

## ARTICLES

# Mapping the Parameters of Online Dispute Resolution

Leah Wing\*

### Abstract

*The definition of online dispute resolution (ODR) has become increasingly contested, particularly fueled by the recent explosion in the use of technology during the pandemic by courts and alternative dispute resolution practitioners. The recent expansion of stakeholders has contributed productively to the on-going discussion of the parameters of ODR that have implications for ethical practice. Does the use of video conferencing constitute ODR? What new procedural and substantive justice concerns arise with the use of technology in dispute handling and how should they be addressed? Since technology not only alters the role of third parties and disputants but also serves as a fourth party, what are the ethical implications for example, of employing artificial intelligence? How can explorations of the boundaries of ODR foster a re-imagining of 21st Century justice systems?*

*This article explores the importance of the parameters of ODR for the ethical practice of dispute resolution and introduces a paper, *Framing the Parameters of Online Dispute Resolution* (National Center for Technology and Dispute Resolution, 2022) that offers a descriptive ODR Framework; one that encompasses the broad range of views on the boundaries of ODR along an axis of increasing reliance on technology through various functions and stages of dispute handling. The article discusses the implications of this ODR Framework for enhancing ethical guidance and regulation for whatever definition of ODR is utilized.*

**Keywords:** ODR, ethics, online dispute resolution, alternative dispute resolution, technology, artificial intelligence.

## 1 Introduction

An important discussion is underway about the parameters of online dispute resolution (ODR). Likely a sign of the maturation of the field, it has been fuelled by the recent rapid and widespread adoption of technology in dispute handling

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processes owing to the pandemic. Unsurprisingly, these stakeholders from across the globe are contributing from their own vantage points to the exploration of what falls under the definition of ODR. The views range from more expansive to more restrictive definitions and are likely to continue to morph with the introduction of new technologies. This vibrant discussion and the disruptive nature of technology offer us a chance not only to enhance efficiency and access to justice but also to think beyond just ‘plug and play’ – to how we can reconceptualize the way justice and resolution are delivered.<sup>1</sup>

The growing conversation about deploying ODR joins a twenty-five-year exploration of the possibilities, risks and ethical responsibilities that accompany the use of technology in dispute resolution. A body of scholarship<sup>2</sup> and ethical guidance and standards on ODR<sup>3</sup> have developed over time, and new contributions will undoubtedly strengthen them. From early on in the development of ODR, the business sector<sup>4</sup> impacted the framing of the universe of ODR through its efforts

- 1 D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021; E. Katsh and O. Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, Oxford, 2017; R. Susskind, *Online Courts and the Future of Justice*, Oxford University Press, Oxford, 2019.
- 2 See the Online Dispute Resolution Bibliography housed at The National Center for Technology and Dispute Resolution available at: <https://odr.info/publications/> (accessed 28 March 2022).
- 3 See the ODR Standards, Principles, and Guidelines archive housed at the National Center for Technology and Dispute Resolution available at: <https://odr.info/standards/> (accessed 30 March 2022).
- 4 Whether presented as ODR or in terms of customer service, e-commerce businesses have utilized technology to assist in preventing and addressing disputes since early in the history of ODR, and practitioners and theorists have also concentrated on commercial use of ODR throughout its history; see A.J. Schmitz and C. Rule, ‘The New Handshake: Where We Are Now,’ *International Journal of Online Dispute Resolution*, Vol. 3, No. 2, 2016, pp. 84-101; C. Rule, ‘How the Internet Is Changing the Way Disputes Are Resolved,’ *Wired*, June 26, 2014, available at: <http://insights.wired.com/profiles/blogs/how-the-internet-is-changing-the-way-disputes-are-resolved#axzz36WPtGErc> (accessed 17 June 2016); B.G. Davis, ‘The New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers,’ *Journal of International Arbitration*, Vol. 17, 2000, p. 116; E. Katsh, ‘Online Dispute Resolution: Some Lessons from the E-Commerce Revolution,’ *North Kentucky Law Review*, Vol. 28, No. 4, 2001, pp. 810-821; E. Katsh, J. Rifkin, and A. Gaitenby, ‘E-commerce, E-disputes, and E-dispute Resolution: In the Shadow of eBay Law,’ *Ohio State Journal on Dispute Resolution*, Vol. 15, No. 3, 2000, pp. 705-734; A.E. Vilalta and R. Perez Martell, ‘E-Commerce, ICTs and Online Dispute Resolution: Is This the Beginning of a New Professional Profile?’ *International Journal of Online Dispute Resolution*, Vol. 2, No. 2, 2015, pp. 140-154; A.E. Vilalta and R. Perez Martell, ‘La Mediación Civil y Mercantil en España: Algunas Consideraciones a la Luz de la Nueva Ley 5/2012, de Mediación,’ *Revista General de Derecho Procesal, IUSTEL, Estudios*, No. 28, Octubre 2012, pp. 1-24; M. Abdel Wahab, ‘E-Commerce and ODR for Developing Countries: The Digital Nemesis,’ *Journal of Arab Arbitration*, August 2004; C. Rule, V. Rogers, and L. Del Duca, ‘Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments,’ *Universal Commercial Code Law Journal*, Vol. 42, No. 3, 2010, pp. 221-264; P. Cortes, *Online Dispute Resolution for Consumers in the European Union*, Routledge, London, 2010.

