

Online Dispute Resolution Comes Of Age



Hon. Bruce T. Cooper

served as an Administrative Law Judge for the Maryland Office of Administrative Hearings between 1990 and 2000. During his tenure, he conducted numerous hearings via telephone and videoconferencing. Since 2000, he has actively handled mediations and administrative hearings in Los Angeles on an independent basis, and assisted in the design, creation, and implementation of Web-based resolution solutions. Currently, he is an Executive Committee member of the ABA National Conference of Administrative Law Judiciary, chairs the ABA Judicial Division & Dispute Resolution Section's Joint Committee on ADR & Mediation, and is a member of the ABA Judicial Division's Court Technology Committee. Judge Cooper is the owner of The Electronic Courthouse, a Web-based dispute resolution entity, and he is an ALJ for the California Unemployment Insurance Appeals Board. The author thanks Colin Rule, Director of Dispute Resolution for eBay & PayPal, Jeff Aresty, President of InternetBar.org, and Judge Arthur M. Monty Ahalt (ret.), CEO of VirtualCourthouse.com, for their contributions to this article. For more information see www.ElectronicCourthouse.com.

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With the maturation of Web-based technology, ADR has taken its next step forward: online dispute resolution (ODR).

SOUND THE trumpets!!! Bang the drums!!! Crash the cymbals!!! Listen to what's happening. It's been brewing for years. It's been a slow and long process, but technologically assisted resolution, otherwise known as Online Dispute Resolution (ODR), is moving into a new era. It's been tested and is ready for implementation. It's time to come of age. Are you ready?

When was the last time an attorney referred to the judicial process as fast, affordable, and efficient? Even Alternative Dispute Resolution systems, which were supposed to replace the slow-moving court bureaucracy, have become mired down in delays and time consuming procedural formalities.

ORIGINS OF ODR • On October 25, 1995, a meeting sponsored by the National Center for Automated Information Research (NCAIR) and the Cyberspace Law Institute (CLI) created the Virtual Magistrate Project, which went public March 4, 1996. The first class of magistrates included: Professor Charles McClure, School of Information Studies, Syracuse University; Professor Ethan Katsh, Department of Legal Studies, University of Massachusetts; N. M. Norton, Jr., Wright, Lindsey & Jennings, Little Rock, Arkansas; Paul Hoffman, Esq., Croton-on-

Hudson, New York; Larry E. Meyer, Pohl, Bennett & Mathews, Houston, Texas; Alton W. Payne, Sroufe, Payne & Lundeen, Houston, Texas; Andrea W. Selvaggio, Esq., Washington, DC; and, G. Ger-vaise Davis III, Davis & Schroeder P.C., Monterey, California. See, *A Brief History of the Virtual Magistrate Project: The Early Months*, Robert Gellman, www.adr.info/ncair/gellman.htm, May 22, 1996.

The Virtual Magistrate Project had difficulty receiving disputes and complaints for resolution. However, one of its original magistrates, Ethan Katsh, current Director of the National Center for Technology and Dispute Resolution, began mediating disputes online involving domain name/trademark issues and other intellectual property conflicts with Internet Service Providers. Then, in the Spring of 1999, Professor Katsh supervised a project with the online auction site eBay, in which over 150 disputes were mediated during a two-week period. Together with his colleague Professor Janet Rifkin, this experience led to the authoring of their seminal book on ODR, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001). Therein they discussed their eBay project and the development of the “4th party” (technology) as a crucial component of the resolution process.

During this time, I was convening hearings using videoconferencing technology, which piqued my interest on how the Internet can be used to aid the resolution process. ODR can best be described as the use of information and communications technology to help parties and resolution professionals manage, transform, and resolve conflict.

