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ETHICAL COMPASS

Ethics Meets the “O” in DR

By Professor Elayne E. Greenberg and Noam Ebner, Guest Collaborator¹

Introduction

Lawyers, the menu of justice options available to resolve your clients’ legal disputes has now expanded to include online dispute resolution processes. Online dispute resolution (ODR) is an umbrella term that may be used to describe the use of technology to help expedite legal case management, replicate existing dispute resolution processes online, such as by utilizing video conferencing for arbitration and mediation (“replication ODR”); or to help streamline or even resolve legal claims through the use of algorithms (“algorithm ODR” or “algorithm-based ODR”).² Even though ODR is fast becoming a regular part of legal practice, generally, and dispute resolution, specifically, many lawyers are ambivalent about this trend. Lawyers are beginning to recognize that a growing number of arbitrators and mediators are offering to conduct their processes online, and that this might offer convenience and expertise to their clients. However, lawyers are less sure about the merits of digital justice—the term used for those court initiatives that integrate algorithms into case management and decision systems, such as the one being considered in the New York courts. New York, following the lead of other court systems in the U.S. and around the world who are offering online dispute resolution processes to help resolve defined legal disputes,³ is planning to pilot an ODR program to settle small claims disputes.⁴

Some naysayers fear that the increased use of ODR will transform the practice of law, arbitration and mediation; others are concerned that court systems venturing into digital justice might eventually go beyond that, rendering lawyers, mediators, and arbitrators obsolete and then extinct. Such prognostication might be entertaining to some, terrifying for others, and intriguing to others.⁵ Yet, one thing is clear: your ethical obligation as a lawyer has now expanded to helping your client decide, choose, and, if selected, prepare for ODR. What should you consider when helping clients decide whether ODR is right for them? If clients opt for an online dispute resolution procedure to resolve their legal dispute, how might you advise your clients to act so as to increase the likelihood that they will best achieve their interests? Beyond posing lawyers a new set of practical tasks, the expanded role also poses an expanded set of ethical considerations.

This column will provide an overview of ethical considerations related to ODR advocacy in two types of ODR processes: replication ODR and algorithm-based ODR processes, both of which are becoming part of court-connected processes. While most of the writing related to ethics in ODR has focused on the ODR system provider’s ethics, or those of individual practitioners, this column focuses on your ethics as an attorney who

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is considering recommending ODR for your client. I am honored to have my esteemed colleague and critical thinker about ODR, Noam Ebner, collaborate with me in facilitating this evolving discussion.

This conversation will continue in four additional parts. Part One will provide an overview of court-connected ODR, a less familiar ODR process to most. For those doubters about ODR, Part Two will explain its benefits. In Part Three, we will highlight the ethical considerations for lawyers about ODR use when you are advising, counseling and advocating for your clients. We will conclude by offering lawyers suggested guidelines to help them ethically respond to this rapidly evolving trend.

Part One: How Does Court-Connected ODR work?

As court-connected ODR programs emerge in different jurisdictions in the U.S. and around the world, the first challenge facing lawyers is that such programs are far from cookie-cutter. The programs differ in the type of legal cases they are designed to resolve, the number of stages included in the program design, the use of algorithms to provide appropriate tailored options to participants and the use of algorithms to render online decisions. To date, court-connected ODR programs have been designed to resolve a range of cases from divorce to small claims disputes. Some have multiple stages such as an online evaluation, online negotiation, online facilitation and online decisions. Some programs are synchronous, others are asynchronous. Some focus on providing parties with information, others on providing them with solutions.

Of particular concern to lawyers, court-connected ODR involves algorithmic intervention in the dispute. By

algorithmic intervention, we mean that the parties input information about the dispute into a computer system, and then the system makes process and/or outcome decisions for them. Such algorithmic intervention may take the form of automated, algorithm-based case intake, case management, information exchange, and initial resolution efforts. The movement from one phase to the next is determined by the system, with little or no human intervention or specific human monitoring of each case. Current ODR systems tend to be hybrid, in the sense that algorithmic intervention is complemented by human facilitation. If initial algorithmic interventions are not successful, the system shifts parties to an online replication process, in which a human mediates, or adjudicates, their dispute.