to foster trust in cross-jurisdictional e-commerce.<sup>5</sup> As attention to ODR by other sectors and stakeholders grew, increasing numbers of government agencies, regional governance bodies, courts and dispute resolution membership organizations articulated boundaries of ODR in their legislation and policies for guidance and regulation.<sup>6</sup> Where there has been an absence of guidance and regulation, courts and individual practitioners have contended with making decisions about the use of technology that – whether explicitly or implicitly – have at their core questions about the parameters of ODR and what that means for managing their processes. Which cloud service offers the best or at least minimally sufficient data protection for document sharing, asks a mediator? Based on what criteria do I decide that? If I am using collaborative writing software with parties to draft an agreement or e-calendars for scheduling sessions and assisting in the development of parenting plans for a divorcing couple, does that constitute ODR? If it does, what new confidentiality protocols do I need to put in place? As an arbitrator, if my use of videoconferencing constitutes ODR, what impact should that have on my practice, if any? When traditional mediator and arbitrator ethical standards fall short of addressing new risks and ethical responsibilities that arise with the incorporation of technology, who will issue and regulate new ethical guidance and standards? What are the possible implications if there are no consistent definitions of whether videoconferencing constitutes ODR across jurisdictions? Is it ODR when a court uses artificial intelligence (AI) for decision-making about bail? If a court subcontracts the development or hosting of a dispute resolution system that includes case management, document exchange functions and video conference capabilities, how is liability distributed for data security? Is there (and if not, should there be?) a shared definition of ODR that articulates what technologies constitute ODR? Should that depend on the setting and purpose? As the type and amount of reliance on humans can change with increased integration of technology, what ethical questions and new guardrails are needed for the provision of ethical processes?<sup>7</sup> Answers to these questions can significantly impact the delivery of dispute resolution services, training and education, as well as related topics such as liability insurance, credentialing and legislation.

Defining what constitutes ODR is further complicated by the fact that technology disrupts boundaries.<sup>8</sup> For example, there are many people employing it

5 Examples of regulation of ODR for e-commerce include The European Parliament and the Council of the European Union, 'Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR),' *Official Journal of the European Union*, 2013, L 165/1-12; and Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Technical Notes on Online Dispute Resolution*, 2017, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382\\_english\\_technical\\_notes\\_on\\_odr.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf) (accessed 28 March 2022).

6 See a growing list archived at the National Center for Technology and Dispute Resolution available at: <https://odr.info/standards/> (accessed 30 March 2022).

7 Thanks to Orna Rabinovich-Einy for her thoughtful contribution and engagement on this point.

8 Katsh and Rabinovich-Einy, 2017; O. Rabinovich-Einy and E. Katsh, 'Technology and the Future of Dispute Systems Design,' *Harvard Negotiation Law Review*, Vol. 17, 2012, pp. 151-199.

