Chapter 41

ONLINE DISPUTE RESOLUTION

James C. Melamed, B.A Stanford University (1978); J.D., University of Oregon Law School (1982); admitted to the Oregon State Bar in 1983; mediator, CEO, Mediate.com, Sunriver, OR.

§ 41.1-1 What is Online Dispute Resolution?

How better to identify a reasonable definition of *online dispute resolution* than to first check out search results for that term using Google, and then perhaps review the first result from Wikipedia:

> **Online dispute resolution** (**ODR**) is a branch of dispute resolution which ***uses technology to facilitate the resolution of disputes between parties***. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process. (Emphasis added.)

For a valuable overview of ODR, see *Online Dispute Resolution: Theory and Practice* (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011).

In the forward to that treatise, Professor Richard Susskind asks the fundamental question of whether "court" is a service or a place? "When people or organizations are in dispute," Susskind asks, "must they congregate in physical courtrooms to resolve their differences?" *Online Dispute Resolution: Theory and Practice* at v. Increasingly we find the answer is "no," since parties are in fact able to effectively resolve disputes online, or at least focus and streamline any necessary face-to-face meetings.

ODR as a general concept is applicable to a vast range of disputes. The low hanging fruit for fully automated ODR includes certain high-volume, low-value "distributive" e-commerce (e.g., eBay) and legal disputes (e.g., traffic ticket disputes, appeals of property tax assessments, etc.). Courts are also now increasingly operating online, both with e-filing and online referral to alternative dispute resolution (ADR) or ODR opportunities. Initial court ODR programs have been focused on relatively simple small claims and parenting issues. ODR has also been applied to large-scale public policy disputes where unlimited participants can be assisted to reach consensus online.

This chapter, however, focuses primarily on areas of ODR that are likely to involve attorneys, be that as legal representatives or as "online" mediators and arbitrators. Given professional costs, attorney involvement in ODR tends to be for more complex and substantial disputes, such as resolving all divorce issues or settling an estate or resolving ongoing business issues. These are areas of "integrative" ODR practice, where there are likely multiple issues and commonly a continuing relationship. For these more substantial and complex matters, ODR technologies are very helpful, but not sufficient. It is in these integrative areas where technology must be effectively integrated with legal and ADR services that are most relevant to attorneys moving forward.

In substantial part, ODR, from an attorney perspective, can helpfully be viewed as an extension of ADR (mediation and arbitration) in that ODR today is largely (1) by agreement and (2) supports existing mediation and arbitration processes. ODR also continues the trends of dispute resolution increasingly being located outside of formal

governmental institutions, be that by current choice or previous contractual commitment to engage in ADR.

For a broader understanding of ODR as it relates to e-commerce, see Amy Schmitz & Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (2017), and Ethan Katsh & Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (2017).

§ 41.1-2 How Do ODR and ADR Compare?

The definition of ODR (*see* § 41.1-1) requires that we also have some understanding of the meaning of ADR, which Wikipedia conveniently defines as follows:

> Alternative dispute resolution (ADR) . . . includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement *short of litigation*. It is a collective term for the ways that parties can settle disputes, *with the help of a third party.* (Emphasis added.)

Indeed, mediation and arbitration are really only similar in one respect: they are both not traditional litigation before a judge. Beyond this, there are few processes more different than mediation and arbitration. For example, in arbitration, one or more arbitrators have complete decision-making power. In mediation, by contrast, the mediator has absolutely zero decision-making power.

Further, for purposes of ODR, online arbitration tends to collect all relevant case documents, materials, submissions, dialogue, and decisions into a single all-inclusive "case file," which then may be available as a basis for any possible appeal or enforcement of the arbitration decision. In stark contrast, it is readily expected that mediation communications,

including both joint and caucus conversations, may well take place in a variety of modalities at different times with different participants. It is understood that the key conversations in a mediation may well be "off the record," using a variety of communication modalities, in contrast to "a single official digital record" for an online arbitration.

As a final introductory note, ODR is now often commonly referred to as the "fourth party" at the virtual dispute-resolution table. This concept of "the fourth party" was first articulated by Ethan Katsh and Janet Rifkin in their pioneering book *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001). Thus, in a classic two-party dispute, we have the disputants as the first two parties, the ADR professional (typically a mediator or arbitrator) as the third party, and now a fourth party (or fourth parties) in the form of helpful technologies supportive of the dispute-resolution effort. Among the early-identified valuable technical functions of ODR are the ability to discuss, store, schedule, evaluate, calculate, calendar, display, survey, draft, monitor and enforce. *See* U.N. Conference on Trade and Development, *E-Commerce and Development Report 2003*, at 189 chart 7.4 (2003), *available at* <http://unctad.org/en/Docs/ecdr2003_en.pdf>.