The ODR systems of today use algorithms to determine the *advice* parties are given and the *process* they go through. As ODR develops, however, direct algorithmic intervention in the *outcome*—through more aggressive case management, shunting some cases towards automated decision or through supplanting human involvement at later decision-making stages—is nearly inevitable. Looking ahead at the rise of the algorithms, lawyers need to ask: How are these algorithms formulated? Will the algorithm advantage or disadvantage your client? Do “repeat players” enjoy any advantage?

Part Two: What Might ODR Processes Offer Your Client?

Generally speaking, ODR is touted to offer clients an efficient, less emotional and more arm’s-length resolution to your client’s dispute. As an illustration, replication ODR offers parties all of the advantages that traditional mediation and arbitration offer over litigation, and, in addition, enjoys benefits of time saving and flexibility. Algorithmic ODR also extols efficient resolutions and offers additional benefits. One is the potential for achieving *optimal* results by maximizing party outcomes to a degree that even traditional ADR, for all its aspiration to win-win outcomes, rarely achieves. From a justice perspective, another benefit of algorithmic ODR is that it provides users with standardized results. Thus, algorithmic ODR can enhance justice by eliminating human factors that cause two similar cases to be treated differently.

When counseling a client about whether one of these processes is an appropriate option for them, lawyers must first work with the client to assess and prioritize their justice interests. If the efficient resolution of the presenting dispute is a priority for your client, algorithmic ODR might be an appropriate means of resolution. However, if your client’s priority is having her “day in court” or seeking a remedy beyond the standardized outcome list of an algorithmic ODR system, such a process would not suit them. On the other hand, issues of both voice and creative outcomes might be satisfied through replication ODR—even though such a process might take longer. For other clients, the lack of a physical experience of a day in court might render such a process unsuitable. The suitability of any particular ODR process to your

client’s needs requires understanding all of your clients’ interests, including their justice interests. This requires a set of considerations different from typical litigation management, and one that goes beyond the now-familiar considerations involved in assessing the suitability of a traditional ADR process.

Part Three: What Does Ethics Have to Do With ODR?

Your ethical obligations as detailed in the N.Y. Part 1200 Rules of Professional Conduct⁶ also extend to ODR. After all, ODR is just another means for your client to resolve her legal dispute and get the justice she seeks. Thus, lawyers must be well-versed in how ODR operates if you are to provide competent,⁷ client-informed⁸ and ethical representation⁹ of your clients. Even if you are not representing your client in the ODR process, your guidance on participation must be given within an ethical framework: You must have the requisite skill to counsel and advise clients about ODR and provide them with sufficient information about the ODR choice they are facing so that they are able to make an informed decision.

We note that New York State has not fully adopted the ABA’s wording of comment 8 to Model Rule 1.1 on attorney competence, which dictates that “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology.**” Instead, New York State has limited the scope of technological competency in its version of Comment 8(ii) to “keep abreast of the benefits and risks **associated with technology the lawyer uses to provide services** to clients or to store or transmit confidential information.” Therefore, we impute that a lawyer’s duty to stay abreast of developments in technology that affect her clients, such as ODR, stems from more general duties requiring knowledge, skills, thoroughness and preparation. In court-connected circumstances, it also stems from the lawyer’s duty detailed in Comment 8(i) to NYS Rule 1.1(a) to “keep abreast of changes in substantive and **procedural** law.”(emphasis added, throughout).

However, competence in providing preliminary counsel, ongoing advice, and actual representation to your client is not the only ethical concern pertaining to ODR. When it comes to honoring a lawyer’s ethical obligation to protect attorney-client privilege and confidentiality of settlement discussion,¹⁰ lawyers whose clients are considering using ODR have additional confidentiality considerations. In fact, we believe that the potential increases in breaches of data security that are possible or likely with the increased use of ODR expands a lawyer’s ethical obligation to verify the ethics and standards of the ODR provider that the client is considering. In this regard, new questions abound. For example: Is the platform through which the ODR process is conducted secure?¹¹ What information is stored, and what is done with it? Is it accessed by the ODR provider, or by the court system, to review specific cases, or to garner insight regarding system-wide trends? Do the algorithms that are part of

the specific ODR program yield biased results in favor of repeat users? Do they tend to prompt quick rather than explained decisions, and what does this mean for your client's affairs? If you and your client are mediating via video conferencing, is the interaction being recorded? Are there other people in the room that you cannot see and don't want to be part of the process? Do you have an input in these protocols? You do not need a degree in computer science in order to provide guidance on these issues, at least to the extent of noting the challenges these issues pose and exploring your client's concerns. You do, however, need to familiarize yourself with a working knowledge of ODR platforms and practices, their advantages and the question marks they raise, dedicating particular effort to learn about specific platforms introduced in the jurisdiction of your practice.

