

Online Dispute Resolution: Some Context and a Report on Recent Developments

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Daniel Rainey
Director, Office of Alternative Dispute Resolution Services
The National Mediation Board
1301 K Street, NW
Suite 250-E
Washington, DC 20005
202-692-5051
rainey@nmb.gov

What is Online Dispute Resolution?¹

As a concept, Online Dispute Resolution, and its perhaps unfortunate acronym – ODR – has been around since the mid-1990's.² From the beginning there have been commercially available ODR services designed to operate in the legal arena, but by far the most aggressive and influential area of ODR development has been related to commercial transactions,

¹ This article is a product of research supported by National Science Foundation award #0429297, "Process Technology for Achieving Government Online Dispute Resolution." (<http://www.fastlane.nsf.gov/servlet/showaward?award=0429297>).

²There have been many articles written about ODR and its application to various legal and social systems. Although it is a bit dated, a lawyer's reaction can be found in Joseph Goodman's, "The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Sites," published by the Duke Law and Technology Review, and available online at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html>. The Center for Information Technology and Dispute Resolution (CITDR) at the University of Massachusetts at Amherst maintains a web site that is an excellent source of information about all facets of ODR. CITDR's ODR.INFO site can be found on the web at <http://www.odr.info/>.

particularly in the mediation of business-to-business (B2B) and business-to-consumer (B2C) disputes. That B2B and B2C disputes should be the focus of ODR development is not surprising. One event and one observation led to the explosion of ODR sites for online business, and have set the tone for ODR development.

The event was the National Science Foundation's lifting, in 1992, of the ban on commerce over the Internet.³ Very soon after commerce was allowed, consumers could order pizza online from Pizza Hut, and they could buy and sell an unimaginable array of items using a fledgling service called eBay.

The observation, made by Ethan Katsh⁴ and others, was that commerce in cyberspace would create unique cyber-conflicts, and that cyber-commerce was likely to produce more of these conflicts than could be handled using conventional legal or ADR tools, or even using the best of the new ODR tools just being developed. Almost instantly, a market for ODR development was created. Commercially available ODR sites sprung up

³ For a brief and entertaining history of the development of the Internet, have a look at the Internet Society's "Brief History of the Internet," found at <http://www.isoc.org/internet/history/brief.shtml>.

⁴ See Ethan Katsh and Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace, Jossey-Bass, 2001; and, Colin Rule, Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, and other Commercial Conflicts, John Wiley & Sons, 2002.

quickly, and some disappeared just as quickly.⁵ The most enduring, of course, has been SquareTrade, the primary ODR provider for eBay. Their web site claims over 2 million technology-assisted negotiations and mediations, and they have spread far beyond eBay.

The development of ODR services and applications started with the idea that e-commerce created a special class of disputes (cyber-disputes) with disputants who were dispersed geographically, and who would have difficulty using, or would find it impossible to use, traditional legal and ADR channels. Even if online dispute resolution was seen to be somehow not as effective as face-to-face dispute resolution, ODR was, for these parties, the only game in town. To a great degree, this conception of ODR parties persists, but increasingly the technology is being used to prepare for or partially substitute for face-to-face intervention.

E-commerce may have been one of the initial arenas for ODR, but by no means all ODR action has been in the commercial world. From the beginning, mediation of disputes in the workplace, settlement of financial disputes in the insurance and real estate industries, and online alternatives to "live" legal proceedings, both arbitral and courtroom based, have all been subjects of ODR concern and development.⁶

⁵ For a good review of the range of ODR services available, see Melissa Conley Tyler, "115 and Counting: The State of ODR 2004," available online from CITDR at <http://www.odr.info/unforum2004/ConleyTyler.htm>.

⁶ Use of ODR technology in traditional legal settings is the focus of several interesting programs, including Courtroom 21 at William and Mary University

Recent Developments in ODR

In November, 2004, the National Science Foundation (NSF) awarded a grant to the University of Massachusetts at Amherst (UMass), with the National Mediation Board (NMB) as a partner in the research.⁷ The NMB is an independent Federal agency, responsible for dispute resolution in the U.S. airline and railroad industries.⁸

The goal of the UMass/NMB research is twofold: first to assess the efficacy of using process modeling to develop ODR applications, and second to assess the impact of using ODR applications to conduct mediation.