NovaForum, also known as the Electronic Courthouse, in 1998, began conducting intensive research and development on a Web-based dispute resolution system mirroring steps the parties and their counsel would carry out under conventional ADR methodologies, but through faster and more efficient tools accessible from the desktop. The online ADR model used by the Electronic Courthouse incorporated an eight-step process (available

at www.electroniccourthouse.com/resolving_your_dispute_start_here_revised.php). The steps are:

1. Referral. The parties are referred by participating law firms, industry associations and through marketing channels.
2. Intake. The parties confirm that there are two willing parties with a commercial dispute.
3. Contract. The parties commit to ADR rules, such as the American Arbitration Association, the UN Rules, or can craft their own using proprietary model rules.
4. Input. Using model forms, the parties search databases to find and cite appropriate case law, complete their document submissions and can securely send documentary evidence electronically supporting their claims.
5. Output. The parties can also address special needs, such as foreign translation or preliminary meetings to handle more complex disputes.
6. Analysis. The parties select a “resolution professional” by choosing from a short list generated automatically by matching the needs of the parties with the skills and experience of the resolution professionals on the service’s roster. It is the parties that make the final choice from this list. The parties may also have access to an extensive legal database of articles and resources uniquely crafted for business people who are not legal professionals.
7. Resolution session. The parties “meet” in what the Electronic Courthouse calls its SecureResolutionRoom, which includes all the tools that parties would use in a conventional ADR session, including:
 - Voice. A voice conference call with features like playback and transcripts;

- Documentation. The parties' submissions and supporting documents are collated with value-added search and retrieval and related tools that eliminate digging through file folders and contracts;
- Drafting. Model templates and collaborative drafting tools for drawing up minutes of settlement, as well as innovative tools such as international time docks and currency measures for cross-border disputes.

8. Decision. The parties receive a model resolution report incorporating the adjudicative award, minutes of settlement, or evaluation report.

Beginning in 2000, the Electronic Courthouse has provided ODR services to commercial international business entities using this eight-step approach.

UNDERSTANDING THE CURRENT STATE OF ODR

• Similar to the beginnings of the use of ADR before becoming "mainstream" within judiciaries countrywide, ODR faces distrust of technology, confusion on how to incorporate solutions and a general reluctance within the base legal community to embrace change and progress. ODR is simply a complement and supplement to existing processes involving ADR and other resolution environments, including Courts.

Most attorneys and judges utilize technology in their activities of professional life. More and more reliance and trust will develop as time and technology moves forward. What exists today will be quite different than what we will have, say, 10 to 15 years from now. Presently, however, the time is ripe to learn, expand, and implement ODR into general practice. ODR providers and practitioners, many of whom have worked rather anonymously since 1996, expect and anticipate very promising results.

Currently existing online are a variety of Web-based modes of resolution solutions. Most are rooted in basic concepts of communication and process found in dispute resolution principles and practice. The use of Web technology permits asynchronous communication between parties and resolution professionals as well as real-time communication. Various types of resolution rooms exist in which parties are able to organize arguments and evidence in a well-directed and organized manner by responding to specific questions, depending on the case at hand. Evidentiary elements are assessed and evaluated by resolution professionals who assist the parties to achieve resolution through mediation, arbitration, neutral evaluation or other means. Parties, on the other hand, are also able to better understand each other's positions through informal discovery and have the opportunity to settle a matter prior to a neutral getting involved. Online blind bidding negotiation tools are prevalent, as well as new online community courts.

These technologies exist, are in use, and will eventually become well accepted and the norm. Whether it's throughout the insurance industry addressing early claims adjustment, commercial arbitration disputes, small claims cases, interpersonal problems, e-commerce issues or other matters, ODR helps make resolution more efficient.

According to Colin Rule, Director of Dispute Resolution at eBay/Paypal, the eBay community generates approximately 40 million disputes funneling into its ODR process. He said more than 80 percent are resolved automatically between the parties. Recently, eBay-India is implementing a revolutionary "Community Court" in which members of the eBay community serve on 100-person juries to resolve feedback disputes between users. The jury votes to allow or disallow the feedback after reviewing the entire record of the transaction. Other community court type processes can be found on the Web at www.PeoplesCourtRaw.com and www.AllRise.com.