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to resolve disputes who are not regulated by and do not identify as part of the legal or broader dispute resolution fields. Consider the social worker using videoconferencing as he mediates online between a parent and adolescent during a therapy session. Whether he is bound solely by the ethical standards of his social work credentialing and membership organization or also by legislation designed for mediators in his state, what if neither code of ethics addresses the specific responsibilities that arise when technology is employed? Additional boundary busting occurs within the dispute resolution field itself, as when technology serves as a fourth party in a dispute,<sup>9</sup> for example, by providing automated responses or AI-generated options or decisions. While we are still discovering the myriad of ways in which uses of the fourth party to enhance participation, efficiency, fairness and creativity can alter our processes, we can already see that the boundaries of our own roles (and those of the disputants) are being reconfigured. How might this affect the practice of an arbitrator trained twenty-five years ago, and where can she access guidance on this to assist her in determining how to select the forms of technology she may wish to employ and how to integrate them into her reconfigured role? Since risks are raised for both disputants and third parties, how should this impact arbitrator training and qualifications? Will companies offering liability insurance become by default those that define what constitutes ODR? The complexity of answering questions such as these is likely to only increase as the dramatic expansion in the use of technology by courts and other rule-based systems requires compliance with regulatory mechanisms that were not designed with ODR in mind.

The seismic shift in the infusion of technology into dispute handling over the past few years has outpaced the development of an agreed view on what constitutes ODR in the field, let alone across a landscape of disciplines, professions and geography. This is reminiscent of the debates that emerged amidst a burgeoning alternative dispute resolution (ADR) field with increased discussion about its parameters and ethics. This was arguably a sign that that field had matured faster than consensus on its regulation, resulting in a mixture of a lack of accountability mechanisms and conflicting forms of oversight.<sup>10</sup> The innovations and strengths that technology brings to the maturing ODR field also bring great challenges. As noted previously, two particular trends stand out: one, the disruptive nature of technology has eroded traditional disciplinary and professional silos and through its application insinuates itself across sectoral and legal jurisdictions as well as

9 See E. Katsh, and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, San Francisco, 2001; L. Wing, J.K. Martinez, E. Katsh, and C. Rule, 'Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party,' *Negotiation Journal*, Vol. 37, No. 1, pp. 49-64.

10 Carrie Menkel-Meadow explored this at the time in 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution.' *Fordham Urban Law Journal*, Vol. 28, 2001, pp. 979-990. Her insights about ADR at that juncture, two decades ago, resonate with the state of ODR today. Professor Menkel-Meadow wrote: "There are many changes occurring in ADR, and I now fear that, because of all the activity, we are about to encounter the possibility of 'conflicts of laws' with respect to ethics in the practice of alternative dispute resolution. If we do not already, we soon will have many different rule systems governing our practice, some of which explicitly conflict with each other and others of which are implicitly or indirectly in conflict" (p. 979). These insights reverberate today for ODR.

national and cultural boundaries. Two, technology alters practice significantly through new tools for dispute prevention, resolution and solution generation for practitioners, entities (e.g. courts, arbitrator and mediator rosters and law firms) and disputants (with and without third party assistance). Some can be accessed off the shelf and were not designed for ODR (e.g. e-case management, e-collaborative drafting, e-calendar scheduling, videoconferencing, e-documents management and e-payment systems), while others are tailored for dispute handling such as ODR platforms that can include a wide variety of tools, including AI for problem diagnosis and decision rendering. The application of technology can exponentially increase access and efficiency<sup>11</sup> and reduce some inequalities.<sup>12</sup> But it also raises new risks and can exacerbate inequalities within dispute resolution processes;<sup>13</sup> for example, regarding data security,<sup>14</sup> unequal access to technology and the Internet,<sup>15</sup>