§ 41.1-3 To What Extent Is ODR a Digital Record?

One interesting aspect of ODR is the extent to which a digital record is kept and, if so, who has what rights of access, for what purposes, and for how long? Privacy and data protection standards are increasingly relevant for online dispute resolution. Clearly, ODR programs and practitioners have an obligation to capably disclose data privacy and confidentiality expectations for ODR participants and their legal representatives.

In the case of an online arbitration or online court program, it is almost certainly required that all case communications are made part of an overall digital case record that is created in part to allow for review, appeal, or enforcement specifically based upon this complete digital record, and commonly upon nothing but this digital record.

In stark contrast, consider the far less predictable online mediation process. In online mediation, rather than all dispute communications being part of a single online case record, it is more likely that the online mediation communications, be they joint or caucus, will be both "off the record" and individually tailored to the respective communicational preferences of each participant. For some, e-mail communication with attachments may be best. For others, it might be phone calls, text messages, Skype, or some combination of these communicational modalities. In any event, in online mediation there is no expectation that all case communications will be part of a single discoverable digital case file. In fact, the more accurate expectation is the opposite, that all mediation discussions will be private and confidential except as agreed otherwise.

The fact that mediation communications take place online rather than face-to-face should in no way lessen the expected confidentiality of those communications or of the overall mediation process. It is surely wise for practicing mediators to confirm all this in their agreements to mediate, namely, that all communications, whether in person or by any digital modality, are to be considered fully confidential as part of the mediation. Conversely, online arbitrators are wise to clarify, should it be the case, that all communications regarding an arbitration will be made part of an enduring arbitration case file, along with submitted documents,

which may over time come to be discoverable as part of any available appeal or other potential court process.

§ 41.1-4 Online Mediation as a Choreography of Communication

As mentioned in § 41.1-1, certain high-volume, low-value disputes are increasingly resolved by automated ODR systems. eBay was one of the first companies to demonstrate the ability to resolve tens of millions of annual disputed transactions with a capably designed and ever-improving ODR system. Parties are assisted by the ODR system to, in a structured way, communicate about their complaints and to propose and respond to discrete financial settlement offers. While eBay's online system is not able to resolve all disputes, the company has been successful in resolving approximately 90 percent of presented disputes (over 30 million per year) with their ODR automation. Further, to the extent that automation does not get the job done, eBay then coordinates the option and assignment of an online human mediator to further assist disputants.

Lessons from eBay include a recognition that, for low-value e-commerce disputes (often also cross-border or at a distance), there is little option but to resolve as many of these disputes as possible online. It is worth here noting that most of these commercial relationships are exclusively online relationships. It would make little sense to require that a dispute and relationship that is 100 percent online must somehow be resolved face-to-face. In fact, for high-volume e-commerce disputes, ODR is, to a substantial degree, as much an extension of customer service as it is a truly independent dispute-resolution service.

Another lesson from eBay is that "distributive cases," where the only issue is money (who gets how much?) are far more easily resolved

online than cases involving "integrative" multi-issue arrangements. Hence, we are finding that there has been great success applying automated ODR to such matters as property tax assessments, traffic offenses, and "small claims" for which the only requested relief is monetary. However, as a general concept, these high-volume, low-value systems do not meaningfully involve attorneys either as representative or as arbitrator or mediator.

Next, consider the situation where a fully automated ODR system is not able to resolve a dispute. Does this mean that ODR is no longer relevant or helpful? To help answer this question, again consider what is meant by *online dispute resolution*. For example, do *all* dispute-resolution communications need to take place online for a process to be considered ODR?

What if disputants bring a mediator into their settlement discussions already taking place by e-mail? Is that ODR? What if the mediator joins the parties' discussions by Skype, Zoom, Webex, GoToMeeting, or the like? Is that ODR? It seems so. But what if that same mediator, by agreement, meets for coffee with each of the parties? Is that still ODR?