The second goal, assessing the impact of ODR technology, will allow the researchers to add to the growing body of literature regarding the impact of online mediation by using the NMB's grievance mediation program as a testing ground for ODR techniques. The NMB has assembled a core list of research partners consisting of management and labor from the airline and railroad industries, all of whom have agreed to conduct grievance mediation

(www.courtroom21.net), and Court 21 in the UK (<http://www.computingleeds.ac.uk/back/issue2/current/court21.html>). For other ODR sites in other arenas, see Melissa Conley Tyler's review of ODR in footnote 4 above.

⁷ For an overview of the grant project see: <http://www.umass.edu/umhome/news/articles/9552.php>

⁸ For detailed information on the National Mediation Board, go to the agency web site at www.nmb.gov.

using an online application developed by UMass and the NMB under the auspices of the NSF grant. In the short term (over the three years of the research project) the benefits to the labor-management and ODR/ADR communities will be the generation of concrete information about the impact of ODR on mediation efforts, and the development of an ODR application that could be very inexpensively developed for use in a wide variety of mediation environments.

However, it is the first goal of the research, testing the use of process modeling as a developmental tool, that holds the most interesting long term possibilities for practitioners and application developers.

At the risk of making a complex process overly simple, using process modeling to develop an ODR application involves accurately developing, in detail, a model of the things that mediators actually do when they work with parties, then transcribing that process into a process modeling language,⁹ then using “binding” software to control a user interface (what the user sees on the screen) so that the model controls the online process. Our model development included narrative descriptions of the mediation process by professional mediators, sample mediation sessions, and group reviews of the

⁹ The process modeling tool being used by the researchers is called Little JIL: it is a process modeling language developed by Professor Leon Osterweil and his colleagues in Computer Science at the University of Massachusetts at Amherst.

model-in-progress to make sure it matched as closely as possible the process actually used by the mediators.¹⁰

If this were an IT journal, I would now wax rhapsodic about the beauty of process modeling, exception handling, binding software, etc. But the best way to explain the real significance of this application development approach to a general audience is to recall a term coined by Ethan Katsh and Janet Rifkin – the “Fourth Party.”¹¹ The Fourth Party refers to the notion that the use of online applications adds another, virtual, party to disputes that traditionally involve two interested parties and the third party (e.g., a mediator, facilitator, arbitrator, etc.). The Fourth Party actually becomes an active influence on the dispute resolution process, and can, at its most intrusive, affect the likelihood of achieving a resolution.¹²

In some ODR classes I have taught online, I have described ODR software as falling into three broad categories.

¹⁰ One ongoing outcome of the development effort has been the discovery that the process model used for face-to-face sessions is at best a guide for the process that evolves when mediators use online tools. As a result, a second generation process model is being developed, and it is that model that will drive the ODR application used during the research project.

¹¹ See Katsh and Rifkin, note 3 above.

¹² The influence of the Fourth Party shows up in many ways. A number of articles have been written about the influence of language in ODR applications and about the problem with changing and sometimes contradictory legal structures as ODR use virtually crosses international borders. I am currently preparing a paper with a colleague, Alma Abdul-Hadi Jadallah, entitled “The Culture in the Code,” which we will present at an upcoming ODR conference in Cairo, Egypt. Simply put, the concept behind the paper is that the coding of an ODR application carries cultural assumptions that can compromise the effectiveness of dispute resolution efforts when the application is exported from the culture in which it was created.

Function Driven software is developed by observing the functions that third parties need to perform (making lists, communicating with parties, stating preferences, etc.) and making those functions available at the discretion of the third party. Using this type of software, the third party sets up groups, assigns rights and privileges, and does other administrative tasks, in addition to doing all the things a third party normally does (interacting with the parties, encouraging, summarizing information, etc.).