- 11 See A. Lee 'Online Dispute Resolution in China: Today and Future,' in D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021, pp. 681-705; A.J. Schmitz, 'Dangers of Digitizing Due Process,' in K. Benyehhlef (Ed.), *AI and Law: A Critical Overview*, Les Éditions Thémis, 2021; A. Schmitz and L. Wing, 'Beneficial and Ethical ODR for Family Issues,' *Family Court Review. Special Issue: Online Dispute Resolution (ODR)*, Vol. 59, No. 2, April 2021, pp. 250-267; A.M. Kusomotu, 'Online Dispute Resolution and Africa,' in D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021, pp. 667-679; C. Rule 'ODR and Peacetech' in D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021, pp. 451-470; F. Bell, M. Legg, J. McIntyre, and A. Olijnyk, 'The Use of Technology (And Other Measures) to Increase Court Capacity,' *International Journal of Online Dispute Resolution*, Vol. 8, No. 2, 2016, pp. 102-130; G. Ross, 'What's Good for ODR: AI or AI,' *International Journal of Online Dispute Resolution*, Vol. 8, No. 1, 2021, pp. 20-30; P. Embley and Lise Embley, 'Online Dispute Resolution in US Courts Looking Back and Going Forward,' in D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021, pp. 275-296; Wing, Martinez, Katsh, and Rule, 2021.
- 12 For a relevant study on the use of an online format without video, see A. Mentovich, J.J. Prescott, and O. Rabinovich-Einy, 'Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality,' *Alabama Law Review*, Vol. 71, No. 4, 2021, pp. 893-979.
- 13 See A.L. Bannon and D. Keith, 'Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond,' *Northwestern University Law Review*, Vol. 115, No. 6, 2021, pp. 1875-1882; A. Barsky, 'The Ethics of App-Assisted Family Mediation,' *Conflict Resolution Quarterly*, Vol. 34, No. 1, Fall 2016, pp. 31-42; B. Davis, 'ODR and Social Justice: Technology Not Tricknology,' in D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021, pp. 297-313; D. Larson, 'ODR Accessibility for Persons with Disabilities: We Must Do Better,' in D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021, pp. 149-179; Kusomotu, 2021; L. Wing, 'Artificial Intelligence and Online Dispute Resolution Systems Design: Lack of/Access to Justice Magnified,' *International Journal of Online Dispute Resolution*, Vol. 4, No. 2, 2017, pp. 16-20; L. Wing, 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field,' *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29; M. Anderson and K. Madhumitha, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, Pew Research Center, 7 May 2019; Schmitz, 2021.
- 14 Lee, 2021; C. Draper, 'Online Dispute Resolution Data Security,' in D. Rainey, E. Katsh, and M.S. Abdel Wahab (Eds.), *Online Dispute Resolution: Theory and Practice, Second Edition*, Eleven International Publishing, The Hague, 2021, pp. 181-228.
- 15 Anderson and Madhumitha, 2019; Lee, 2021; Kusomotu, 2021.

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replication of human bias by AI,<sup>16</sup> technologically enhanced repeat player bias,<sup>17</sup> unequal risks with software and platform usage,<sup>18</sup> and a lack of transparency and accountability in the use of technology.<sup>19</sup>

Clearly, technology has altered the parameters of our processes and has stimulated valuable research and discussions about its ramifications in ADR and courts. With the rapid development of new technologies and dramatically shifting landscape as it is incorporated into dispute management, further research on new and continually changing risks and ethical responsibilities are vital. There is still much to learn about the potential and actual impacts on disputants and their outcomes. This, in turn, can drive our decisions for training, practice, guidance and regulation, shaping the way risks are addressed by individual practitioners as well as the entities to which they are accountable, including those from other disciplines and sectors who see the use of technology for handling disputes as being within their purview.<sup>20</sup> Importantly, the parameters of what is considered ODR will continue to have ramifications for the development of legislation and regulation on ODR and its usage in courts, ADR and other avenues for dispute handling even outside the field.

The National Center for Technology and Dispute Resolution (NCTDR) has been grappling with questions about what constitutes ODR while generating theory and practical applications since its founders<sup>21</sup> first conceptualized ODR. We have had the pleasure of working in collaboration with 50 NCTDR Fellows from around the world and hundreds of organizations and governments to further ethical ODR development and deployment. NCTDR believes it is an optimal time to briefly outline the state of play of this important discussion about the parameters of ODR. Explicitly stated, our goal is an attempt to describe rather than proscribe, to provide a map to frame the discussion. Our hope is that this will stimulate further engagement about not only what may be considered ODR at present but also what it can and should be in the future. What follows is a paper introducing an ODR Framework issued by the NCTDR.

16 Draper, 2021; Wing, 2017.

17 Katsh and Rabinovich-Einy, 2017; Mentovich, Prescott, and Rabinovich-Einy, 2021; Wing, 2016.

18 See Barsky, 2016; Wing, 2016.

19 J. de Werra, 'ADR in Cyberspace: The Need to Adopt Global Alternative Dispute Resolution Mechanisms for Addressing the Challenges of Massive Online Micro-Justice,' *Swiss Review of International & European Law*, 2016, pp. 289-306; Katsh and Rabinovitch-Einy, 2017; S.J. Shackelford and A.H. Raymond, 'Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR,' *Wisconsin Law Review*, Vol. 3, 2014, pp. 614-657; Wing, 2017; Wing, L. Martinez, J. K., Katsh, E., and Rule, C., 2021.