The simple point here is that there remains, even today, a tendency to assume a false dichotomy between "online" and "face-to-face" dispute resolution. Certainly, before the Internet, there was a time when one might reasonably have described all dispute resolution (court, arbitration, mediation) as face-to-face. However, with the advent of the telephone and fax machines, and then e-mail with file attachments, and then the Internet—websites, online intake, online calendaring, secure online document storage, shared editing tools, online voice and video

conferencing, online signing, and online satisfaction surveys—today's reality is that just about every single "face-to-face" dispute-resolution practice and program is increasingly utilizing effective online tools to get the job done. Hence, the real issue is not face-to-face or online, but, rather, for most disputes, how can the technology be best *integrated* with face-to-face assistance to most capably and affordably get a matter resolved?

What, then, is face-to-face assistance? Historically, of course, assistance of this kind involved a physical encounter with another human being, being able to literally reach out and touch someone. And certainly, at least for a time, there will continue to be valuable introductory sessions and important physical face-to-face joint and caucus meetings. Just as certain, however, is that ADR's historic reliance on physical meetings is steadily eroding as ever-improving online options become more familiar. ODR communication capacities may not replace physical meetings, but they are certainly lessening our reliance on face-to-face meetings as our only meeting and communication option. Increasingly, mediators and arbitrators are moving our work online for reasons of convenience and cost, and also because clients and their advisors now expect nothing less.

When thinking of possibly proposing a face-to-face physical ADR meeting, professionals must now reasonably ask themselves, "Is this (physical) meeting really necessary?" Both professionals and clients now commonly consider whether parties might resolve issues, or at least move toward a resolution, by taking advantage of available online discussion and meeting capabilities at greater convenience and lower cost.

PRACTICE TIP: Professionals who continue to offer "face-to-face" services should consider how to best integrate face-to-face

services with online efforts. As more and more ADR discussions take place online, there will likely be a decrease in the total number of face-to-face meetings and their length. Physical meetings, to the extent that they continue, will evolve to be critical "summit meetings," with everything else that can reasonably be done online being done online in a more convenient and affordable way.

Next ,consider the possibility of ADR services (mediation or arbitration to keep it simple) being offered "fully online." The object here is not so much about integrating face-to-face discussions with online discussions as adopting the various online technologies that may assist one's overall professional dispute-resolution efforts.

For example, many ADR professionals are already utilizing a variety of online technologies to "get the case," such as online directories, Google advertising, professional websites, articles and blogs, linked references, introductory videos, intake forms, scheduling calendars, etc. Many are also now increasingly likely to use online technologies to deliver valuable mediation services (signing an agreement to mediate, then using e-mails, attachments, PDFs, online forms, document sharing, drafting, editing, online case management, phone, text messages, Skype, Zoom, etc.) to get the job done. So, how should all of these and other emerging online technologies be integrated?

One concept that remains critical is that of achieving and maintaining a "rapport relationship" with ADR clients and their advisors. And so, one of the driving forces in choosing online approaches is to develop rapport. Along these lines, "rich media" (video and audio) conveys far more relational information than, for example, plain text. It is

thus recommended that online mediators and arbitrators, in addition to highly capable and responsive online systems, early schedule a Skype or Zoom call to go over all process issues, any questions, and to formulate a statement of the issues in need of resolution and identify any easy points of agreement that might be built upon. The conveyance of rich information about the ADR professional acting online creates safety and confidence in ADR participants and is strongly encouraged to humanize ODR.

Further, at least for online mediation, there tends to be a beginning, middle, and end to most mediations. Utilizing rich media for the beginning, as described above, often makes great sense. However, online mediators will also likely find that it is rather challenging to do all of the "middle" heavy lifting (bringing the parties together) in joint online discussions. As discussed in § 41.1-7, it is more common that progress online is made in shorter respective caucus discussions. Even assuming this, as part of the "end game," it is again recommended that all clients and their advisors be brought together to confirm resolution, respond to any questions, and to jointly (and humanely) commit to a better future.

ADR professionals are thus now engaging in a "choreography of communication." For them, the essential question in this new world is, "How can we best coordinate all of our communication options, both face-to-face and online, to deliver the best possible dispute-resolution services to parties in a particular dispute?" Driven by technological advancements and the preferences of a newer generation, as well as by federal, state, and local governments looking to provide valuable and necessary dispute-resolution services in more accessible and affordable ways, the transition to online forms of dispute resolution will pave the

way to new means and opportunities for resolving disputes, both private and public. As crazy as it may sound, ADR and ODR are both steadily converging and, at some point in the not-too-distant future, it may well come to be that all ADR is also ODR.

