

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

Developed by the Section of Dispute Resolution ODR Task
Force (2019-2022)

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INTRODUCTION

Online Dispute Resolution (ODR) systems have the potential to increase or impede access to justice and the fair resolution of disputes. The American Bar Association Section of Dispute Resolution formed the ODR Task Force to explore ways to enhance the quality of ODR.² This Guidance was developed to assist ODR system designers and developers, provider organizations (including courts), practitioners, and users in promoting access to justice and fair resolutions.³ The Task Force met extensively and provided extremely valuable input.

¹ This Guidance has not been submitted for adoption by the ABA Board of Governors or ABA House of Delegates and should not be construed to be the policy of the American Bar Association. To promote the purposes of this Guidance, it may be freely and publicly distributed and published. Suggested citation: American Bar Association Section on Dispute Resolution Guidance for Online Dispute Resolution (ODR), Aug. 6, 2022.

² The Task Force was co-chaired by David Allen Larson, Amy J. Schmitz, and Alan Wiener and included the following individuals with deep expertise in ODR, many of whom are members and leaders of the National Center for Technology and Dispute Resolution (NCTDR) and/or the International Center for Online Dispute Resolution (ICODR): Yeruchem Altusky, Susan Andrews, Larry Bridgesmith, Sue Bronson, MJ Cartwright, Dennis Davis, Sharon Davis, Ellen Deason, Gary Doernhoefer, Chris Draper, Noam Ebner, Paul Embley, Patrick Forest, Hon. Robert Freedman (Ret.), Catherine Geyer, Svetlana Gitman, John Greacen, Hon. Constandinos “Deno” Himonas (Ret.), Bonnie Hough, Ethan Katsch, Jessica Lewis Kelly, Heather Kulp, Amie Lewis, Daniel McFadden, Sandro Montebianco, Mireze Philippe, Daniel Rainey, Angie Raymond, Erika Rickard, Colin Rule, Linda Warren Seely, Lori Shemka, Steve Shields, Donna Stienstra, Sharon Sturges, Douglas Van Epps, Nancy Welsh, Nick White, and Leah Wing.

³ This Guidance is substantially built upon ICODR’s *Online Dispute Resolution Standards* (2017). The Standards were updated by NCTDR and ICODR in *Online Dispute Resolution Standards* (May 2022).

ODR systems, as broadly defined below, include ODR technology and all persons and entities involved in designing, developing, implementing, hosting, or providing ODR services. Provider organizations and practitioners are encouraged to select and utilize systems and technology that are consistent with this Guidance.

A key consideration was whether to frame this document as standards, model standards, best practices, or guidance. Chiefly because there is currently no enforcement mechanism, guidance was deemed most appropriate. This Guidance therefore generally uses the term “should” rather than “must,” although in some instances, the drafters consider the provision so important that they do use the word “must” (most frequently where the compliance is required by law). The drafters consider many of the provisions that use the word “should” to be extremely important. Organizations that choose to follow or adopt this Guidance are encouraged to consider whether to replace instances of “should” with “must.”

The following provisions are interconnected and should be read and applied as a whole. Moreover, they supplement, and do not replace or supersede, applicable technical standards or the legal and ethical principles that apply in face-to-face dispute resolution processes. For example, due process is a requirement in adjudicatory processes such as arbitration, and self-determination is a requirement in consensual ODR processes such as mediation.⁴

I. DEFINITIONS

AI (Artificial Intelligence): The use of machines or other technology to anticipate and solve problems, adapt to new circumstances, achieve outcomes, and perform other human-like functions.

⁴ See, for example, the Code of Ethics for Arbitrators in Commercial Disputes, the Model Standards of Conduct for Mediators, the ODR Technical Interface Standard, the National Court Open Data Standards, and the National Information Exchange Model.

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ODR (Online Dispute Resolution): The use of technology to facilitate or perform any central function of preventing or resolving disputes.⁵

ODR Practitioner: A person or entity using technology to help others prevent or resolve a dispute.

ODR Provider: A person or organization that “hosts” or makes an ODR system available to practitioners and end users.