Process Derived software takes the programmer's observation of the specific mediatory process being used and sets up a user interface that allows the third party to move through the process logically, retaining the ability to skip around in the process at will. Using this type of software, the third party can move from convening to storytelling to optioning and so on, in a logical progression that mimics the basic mediation model used in most of the mediation training done in the United States. A third party still must do some administrative tasks, however, and there is the ability to move around in the process. This can result in some unfortunate errors: a mediator who uses process derived software once told me that she does not ever send text messages to a party in an online forum that she would not be willing to have seen by all of the parties. One instance of sending accidentally a private, sensitive message to the wrong party was enough to change her behavior and her willingness to trust that she would perform the proper action with the software every time.

Observing the use of both function driven and process derived applications makes it easy to see how Katsh and Rifkin's Fourth Party concept works – the application is an entity, a fourth party at the table, with whom everyone must interact. The result of incorrect or ill-advised interaction with the fourth party can have an impact on the two primary parties, and their relationship with the third party.

My third category of ODR applications, **Process Driven** applications, is the subject of the NSF/UMass/NMB research. Briefly put, process driven software presents the third party with only those options that are appropriate for the stage of the process in which the parties find themselves. If information should not be shared across the table at a certain stage of the process, the application does not allow the user the possibility or option of sharing information. If a brainstorming session's guidelines call for the participants to make no comments about items that have been proposed, the application does not allow the parties a channel through which to comment. The options offered to the user by the application are literally bound to and driven by the process model that was developed by the parties.

The practical implications of developing process driven applications is significant, particularly for the third party. Using Katsh and Rifkin's Fourth Party concept again, if the application is driven by a process model, the third party has to spend much less time and attention interacting with the fourth

party (the software) and can spend more time and energy interacting with the two interested parties. There are fewer choices to make, less software administration to handle, and fewer chances to make unwitting choices that have unintended consequences. Ultimately, process modeling and the production of process driven applications should make the fourth party a much less volatile influence on the dispute resolution process. This is the theory undergoing a test in the UMass/NMB research project.

The NMB, Technology, and ODR

The NMB's ODR program is based on a conception of ODR that is broader than the classic definition of ODR. Instead of thinking of ODR as technology that is networked and that is used primarily by parties who will not interact face-to-face, the NMB's ODR program is based on the use of any technology that enhances the dispute resolution process, used with parties who will have significant face-to-face interaction.

Early in the NMB's use of ODR tools, two groups were using a brainstorming tool in a contract negotiation session. The application was running from a laptop, and the participants were able to see information on a projection screen as the mediator added brainstorm ideas to a list. Basically, the application was being used as an electronic white board. An NMB mediator who was observing the session took me aside and literally

whispered, "You know, you are not really 'online'." The notion of using ODR, online dispute resolution, as a way to describe the use of technology that was not networked, apparently bothered him. It does not bother me. We include in our ODR program mind-mapping software, web-based video and audio conferencing software, brainstorming software, and of course our newly developed UMass "Storm" application. At the NMB we think it makes sense to be very inclusive in the conception of what technology may be useful for our dispute resolution efforts, and to go beyond the notion of only networked applications as part of the ODR world.¹³

At the NMB we are using web based video and audio conferencing to hold arbitration hearings, to conduct adoption and settlement conferences, and to craft final contract language for collective bargaining agreements. We are using group software and mind mapping software to conduct bargaining sessions for contract negotiations, for grievance mediation, and for problem solving facilitation.

The ODR application developed under the NSF grant project by UMass and the NMB will get its first test with parties removed from each other in time and space (asynchronously) and with parties together in time but not

¹³ This is an idea that has some support. In many conflict torn and/or remote and dispersed areas, the umbrella term of ODR has come to refer to technology as broad and as mainstream as cell phones and AM radio, all of which are used to establish a communication channel among the members of groups in conflict. For interesting views about this issue (and others) see the discussion during Cyberweek 2005, led by Sanjana Hattotuwa, Head, Research Unit, *Info Share*, Sri Lanka, and Editor of the *Peace Library*, found at the CITDR web site, <http://www.adr.info>.

necessarily together physically (synchronously), when we begin conducting grievance mediation online in late January, 2006. And, finally, we are just beginning a pilot program to test the use of some of our ODR software in the Superior Court of the State of Massachusetts.¹⁴

Where is ODR going next?