§ 41.1-5 ODR Practices for ADR Professionals

An ADR professional's ability to offer an informative, valuable web site, to responsively communicate by e-mail, phone, and text messages, and to attach drafts for editing, as well as other everyday cyber skills, is now just as critical to mediation success as any face-to-face mediation technique used by a mediator "in the room." Electronic and face-to-face communications are not at odds, but, rather, are cumulative opportunities for ADR professionals to get things moving in a better direction. A mediator's or arbitrator's effective facility with online communication options situates him or her to have the greatest chance of success, be that face-to-face or online success or both.

Before the advent of electronic mail, ADR professionals used to print out (remember paper?) mediation correspondence and draft settlement agreements and then mail those documents in impressive and expensive packages to clients and their legal counsel. Today, a mediator would not survive in the marketplace by relying on snail mail and printed communications and drafts. The marketplace now expects electronic document delivery, be that by e-mail and attachments or by using a secure document transfer service like Dropbox. The practical reality is that ADR professionals now most often "meet" clients online at an ADR professional directory and then the professional's website. The professional's website also serves as an ongoing resource to help clients

understand that professional's dispute-resolution offerings and to obtain links to other valuable information.

Communication revolutions continue to take place before our eyes. E-mail, because of its ease, ubiquity, and affordability is now "how business is done." A person is now more likely to have an e-mail address than a street address. Also notable is that phone numbers used to be tied to locations (land lines). Now phone numbers are generally to individual cell phones or mobile devices, and thus phone communications have become "personalized." This development supports a greater capacity to communicate with individual participants in mediation than existed in the past. Mediators may also consider first sending a courtesy text message asking, "when would be a good time to talk." Or the mediator might note, "Have just sent you an e-mail with a draft agreement to review. Please review that draft and call me ASAP to discuss." And, remarkably, both clients and mediators can now do all these things, and more, from a device that easily fits in a pocket or purse.

The rather remarkable combination of functions available in smartphones, combined with near universal cell and wireless access, presents participants and mediators with an ever-expanding array of communication options. The communication-savvy mediator today does not view mediation as a face-to-face physical encounter but as a steady stream of communications—some online, some by phone, some face-to-face—and all strategically choreographed to assist participants to move in the direction of an optimized settlement and best understanding. To sum it up, mediation has shifted from being a discrete physical meeting to being an ongoing choreography of communications.

§ 41.1-6 Preparing for the Future

Are ADR professionals and programs embracing online communication technologies because mediators and arbitrators are computer savvy and naturally drawn to the latest innovations in computing? The clear answer here is "no." By choice, most mediators and arbitrators would seemingly prefer to avoid learning any new communication technologies (at least those over 35 years old). Nonetheless, the reason ADR professionals and programs are embracing these technologies is simple: current and future clients are demanding it.

The wise ADR professional, at least the one that wants to stay in business, must learn to communicate with clients and potential clients in the ways that each participant wants to be communicated with. For a rapidly growing segment of the marketplace, there is now an expectation of being able to convene a mediation or arbitration online, even if all or a good measure of those eventual settlement discussions come to take place face-to-face. *Convening* these days, quite simply, takes place with online communications, and correspondence and document exchange takes place online before any face-to-face or online meeting. Remarkably, more and more clients are now coming to ask, especially when they are at a geographic distance, "Do we really need to get physically together to meet?" or "Can't we meet online?" In sum, ADR professionals are not driving the ODR revolution for the mere sake of innovation. Rather, to continue being relevant, the profession is now recognizing the need to keep up with client expectations and desires.

§ 41.1-7 An Illustration: Sample Mediation Communication Choreography

As an example, a mediator today may commonly engage the following types of online communication approaches, none of which existed 20 years ago:

(1) The mediator has a fully capable website showing his or her picture, a welcoming video clip, a full description of practice and background, links to authored articles, resources, references, etc. This website is available around the clock and has eliminated the need to "send out" basic information.

(2) A Google search of the mediator's name reveals published articles accessible on the Internet and also that the professional belongs to a number of mediation organizations.

(3) Using a smartphone, the mediator responds to inquiries from pretty much anywhere at any time (often now including while on vacation) and sends along responsive e-mails with attachments and links.

(4) By directing participants to online scheduling and intake forms, the mediator obtains full contact information for all participants and attorneys (cell phone numbers and e-mail addresses) and then assists everyone to get up to speed with e-mails, attachments, and web links.

(5) The mediator schedules a joint Skype or Zoom video-conference as a "mediation process session" to discuss and resolve any and all process issues, including participant and attorney issues, a best agenda, identified issues of agreement, document production, and the like.