ODR System: All persons, entities and technologies involved in making ODR available to end users, including ODR designers, developers, providers, practitioners, and technologies.

ODR System Data: All information about disputes and participants.⁶

End User: Parties and their representatives.

II. SYSTEM DESIGN, SELECTION, IMPLEMENTATION, AND EVALUATION

- A. **Reducing Bias in Augmented or Artificial Intelligence (AI) Systems.** It is essential to avoid bias in the design, explanation, implementation, and use of the technologies. ODR system design should include reasonable efforts to prevent any AI decision-making function from creating, replicating, or compounding process or outcome bias. It is essential to disclose the relative control given to human and artificial decision-making, and to provide human oversight.

⁵ ODR may be used for any type of dispute resolution process, including negotiation, mediation, arbitration, and trial. ODR may also facilitate many core aspects of dispute prevention and resolution, including communication, diagnosis, and triage; storing, searching, and retrieving information and documents; brainstorming and exploring possible solutions. ODR may include asynchronous and/or synchronous communications.

⁶ ODR System Data includes all forms of information, including analog, digital, textual, numeric, audio, photographic, and video.

- B. Resources.** The design of an ODR system should consider the financial, technical, and human resources required to develop, implement, maintain, evaluate, and upgrade the system. The system design should address how those resources will be provided in a sustainable manner that is consistent with this Guidance.
- C. Costs.** It is critical that the costs to all users be considered in the design, selection, and implementation of an ODR system.⁷
- D. Goals.** Any person or organization (including a court) implementing an ODR system should clearly articulate the goals of the system, the types of conflicts it will address, and the potential outcomes it will allow.
- E. Context and Culture.** It is essential that an ODR system be responsive to the situations and environments in which it will be used.
- F. Broad Perspectives.** The design, development, and selection of an ODR system, particularly by a public entity, should take into account the interests of all persons and organizations whose interests will or may be impacted. Input from interested parties should be solicited and considered in the design, selection, and deployment of an ODR system.
- G. System Selection.** The options available for an ODR system that achieve the articulated goals and address the interested parties' concerns should be carefully evaluated, including the options for off-the-shelf and customized systems. Auditability is an essential component of ODR system selection.
- H. System Evaluation.** The design and implementation of an ODR system should include plans for periodic evaluation of costs and benefits, user satisfaction, and whether the system is meeting the articulated goals.

⁷ The costs and demands of constructing and maintaining an in-house ODR system should be compared with the costs of acquiring an existing system, including the vendor's ongoing service fees. The cost of integrating ODR practitioners into the system should also be considered.

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- I. **System Upgrades.** An ODR system should be updated with reasonable regularity to improve performance, address the system evaluations, and otherwise enhance or expand functionality.

III. ACCESSIBLE

- A. **User Abilities and Needs.** An ODR system must comply with all applicable laws regarding accessibility. In addition, an ODR system should maximize accessibility with respect to literacy level, language, disability, culture, physical location, financial resources, and technology skills.⁸ These accessibility requirements apply to all stored data.
- B. **Cost to Participants.** An ODR system should be accessible to potential end users with limited financial means. If the use of ODR is required by contract, it is essential that end users with limited means be given free or affordable access to the system.
- C. **Continuing Obligation.** An ODR system must be updated to comply with relevant law and should be updated to maximize accessibility.

IV. ACCOUNTABLE

- A. **Operating Authority.** An ODR system must comply with any statutes, rules, or other authority under which it is operated.
- B. **Design Consistency.** An ODR system should be monitored during development, implementation, and use to ensure that it operates as designed.
- C. **System & Process Quality.** An ODR system should identify and disclose the metrics used to assess system performance, including the accuracy of those metrics.
- D. **Data Management.** An ODR system should remain accountable by managing data in ways that ensure the data can be used for regular monitoring, learning, and evaluation.

⁸ An ODR system should be tested by a broad range of potential users during the development stage and before it is launched. An ODR system should comply with the Web Content Accessibility Guidelines promulgated by the World Wide Web Consortium (W3C).