Part Four: Takeaways for Lawyers

Because ODR is such a rapidly evolving field, we realize that it is hubris to offer precise predictions about how lawyers should ethically counsel clients regarding use of ODR, or use ODR in their client representation. Rather, we believe you will find it more useful if we offer three guidelines to help you navigate ODR's addition to the justice and dispute resolution landscape.

First, your personal attitude towards technology should not interfere with your ethical responsibilities as a lawyer. You may be natural born techie who approaches ODR with a comfort that may obscure ODR's actual limitations. On the other end of the spectrum, you may be technology adverse, believing you can avoid ODR totally. After all, you have been successful without ODR most of your career. ODR is not about your personal attitude. It's all about the client's preferences.

Second, our competence and comfort with ODR will grow as we experiment with its use and value. The devil is in the details, and technology reveals its details only to curious users. You cannot possibly appreciate all the nuances of ODR advocacy without having practical experience using it. So, begin using ODR, with an eye toward flagging ethical issues for consideration.

Third, get involved. Good ODR practice dictates that dispute system designers reach out to those potential users of the court-connected ODR program to better understand users' needs and concerns. Help these dispute system designers build a better mousetrap. It is much more constructive to share your concerns during the development stage than after the ODR process is a *fait accompli*.

We welcome your ideas and comments about this emerging justice option.

Endnotes

1. Professor Elayne E. Greenberg is the Assistant Dean of Dispute Resolution, Director of the Hugh L. Carey Center and Professor of Legal Practice at St. John's Law School. Professor Noam Ebner is the Professor of Negotiation and Conflict Resolution in the Department of Interdisciplinary Studies at Creighton University Graduate School. Thank you Tina M. Kassangana ('19) for your research assistance.

2. See generally Katsh & Rabinovich-Einy, Digital Justice (2017).
3. See, e.g., <http://www.ncsc.org/~media/files/pdf/aboutpercent20us/committees/jtc/odr.percent20qr.percent20final.percent20v1.percent20- percent20nov.ashx>.
4. E-mail communication dated 5/7/18 with Diana Colon, Assistant Deputy Counsel at the New York State Unified Court System (on file with author).
5. Also, very confusing to some, particularly around the question of whether the systems being discussed are human-driven or algorithm-operated. See, on this point, Zeleznikow, J. (2017); Don't Fear Robo-Justice, <https://theconversation.com/dont-fear- robo-justice-algorithms-could-help-more-people-access-legal- advice-85395>.
6. <http://www.nycourts.gov/rules/jointappellate/ny-rules-prof- conduct-1200.pdf>.
7. N.Y. Rules of Professional Conduct 1.1(a) Competence provides A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill (emphasis added), thoroughness and preparation reasonably necessary for the representation.
8. Rule 1.0(j) explains that informed consent denotes the agreement to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.
9. See, e.g., Rule 1.2 (a) Scope of Representation and Allocation of Authority Between Client and Lawyer states in relevant part ... a lawyer shall abide by a client's decisions concerning the objectives of representation, and as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued...(a) (2) A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished. See also Rule 1.4 Communication 1.4(a)(1) (i) A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these rules.
10. RULE 1.6. Confidentiality of Information (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless: (1) the client gives informed consent, as defined in Rule 1.0(j); (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or (3) the disclosure is permitted by paragraph (b). "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. -9- (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime; (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud; (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm; (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or (6) when permitted or required under these Rules or to comply with other law or court order. (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).
11. Of course, we appreciate that as of the writing of this column, no ODR platform is totally immunized from security breaches. However, some are more secure than others.