(6) Whether a joint face-to-face or joint online mediation session is held next, that meeting takes place in the context of the

mediator also now knowing of his or her robust ability to respectively communicate with individuals and sub-groups of participants and attorneys following best efforts with joint discussions.

> PRACTICE TIP: There is likely to be far more "shuttle diplomacy" in online mediation than face-to-face mediation. There are a number of reasons for this. When online, the mediator needs to remember that discussions are always "a click away from disengagement." Participants also do not particularly like being put in a silent caucus room (i.e., "on hold"). Following whatever easy progress that can be made as a group online, participants will often prefer a series of respectively scheduled online caucus discussions (video or phone) to do the heavy lifting in their mediation settlement discussions. If participants have driven across town to meet, they are likely more committed to a lengthy group discussion in person. However, if participants have not made that physical commitment to a substantial meeting, it is likely that joint online meetings will be shorter, more "summit like," with the negotiation of settlement terms more likely to be accomplished in a series of shorter online caucus meetings and information exchanges.

(7) A first draft settlement agreement is circulated by e-mail with a multi-party editing feature such as Track Changes in Microsoft Word. Each participant's and attorney's suggested edits show up in a different color.

(8) The mediator communicates by e-mail and phone respectively with participants and attorneys to bridge gaps and sends additional settlement drafts, as needed, to achieve a final settlement.

(9) The mediator requests a closing Zoom or Skype session to confirm terms and allow for any and all final comments, questions, and refinements.

(10) The mediator may facilitate an online document signing (e.g., DocuSign) or other formal confirmation of the mediated settlement agreement.

See generally James Melamed, *Sync, Un-Sync, Re-Sync—An Emerging Paradigm for Online Mediation*, June 2013, <www.mediate.com/articles/MelamedSynch.cfm>.

§ 41.1-8 Online Arbitration

Arbitration, as a general concept, takes place either when statutorily required (relatively rare) or, more commonly, when agreed to by the parties. This agreement to arbitration could be historic, as part of an earlier contract, or it may be a present agreement to arbitrate, whether or not legally required. Historically, arbitration has been favored by some as a faster, more affordable and more certain dispute-resolution process than litigation. Arbitration, compared to mediation, is also certain to yield a substantive result (in contrast to mediation where no substantive result is guaranteed). The possible problem with arbitration is, of course, that there is a high likelihood that one party is going to be rather disappointed with the binding outcome.

For those who do choose arbitration, there have long been processes, commonly agreed upon by parties, to economize and expedite the arbitration process. For example, at one time there were often "paper arbitrations" for which there was no live testimony, but only written submissions. These days, whatever used to be done on paper is now likely digitized, if only as a PDF file, and submitted online. Further, to

the extent that testimony is desired, it can now rather easily and routinely be obtained using quality online video programs like Zoom, which securely stores the recorded testimony so it is available to all proper parties, but not others.

There are now many online technologies that can be employed to increase the efficiency of arbitrations, to speed resolution, and to reduce arbitration cost.

§ 41.1-8(a) E-Mail

E-mail is an obvious modern method for communication among the arbitrator and the parties for filings, applications, notices, and the like. E-mail is fast and inexpensive, essentially instantaneous, and free, providing both a complete electronic record of all filings and the ability to transmit them in electronic form.

E-mail use, however, is not without some issues. First, some arbitral administering bodies, for example the American Arbitration Association (AAA), require the parties to agree in writing to the AAA e-mail protocol before e-mail can be used directly between the parties and the tribunal. In the absence of such consent, all communication could still be made via e-mail, but must be directed through the administrator, with the resulting possibility of a significant decrease in the speed of communication. Even if the parties have consented to direct party-tribunal e-mail communications under the AAA protocol, all such e-mails must be copied to both parties and the administrator, and *ex parte* e-mail communication must be avoided.

There are also some steps that should be taken in light of the sensitive and confidential nature of party-tribunal communications. For example, one needs to receive and keep these e-mails on secure devices.

Laptops, personal digital assistants, tablets, and smartphones should be password protected. Free e-mail services, such as Gmail, should be avoided as these services routinely scan all e-mails.

Other precautions pertain more specifically to matters in arbitration. While it is important to make sure that all e-mails between the arbitrator and the parties are sent to all who truly need to receive them, those directly involved should avoid sending arbitration submissions to long e-mail lists. One or two lawyers should be responsible for circulation at each firm. Also, filings and orders should be transmitted in a form that is not subject to easy alteration. PDF format works for this, but clearly Microsoft Word or text file formats are not appropriate for the official version of any arbitration transmittal.