- E. **Data Quality.** Any variation in data resulting from digital replications, digital copies, or other digitization should be disclosed and explained.
- F. **Outcome Consistency.** An ODR System should produce identical outcomes based on identical data inputs. If it does not, this should be disclosed and explained.
- G. **Auditability.** An ODR system should be regularly audited for compliance with this Guidance. The confidence level of the audits should be disclosed and explained.

V. COMPETENT

- A. **Required Skills.** An ODR system should identify and explain, in an accessible manner, the skills necessary for all participants, including providers, practitioners, and end users, to effectively use the system.
- B. **Training and Support for End Users.** ODR systems should provide accessible resources so that all participants, including providers, practitioners, and end users, can understand the potential risks and benefits of using the system and use it effectively.
- C. **Familiarity with Guidance.** Persons who design, develop, implement, or administer ODR systems, provide ODR services, or provide ODR education or training should understand and be able to effectively explain this Guidance.
- D. **Familiarity with Technology.** Persons who design, develop, implement, or administer ODR systems or provide ODR services should be able to effectively describe and use that technology, and should be familiar with the range of other available technologies. Persons who provide general ODR education or training should be knowledgeable about the range of available ODR systems or include persons with that knowledge in their trainings.
- E. **Familiarity with Confidentiality, Privacy, and Security Considerations.** It is essential that persons who design, develop, implement, or administer ODR systems or provide ODR services be knowledgeable about privacy, confidentiality, and security, including the applicable laws, cross-jurisdictional issues, and any limitations of the technologies being used.

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- F. **ODR Training Guidelines.** An ODR practitioner should satisfy any training and experience requirements of any ODR system(s) that they use, and of any organizations with which they are associated. ODR practitioners should also have general training and experience consistent with guidelines established by credible and relevant professional organizations.⁹

VI. CONFIDENTIAL

- A. **Compliance with Law.** An ODR system must be consistent with all applicable confidentiality and privacy laws and rules.
- B. **Equivalent or Greater Protection.** ODR should provide at least the same confidentiality and privacy as does offline dispute resolution.
- C. **Privacy and Confidentiality.** An ODR system should meet prevailing standards of privacy and confidentiality.

VII. EQUAL/FAIR/IMPARTIAL

- A. **Systemic Advantage.** The technological components of an ODR system (e.g., automation, assistive technology, algorithms, data analytics) should not provide any user with a systemic advantage. ODR system designers, developers, providers, and practitioners also should not provide any user with a systemic advantage.
- B. **Access to System Features.** All ODR system functionalities, including data control features and other privacy and security protections, should be equally available to all end users.
- C. **Bias.** It is critical to avoid bias, inequity, unfairness, or partiality in any aspect of an ODR system. ODR system designers, developers, providers, and practitioners should recognize and address the potential for, and the appearance of, bias upon any grounds, including race, religion, gender, sexual identity or orientation, disability, income, nationality, language, or other characteristics.

⁹ For example, the American Bar Association, the National Center for Technology and Dispute Resolution (NCTDR), and the International Council for Online Dispute Resolution (ICODR).

- D. **Conflicts.** Conflict of interest principles and practices applicable in the offline environment also apply online. Any laws and rules requiring disclosure of actual or potential conflicts of interest, disqualification, and recusal must be observed.
- E. **Conflict Disclosure.** It is essential that any circumstance surrounding the design, implementation, operation, or use of an ODR system that might reasonably raise a question about bias or partiality be disclosed to potential purchasers, providers, practitioners, and end users.
- F. **Partiality.** An ODR system should provide information to enable users to assess the possible partiality of any decision-making technology (e.g., algorithms) or decision-maker (e.g., because of financial, business, or personal relationships).

VIII. LEGAL

- A. **Local Compliance.** An ODR system must comply with the laws and regulations of all jurisdictions where it is available and should identify the jurisdictions where it is compliant.