There is clearly more and more interest in ODR throughout the legal community, both in the U.S. and abroad. Projects like Courtroom 21 at the William and Mary University Law School, and Court 21 in the UK, are clearly a response to the recognition that any technology that will cut down the cost of legal actions and speed up the processing of cases is worth a close look. The upcoming ABA Section of Dispute Resolution Conference in Atlanta (April, 2006) will be the third consecutive ABA-DRC conference at which ODR will be featured on the program of sessions, and the Association for Conflict Resolution has created an ODR interest group that is working to integrate technology issues into the mainstream of the dispute resolution profession.

Technologically, commercially available ODR services will continue to improve and become more widely available. In our less modest moments,

¹⁴ As I write this article we have scheduled a first test of ODR software with the Massachusetts Superior Court for the end of December. Based on the outcome of that test, the Court will make a decision about whether to continue, and what kind of hearings would be appropriate for ODR use. Assuming that the Superior Court remains willing, we will begin limited use of ODR with them in early 2006.

the UMass/NMB research team likes to think that our research will influence the way applications are developed, making it easier to mediate without having to become a technical expert in any particular application.

Personally, I'll leave you with two thoughts about where ODR tools are headed.

First, this generation of very smart cell phones is already changing the way business is transacted and personal interactions are conducted around the world.¹⁵ As the phones get smarter and users get more comfortable with the truly mobile technology, ODR will move into those platforms.

Second, the use of humanoid avatars (human looking "characters" that act and react in simulated environments) to conduct dispute resolution in cyber-space, drawing on the technology developed for MMORPG's (Massively Multiplayer Online Role Playing Games) is not far away. Researchers are already beginning to write articles about the nonverbal communication implications of using humanoid avatars to simulate face to face human interaction.¹⁶

¹⁵ See the March 10, 2005 edition of *The Economist* for three interesting articles about the Digital Divide and the use of cell phones in developing nations.

¹⁶ For example, "The Impact of Eye Gaze on Communication Using Humanoid Avatars," Maia Garau, Mel Slater, Simon Bee, Martina Angela Sasse, available through the Conference on Human Factors in Computing Systems, Proceedings of the SIGCHI conference on Human factors in Computing Systems, Seattle, Washington, Pages: 309-316, 2001. See also the New York Law School Law Review edition dedicated to "State of Play," a conference promoting discussions regarding virtual worlds, online games, etc. (<http://www.nyls.edu/pages/3176.asp>)

The increasing use of ODR technology in the courts and in other venues brings with it some fundamental questions about the nature of dispute resolution, and it calls into question whether the best practices of face-to-face dispute resolution are indeed the best practices for online dispute resolution.

There are some obvious advantages to the use of ODR technology. Surveys of initial users of the UMass/NMB application indicate that it is very easy to use, and their first observation about its utility is that it could save a lot of time and money if used for the appropriate type of cases. (Opinions may differ regarding what is “appropriate.”) Other obvious advantages of asynchronous ODR applications derive from what every practiced mediator knows – sometimes a time lag between hearing what the other party has to say and responding to what has been heard is not a bad thing. With time comes reflection, and sometimes reflection brings moderation and more willingness to consider alternate points of view or alternate resolutions.

Consider the impact of using technology to allow remote “appearances” at routine hearings for inmates, removing the cost and risk of transportation, or for litigants who are widely dispersed. Consider also the impact of the parties’ virtual presence at mediations involving sexual harassment, child or spouse abuse, victim/offender reconciliations, or other

proceedings where one or more parties feel threatened by the presence of another party. Think about the change in dynamics if the Saddam Hussein trial were being held with virtual testimony from witnesses in environments they considered safe, instead of in a courtroom where the threats are real and innumerable.

All of these situations bring up legal and procedural questions, not the least of which is the notion of what it means to “face” one's accuser, but it seems to many of us that the work of redefining and adapting the dispute resolution and legal worlds to incorporate technology is a game well worth the candle.

If the past pattern of innovation in the world of dispute resolution is any indication, ODR tools will continue to develop, and will in the near future become, even more than they are now, a “normal” option for a wide range of dispute resolution efforts. How, and how often, the tools get used is, of course, a question that time and dispute resolution/legal practitioners will answer.