There are also some steps that can or should be taken to improve the e-mail process. Most Internet service providers have limits on the size of attachments they will process, and one needs to be aware that filings may surpass these limits. If so, such transmissions will need to be broken down into more than one e-mail. If a filing is more than 25 pages in total or has formatting that might not come through on the electronic copy, a hard copy by overnight mail is a wise choice.

§ 41.1-8(b) Video Conferencing

Arbitration hearings by videoconference are becoming common, if not preferred, because of the dramatic time and cost savings. Needless to say, the "simpler" an arbitration is in terms of participants and issues, the easier it is to do by videoconference online. There is also always a risk that one or more necessary participants are not able to coordinate technology or get sufficient bandwidth to allow video conferencing to work. For these reasons, it is often helpful to do a "dry run" of the

technology to be used with core participants a day or two before the actual arbitration hearing to make sure that everyone is able to gain quality online access.

Also notable is the ability to record a videoconference and to securely store that video "in the cloud" for possible later review (all depending upon the procedural agreements of the parties for their arbitration). Of course, video conferencing can also be used for only some portions of an arbitration (e.g., remote witnesses) to augment a face-to-face hearing.

Thus, with the advent of the Internet, particularly with steady increases in transmission speeds and the constant improvements in equipment, together with lower costs for both ADR services and equipment, live testimony by videoconference over the Internet has become a common tool for efficient and cost-effective arbitration. As with e-mail, however, there are precautions applicable to videoconferencing. Most importantly, any documents that may be used during the video testimony need to be available at all locations in advance of the arbitration. Distributing copies of these documents before the hearing starts is far more efficient than attempting to distribute them during the testimony.

§ 41.1-8(c) Arbitration Awards and E-Briefs

Reasoned arbitration awards, an arbitral award that states the reasons for the result, are becoming more and more common. A reasoned award may be a simple, short statement of reasons for a decision or something as complicated as a full "judicial" opinion with findings of fact and conclusions of law. For a tribunal confronted with lengthy briefs and a substantial evidentiary record, preparing a reasoned award and

verifying that the parties' positions in their briefs are supported by the actual hearing transcript or documentary evidence is no small chore. Bouncing between briefs, transcript, and recording, as well as multiple evidence binders, is time consuming and tedious. On top of this, the arbitrator must also check the parties' descriptions of the law against the actual authorities.

A partial solution to this tedium is the increasing use of "e-briefs." An e-brief is much more than a searchable electronic brief. An e-brief also provides the backup documents to which the brief refers, all linked to the textual references in those documents. In other words, each reference in an e-brief to the record or authority is a "hot" link on which the reader can mouse click, causing the record or authority in question to pop up in a separate window. There is no need to go back to the record itself or to dig out the legal authority; they are instantly available by just a mouse click.

See generally Thomas D. Halket, *Using Information Technology in Arbitration*, GP Solo, Jan–Feb 2015, *available at* <www.americanbar.org/publications/gp_solo/2015/january-february/using_information_technology_arbitration.html>; Charlie Harrel, *The Digital Future of Arbitration*, Plaintiff, Nov 2017, *available at* <www.plaintiffmagazine.com/item/the-digital-future-of-arbitration>; Mohamed S. Abdel, *ODR and e-Arbitration – Trends & Challenges*, May 2013, <www.mediate.com/articles/ODRTheoryandPractice18.cfm>.

§ 41.1-9 The Future: Smart Contracts and Blockchain Arbitration

Online mediation and online arbitration have been around for some time, but there is a new form of dispute resolution that is currently being

developed called "blockchain arbitration." Blockchain arbitration has been developed as the mechanism of choice for disputes arising from a new phenomenon called "smart contracts." For the ambitious, some knowledge of blockchain technology and smart contracts is required to understand blockchain arbitration.

The blockchain is essentially an incorruptible digital ledger of transactions that can be programmed to record not only financial transactions, but almost anything that is of value. While originally devised for cryptocurrencies, there are many potential uses for the technology. The blockchain database is not stored in any single location, but is instead spread across a network of millions of computers simultaneously. The blockchain ledger containing the information has been touted to be incorruptible, because to alter any information on it would require the hacker to have the processing capability to overpower the entire network of millions of computers.