IX. SECURE

- A. **Technology Selection.** An ODR system should use data security technologies and practices that meet industry standards for information technology.
- B. **Chain of Custody.** The chain of custody for any data in an ODR system should be sufficiently auditable to determine who had access to what data at any time and how that data was used.
- C. **Data Breach.** An ODR system should determine, minimize, and explain the technological and operational threats of intentional or unintentional data breach. In the event of a data breach, all users whose data may have been compromised should be immediately notified of the breach and informed of the mitigation measures.
- D. **Minimum Security and Confidentiality.** Any combination of technologies, processes, or operations should offer each user security and confidentiality equivalent to or better than comparable offline dispute resolution processes.

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- E. Data Storage.** ODR system data should be stored in a manner that ensures preservation through replication, backup, distribution, and archiving techniques and technologies.
 - F. Data Retention.** An ODR system should have a clearly defined data retention policy that identifies (i) what data is stored, (ii) how long it is stored, and (iii) how completely it can be eliminated once it is deleted.
 - G. Data Permanence.** An ODR system should not archive private, confidential, or contextual data in a manner that does not allow for its destruction or disassociation from any user.
 - H. Data Validity.** If an ODR practitioner or other participant will retain any data outside of the ODR platform or beyond the ODR system's defined data retention policy, that participant should disclose its retention policy and practices and the methods by which data originally generated by the ODR system will be validated.
 - I. Disclosure.** An ODR system should disclose its data security, storage, retention, and permanence policies and practices to potential and actual purchasers, providers, practitioners, and end users.
- X. TRANSPARENT**
- A. Explanation of Risks and Benefits.** An ODR system should provide accessible information about the risks and benefits of using the system, including the risks of data breach, so that ODR system providers, practitioners, and end users can make informed decisions about whether and how to use the system.
 - B. Marketing, Solicitation, and Promotion.** ODR advertisements, solicitations, and promotional statements and materials must be truthful and must not promise results, suggest that the system favors or disfavors any party, or identify past or current users without their consent.
 - C. Form and Enforceability of Outcomes.** It is essential that an ODR system disclose the type of dispute resolution process it provides (e.g., negotiation, mediation, arbitration) and whether and how any outcomes can be enforced.

- D. Source Transparency.** The sources of and methods used to gather any data that may influence an ODR outcome should be disclosed to potential users.
- E. Automation Transparency.** An ODR system should disclose the manner and extent to which AI may influence options and outcomes. ODR systems should indicate whether they comply with relevant governmental and non-governmental guidelines on transparency and fairness of AI systems.
- F. Fees and Other Charges.** It is essential to fully and accurately disclose all fees and charges for ODR. Fees and costs should not be contingent on whether there is a resolution, or the terms of any resolution, if any such contingency might affect the outcome.¹⁰
- G. Interested Parties.** The identities and roles of the participants in the ODR system design, implementation, and oversight should be disclosed.
- H. Funding.** The identity of any organizations or persons that provide funding for an ODR system, other than through usage fees, should be disclosed.

XI. SPECIFIC CONSIDERATIONS FOR COURT-CONNECTED ODR

- A. Preface to this Section.** Because courts play a unique and crucial role in our democracy and governance, including ensuring that litigants receive due process, special considerations apply to court and court-connected ODR programs (referred to collectively as “court-connected programs”). This section therefore identifies some specific matters that should be considered in designing, implementing, and operating court-connected ODR programs.
- B. Court-Specific Interests.** It is essential that court-connected ODR system designers, developers, and providers recognize courts’ unique culture, goals, interests, and priorities, and consider how these will be addressed.¹¹

¹⁰ For example, contingent fees would not influence the outcome in a blind bidding ODR process but could in an online mediation process.

¹¹ For example, court ODR systems should operate as openly and transparently as possible. Moreover, specific courts and case types may require different approaches.