20 Several examples of entities outside the field that have considered the implications of ODR for regulation and guidance include Asia-Pacific Economic Cooperation (APEC), the Council of the European Union, the European Parliament, International Organization for Standardization (ISO), the NITI Aayog government agency of the Republic of India and the U.S. Federal Communications Commission.

21 Ethan Katsh and Janet Rifkin, who at the time were Legal Studies professors at the University of Massachusetts Amherst, USA, and are co-founders of the National Center for Technology and Dispute Resolution.



## 2 Paper Issued by National Center for Technology and Dispute Resolution

### Framing the Parameters of Online Dispute Resolution

#### National Center for Technology and Dispute Resolution<sup>22</sup>

2022



#### *INTRODUCTION TO ODR PARAMETERS*

The National Center for Technology and Dispute Resolution (NCTDR),<sup>23</sup> birthplace of online dispute resolution (ODR), articulated a first set of Online Dispute Resolution Standards for Practice for the application of technology to dispute resolution in 2009,<sup>24</sup> and much has changed since then. NCTDR founded the International Council for Online Dispute Resolution (ICODR) to foster the development of ODR Standards and works in collaboration with it and other entities to foster ethical ODR. Below we outline a brief history of ODR and provide a framework for the scope of ODR, articulating the value and importance of ethical standards for the application of technology at any point in a dispute handling process.

#### *FRAMING THE PARAMETERS OF ONLINE DISPUTE RESOLUTION*

This document presents a framework for considering the nature of Online Dispute Resolution (ODR) for the purpose of addressing the risks and ethical challenges of incorporating technology into dispute handling. With the recent burst in use of videoconferencing in dispute resolution during the global pandemic, growing interest in the application of artificial intelligence, and the development of sophisticated technologically supported platforms, the National Center for Technology and Dispute Resolution believes it is an optimal time to outline the state of play of what constitutes ODR. We hope this will stimulate further engagement about its parameters and how to enhance its ethical usage.

22 This document was produced by the National Center for Technology and Dispute Resolution, <https://odr.info/>. Principal author, Leah Wing with Chris Draper. Many thanks for insightful input go, in particular, to Ethan Katsh as well as Dorcas Quek Anderson, Pablo Cortes, Orna Rabinovich-Einy, Alberto Elisavetsky, Janet Martinez, Chittu Nagarajan, Morenike Obi-Farinde, Daniel Rainey, Colin Rule, and Aura Esther Vilalta.

23 Despite its title, The National Center for Technology and Dispute Resolution is an international organization with 50 Fellows from 25 countries.

24 Available at: [www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf](http://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf).

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Twenty-five years ago, online dispute resolution was envisioned as a natural outgrowth of the Internet going public.<sup>25</sup> With access to new communication channels, it was projected that disputes would emerge in cyberspace. And while this has borne out, it could not have been imagined then the vast breadth and depth of technology's impact on disputing. There has been an explosion of disputes generated online to the tune of over one billion,<sup>26</sup> from e-commerce to cyberbullying. Technology-assisted dispute resolution has also expanded beyond addressing online disputes to applications in courts and face-to-face Alternative Dispute Resolution (ADR) fora as well as becoming rooted in other sectors.<sup>27</sup> Applications of technology to both online and offline dispute resolution has led to a blurring of a distinction between the two,<sup>28</sup> raising questions about where ODR begins and ends. The use of technology in dispute handling expanded slowly but steadily until the COVID-19 pandemic forced widespread global usage of videoconferencing.<sup>29</sup> This exponentially increased the number exposed to its benefits (e.g. increasing access and efficiency) and potential risks (e.g. regarding data security and artificial intelligence-driven bias).

The use of the Fourth Party<sup>30</sup> has seamlessly entered our daily lives even for those unaware of its role in dispute management. One example is the ubiquitous use of reputational comments and ranking used by both online vendors and brick and mortar businesses. This dispute prevention strategy – designed to encourage buyers and sellers to behave in a trustworthy manner – is central to business practices in 2022 and was born out of early online dispute prevention and resolution experimentation.<sup>31</sup> Other dispute prevention technological tools have emerged, such as usage of blockchain as a mechanism to prevent disputes over the originality and time stamps of contracts. This is another example of the expanding types of dispute prevention mechanisms that can fall within the realm of ODR. The deployment of technology to assist with dispute management and resolution processes has increased significantly as well, including a growing infusion into the courts. Practitioners can access software for collaborative writing, videoconferencing, algorithmic solution generation and ODR platforms housing