What has arisen from blockchain technology is something new called "smart contracts." Unlike regular contracts, smart contract components are not written in natural languages such as English or French, but, rather, in computer code. Like a computer program, smart contracts automatically execute or enforce obligations. For example, in a simple contract to sell an item, the smart contract could be coded in such a way that once payment is received, it would automatically transfer ownership of the item to the buyer.

Blockchain arbitration has in turn been developed to service dispute-resolution needs that may follow from smart contracts. There are currently two leading models of blockchain arbitration being developed, CodeLegit and Kleros. CodeLegit has drafted a set of Blockchain

Arbitration Rules and envisions an Appointing Authority that will appoint an arbitrator who may be a jurist or a blockchain technician. Communication would be done by e-mail and there might be an oral hearing over videoconference should the arbitrator call for it. This is in essence quite similar to online arbitration.

Kleros on the other hand represents a different system of blockchain arbitration, in which the developers appear to be creating an entire quasi-judicial system, with a general court, followed by two tiers of subcourt divisions. A rather complex process occurs where "jurors" who volunteer at these Kleros court divisions are selected by random number generation. Kleros also includes an appeal system and even a bribe-resistance system for the jurors.

For more information see Dena Givari, *How Does Arbitration Intersect with the Blockchain Technology that Underlies Cryptocurrencies?*, Kluwer Arbitration Blog (May 5, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/05/05/scheduled-blockchain-arbitration-april-17-2018>; *World's First Smart Contract Based Arbitration Proceedings Conducted*, Trustnodes (July 17, 2017), <www.trustnodes.com/2017/07/17/worlds-first-smart-contract-based-arbitration-proceedings-conducted>.

For another innovative application of technology to arbitrating crowd-funding disputes, see C. Steven Bradford, *Online Arbitration as a Remedy for Crowdfunding Fraud*, Fla St Univ L Rev (forthcoming), *available at* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014148>.

§ 41.1-10 Summary for ADR Practitioners

The overall challenge faced by ADR professionals is to do those things online that can be effectively done online for clients who prefer this form of communication; and to do those things face-to-face that require such direct communication for clients who are so inclined and prepared to physically meet.

Whether one expects to do his or her most important work online or face-to-face, all ADR professionals are ODR professionals to some extent, given the increasing use of such technologies as e-mail with attachments, cell phones, videoconferencing, text messaging, Dropbox, DocuSign, and other forms of communication, both synchronous and asynchronous. The practice of dispute resolution greatly benefits from the expanding variety of communicational capacities. Effectiveness in dispute resolution today thus involves far more than just considering what is best done and said "in the room." To effectively resolve disputes, ADR professionals today must examine all communicational practices and assumptions as they seek to communicate with and best serve a diverse group of ever-more tech-savvy disputants and their legal counsel.

§ 41.1-11 ODR, the Courts, and Access to Justice

The National Center for State Courts (NCSC) (<www.ncsc.org>) has released two 2018 reports on court-connected ODR. *See generally Case Studies in ODR for Courts: A View from the Front Lines*, JTC Resource Bulletin (Nov 29, 2017) (reporting on nine pioneering ODR court programs), <www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20case%20studies%20final.ashx>; *ODR for Courts*, JTC

Resource Bulletin (Nov 29, 2017), < www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>.

"NCSC is the organization courts turn to for authoritative knowledge and information, because its efforts are directed by collaborative work with the Conference of Chief Justices, the Conference of State Court Administrators, and other associations of judicial leaders." *About Us*, <www.ncsc.org/abous-us.aspx>. NCSC's leadership in promoting ODR in the courts is hugely legitimizing and likely to spark enormous interest on the part of court administrative officers and chief justices in the United States going forward.

> For more than 20 years, Online Dispute Resolution (ODR) has been used effectively to resolve individual-to-individual e-commerce disputes. Increasingly, it is being used in innovative applications unique to the judiciary. While ODR is a new concept for courts, it is not a theory or a "bleeding-edge" technology. It is a proven tool with a documentable record of success over a sustained period of time: billions of disputes have been resolved outside of court using ODR. Significant opportunities exist for courts to leverage ODR to expand services while simultaneously reducing costs and improving the public's experience and therefore, satisfaction. For those reasons, it is becoming central to the discussion of the future of courts.

ODR for Courts at 1.

The courts are thus, after some delay, now fully recognizing that ODR has the potential to dramatically expand the public's access to justice and improve their experience with justice processes. Just as ODR presents new opportunities in the private sector for online mediation and

arbitration, ODR is now also recognized to present opportunities for courts to expand their services while simultaneously improving customer experience and satisfaction.

