should* is used, the intention is that the specified action ought to be taken, or not taken, absent a significant reason to the contrary. We also suggest that any

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organizations adopting the Guidance consider changing some instances of “should” to “must.”

Note also, that there are design elements and behaviors that are important but that may be very difficult, and at this stage in technology development, perhaps impossible to achieve. Accordingly, we determined that some recommendations require only “reasonable” efforts. Again, we also recognize that measuring compliance and enforcing some elements of the Guidance is impractical at this time.

For instance, Section II. System Design, Selection, Implementation, and Evaluation (A) begins “It is *essential* to avoid bias in the design, explanation, implementation, and use of the technologies.” The second sentence in that section states, however, “ODR system design should include *reasonable efforts* to prevent any AI decision-making function from creating, replicating, or compounding process or outcome bias.” Yet the third sentence states “It is *essential* to disclose the relative control given to human and artificial decision-making, and to provide human oversight.” We devoted considerable thought and time to deciding whether a provision should be essential or only require reasonable efforts. As noted above, a significant factor was whether a goal could be achieved using currently available technology.

The Guidance states that it is essential that an ODR system be responsive to context and culture, and that it is accessible for persons with limited financial means. It also is essential that: an the ODR system is auditable; designers and providers are knowledgeable about privacy, confidentiality, and security; bias or partiality conflicts are disclosed; the dispute resolution processes (such as negotiation, mediation, and arbitration) utilized by the system are identified; and all fees and charges are fully and accurately explained.

We considered it inappropriate for the Guidance to dictate how courts behave. Consequently, the guidance for courts was not framed as mandatory and only limited recommendations were described as essential. Along those lines, Section XI Specific Considerations for Court-Connected ODR, paragraph (B) says “[i]t is essential (B) that court-connected ODR system designers, developers, and providers recognize courts’ unique culture, goals, interests, and priorities, and consider how these will be addressed.” In other words, it is essential to recognize the independence and sovereignty of the courts.

The Guidance also states it is essential for courts to screen and triage cases to determine if ODR is appropriate for the type of case and litigant, and to provide exceptions and opt-out opportunities if ODR is mandatory. It is also

essential for courts to consider the overall cost to litigants when deciding to implement a court ODR system, taking into account savings or expenses such as time off work, childcare and transportation. Finally, it is essential that courts provide opportunities for litigants to seek advice or assistance from third parties such as attorneys, legal assistance organizations, or support persons.

It was initially contemplated that NCTDR and ICODR would co-author standards or guidance with the Section of Dispute Resolution; however, it was subsequently determined that this was not feasible at this time. The Section of Dispute Resolution, NCTDR, and ICODR could collaboratively develop standards or another form of guidance in the future. For example, “Model Standards for ODR” jointly promulgated by the Section of Dispute Resolution, ICODR, and NCTDR could have a very significant impact, like the Model Standards of Conduct for Mediators jointly promulgated by the American Arbitration Association (AAA), the Association for Conflict Resolution (ACR), and the Section of Dispute Resolution, which many organizations have adopted (with or without revision) and may enforce.

The following Guidance was developed by the Section of Dispute Resolution ODR Task Force (2019-2022); adopted by the Section of Dispute Resolution Executive Committee on July 22, 2022; and adopted by the Section of Dispute Resolution Council on August 6, 2022. To promote the purposes of this Guidance, it may be freely and publicly distributed and published. We sincerely hope this Guidance will be helpful to everyone involved in online dispute resolution. However, it is certainly not the “final word.” So, stay tuned as we and others continue to promote ethical ODR!