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- C. Access to Justice.** A court-connected ODR system should preserve access to other court processes and support services.
- D. Getting Started.** Courts should begin an ODR initiative by identifying a specific problem to be addressed and a manageable starting point. Courts then should consider revising and expanding the program based upon ongoing evaluations.¹²
- E. Investigate.** Courts should consider issuing requests for proposal that include their ODR program goals as well as requests for compliance with this Guidance.
- F. Court System Costs and Benefits.** Courts should assess the costs and benefits of adopting an ODR system, including improving access to justice and court operation efficiencies.
- G. Court ODR Practitioners.** Unless a court ODR program will be entirely automated, courts will need to determine whether ODR practitioners will be court staff or external persons, and how they will be recruited, trained, and compensated.
- H. Current Court Circumstances.** Persons designing court ODR programs should have a thorough understanding of the current court processes, technology systems, integration challenges, and budgetary constraints. Courts should consider what court processes, rules, and statutes may need to be adopted or amended.
- I. Technology Selection and Design.** Courts should select or develop technology that will address the goals and needs they have identified and be cautious about using technology to perform a function for which it was not designed. Courts will need to decide whether to purchase an existing system, build a system in-house, or hire a qualified person or firm to build or customize a system. It is important that evaluation elements are incorporated into the system before it is operative.

¹² For example, many courts start with ODR for a specific and relatively simple case type or at a single location, revise the program based on lessons learned, and then expand to other case types and locations.

- J. Case Screening.** It is essential that courts screen and triage cases to determine if an ODR process is appropriate for a particular case and for each litigant. Screening questions should, for example, address comfort with and access to technology, history and current no-contact orders and allegations regarding domestic violence, language, and disability.
- K. Mandatory ODR Participation.** Courts should carefully consider whether to make ODR a presumptively mandatory process and, if they do, should include appropriate screening and opt-out procedures for the type of case and the type of ODR process. Courts should collect and analyze data continually to inform decisions about mandating participation in ODR. It is essential that mandatory ODR systems have appropriate exceptions and voluntary opportunities to opt out without penalty in cases involving violence or abuse and for persons who may have significant challenges using the platform (e.g., for persons with disabilities, limited English proficiency, or without internet access). The procedure for opting out should be made clear to litigants at the outset of the process.
- L. Proceedings after Opt-out.** If litigants opt out, either before or after the court ODR process has begun, the ODR system design should redirect the parties to appear in court or utilize other court-approved dispute resolution processes.
- M. Cost to Litigants.** It is essential that courts consider the overall cost to litigants when deciding whether to implement a court ODR system. Consideration of costs for litigants need not be limited to ODR fees and may consider other possible savings or expenses (e.g., time off work, childcare, transportation). If the use of ODR is mandatory, there should be a fee waiver procedure. Fees for mandatory ODR may be prohibited by applicable law.
- N. Confidentiality and Privacy.** Filings and communications in the course of ODR must comply with the applicable law and should be afforded the same or greater confidentiality and privacy afforded in non-ODR proceedings.

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- O. Retention or Waiver of Rights.** Courts should ensure that litigants either retain all rights to a judicial determination if they are not satisfied with the outcome of the ODR process, or knowingly, voluntarily, and explicitly waive those rights. Litigants who participate in ODR should have opportunities for recourse and review comparable to litigants who do not participate in ODR.¹³
- P. Review of Orders and Judgments Resulting from ODR.** Courts should implement systems to ensure that orders and judgments resulting from ODR processes are consistent with procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.¹⁴ Courts should carefully consider whether default judgments will be available in ODR.
- Q. Litigant Support.** Courts should anticipate that many ODR participants will be self-represented and should provide information that can be easily understood. Many litigants will require language and interpretation support and legal or other information. It is essential that ODR processes provide opportunities for litigants to seek advice or assistance from an attorney, a legal assistance organization, a relative, a friend, or another support person.
- R. Training.** Courts should ensure that ODR practitioners participating in their programs have received appropriate training in the relevant ODR process and technology.¹⁵

¹³ For example, if current court practices provide for waiting periods and opportunities for reconsideration, those opportunities should be replicated in ODR.

¹⁴ See Conference of Chief Justices/Conference of State Court Administrators, *Call to Action: Achieving Civil Justice for All* (2016), page 33, Recommendation 11.1.

¹⁵ For example, ODR practitioners providing mediation should have successfully completed basic skill-based mediation training(s) designed to resolve court cases, address unique issues encountered when mediating online, and effectively utilize the relevant technology.