Richard Susskind, author of *Tomorrow's Lawyers: An Introduction to Your Future* and other books and articles about the dramatic changes taking place in lawyering and dispute resolution as a result of technology, makes the case for online courts in this YouTube video: <https://youtu.be/VEItwvisanQ>.

See also Giuseppe Leone, *Small Claims Courts 2.0 – Online Dispute Resolution in Action at Franklin County Municipal Court*, Mar 2018, <www.mediate.com/articles/leoneg7.cfm>.

§ 41.1-12 ODR and Ombuds

In addition to ODR growing in the courts and in terms of online mediation and online arbitration, ombuds offices are also greatly benefiting from online communicational capacities. As examples, the Internet Corporation for Assigned Names and Numbers (ICANN), the International Monetary Fund (IMF), the International Red Cross (ICRC), and numerous college and university ombuds offices, are now managing their confidential and secure ombuds caseloads "in the cloud."

Note that ombuds offices commonly deal with such sensitive matters as allegations of sexual misbehavior and whistleblowing, so these ombuds case-management systems themselves need to be bulletproof in terms of privacy, confidentiality, and security. For example, in addition to all of the regular security and access concerns one has for these systems, an ombuds office also needs to be sure that its own information-technology department and its own human-resources department are not able to access any information that is confidential to the ombuds process.

Caseload Manager (<www.caseloadmanager.com>) is a proven and robust case-management system with heightened confidentiality and security controls for ombuds and mediation programs. For example, programs have the ability to delete all personal identifying information from a case, yet preserve the case data for reporting purposes. Caseload Manager is currently utilized by ICANN, IMF, ICRC, four statewide mediation systems, and over 100 mediation programs. *See Representatives Caseload Manager Systems*, <http://caseloadmanager.com/pg31.cfm>. Caseload Manager systems can now also be located in Frankfurt, Germany, to take advantage of elevated European Union privacy and data protection.

For more information about the use of ODR in ombuds offices, see the following:

- Clare Fowler & Jim Melamed, *Caseload Manager Helps Ombuds Offices Meet Best Practice Standards*, <www.mediate.com/articles/OmbudsCM.cfm>.
- Daniel Rainey & Frank Fowlie, *Leveraging Technology in the Ombudsman Field: Current Practice and Future Possibilities*, 8 J Int'l Ombudsman Ass'n, no 1, 2015, at 61, <www.ombudsassociation.org/IOA_Main/media/SiteFiles/docs/JIOA-15-V8-1-Rainey_Fowlie.pdf>.
- Colin Rule & Indu Sen, *Online Dispute Resolution and Ombuds: Bringing Technology to the Table*, 8 J Int'l Ombudsman Ass'n, no 1, 2015, at 73, <www.ombudsassociation.org/IOA_Main/media/SiteFiles/docs/JIOA-15-V8-1-Rule_Sen.pdf>.

§ 41.1-13 Ethics and Standards for ODR

As the ODR field has gained traction and grown, increasing focus is being paid to issues of quality control, ethics, practitioner training, service provider qualifications, and monitoring. Unclear at this point is appropriate governance for the ODR field.

For a capable discussion of the many complex issues involved in regulating the ODR field, see Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for the ODR Field*, 32 Negotiation J 297 (2016), *available at* <https://onlinelibrary.wiley.com/toc/15719979/2016/32/4>.

See also the following:

- Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 Int'l J Online Disp Resol, no 1, 2014, at 37, <www.international-odr.com/documenten/ijodr_2014_01_01.pdf>.
- Model Standards of Conduct for Mediators (Annotated for ODR, August 2016), <http://danielrainey.us/wp-content/uploads/2016/08/MODEL-STANDARDS-ANNOTATED-FOR-ODR-AUGUST-2016.pdf>.
- Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 Int'l J Online Disp Resol, no 3, 2016, at 12, *available at* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973278>.
- David Larson & Lainey Feingold, *ODR for All: Digital Accessibility and Disability Accommodations in Online*

Dispute Resolution, May 2018,
<www.mediate.com//articles/larsond2.cfm>.

- <www.ODR.info>
- <www.mediate.com/ODR>

Appendix 41A Abbreviations and Selected Short Citations

AAA	American Arbitration Association
ADR	alternative dispute resolution
ODR	online dispute resolution
PDF	portable document format