- 25 For more on the origins of ODR, see Katsh, E. and Rifkin, J. *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. Jossey-Bass, 2001.
- 26 Rule, C. *ODR and E-Commerce*. Workshop on Private International Online Dispute Resolution, Stanford University, 19 April 2017.
- 27 Katsh, E. and Rabinovich-Einy, O. *Digital Justice: Technology and the Internet of Disputes*. Oxford University Press, 2017. For examples of ODR tools employed for peacebuilding, disaster response, and addressing disputes faced by refugees see respectively, <https://sanjanah.wordpress.com/category/peacebuilding/>, <https://howtobuildpeace.org/> and [www.odreurope.com/odr4refugees](http://www.odreurope.com/odr4refugees).
- 28 See Rabinovich-Einy, O. and Katsh, E. 'Technology and the Future of Dispute Systems Design,' *Harvard Negotiation Law Review*, Vol. 17, 2021, pp. 151-199.
- 29 Wing, L. Martinez, J.K., Katsh, E., and Rule, C. 'Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party,' *Negotiation Journal*, Vol. 37, No. 1, 2021, pp. 49-64.
- 30 This metaphor for the role of technology in dispute resolution was first introduced in Katsh, E. and Rifkin, J. *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. Jossey-Bass, 2001.
- 31 For a discussion of the creation of reputational feedback and one of the first ODR experiments, see Katsh, E., Rifkin, J., and Gaitenby, A. 'E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law",' *Ohio State Journal on Dispute Resolution*, Vol. 15, No. 3, 2000, pp. 705-734.



entire dispute resolution processes including case management, document exchange, multiple communication avenues and decision management.

While the range and use of technology in dispute handling has increased dramatically over the past twenty-five years, we still do not yet capitalize on all the benefits ODR could offer or fully understand its risks and the potential damage it can cause that directly relate to ethical dispute resolution practices. Although there is a growing body of literature articulating the benefits and numerous concerns,<sup>32</sup> further research is needed in particular on how technology inadequately addresses, at best, and magnifies, at worst, inequalities in society and dispute handling systems. Examples of the many noteworthy concerns include unequal access globally to Internet infrastructure and technological devices, artificial intelligence replication of human bias, technologically enhanced repeat player bias and lack of transparency and accountability.

A transformation is required to reconceptualize courts and ADR, considering the reality of technology's infusion throughout every sector of society as well as trans-nationally and cross-jurisdictionally. Dispute resolution is no longer tied to a courthouse or physical space. New horizons are not only being envisioned but created, and some even by technology itself. Artificial intelligence (AI) is harnessed to assist in various phases of dispute resolution, including scheduling, document maintenance, data analytics and solution options generation, and we predict that machine learning, bots serving as representatives in negotiations, and AI for decision rendering, support, and prediction will become increasingly common.

As noted, the pandemic raised the profile of ODR in court and ADR, particularly as videoconferencing has been widely relied upon to access conflict resolution fora. This has expanded the adherents to the idea that technology has a beneficial role to play in increasing access to justice. Data revealing that significantly fewer people miss court hearings<sup>33</sup> along with recent findings that technology can reduce bias in outcomes in some circumstances<sup>34</sup> and more quickly clear court dockets<sup>35</sup> will likely provide further impetus for courts to consider the increased use of technology. ADR practitioners by the tens of thousands, even those sceptical about using videoconferencing for handling conflicts, began utilizing it for their practice and there is new growth in trainings on ODR usage. These are positive signs for the enhancement of dispute resolution, making it more responsive to expectations of participants already experiencing the convenience and accessibility that technology offers in their daily lives.

32 See the Online Dispute Resolution Bibliography housed at The National Center for Technology and Dispute Resolution, <https://odr.info/publications/>.

33 Matterhorn. *Family Court Results*, <https://getmatterhorn.com/get-results/family-court/>.

34 Mentovich, A., Prescott, J.J. and Rabinovich-Einy, O. 'Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality,' *Alabama Law Review*, Vol. 7, No. 4, 1, 2020, pp. 893-979.

35 Matterhorn. *Family Court Results*, <https://getmatterhorn.com/get-results/family-court/>.

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The explosion in videoconferencing usage, in particular, has fostered the discussion about what the parameters of ODR are. Does holding a mediation session or a court hearing over videoconferencing constitute ODR? Is an e-case management system used for document exchange and archiving in and of itself ODR? In what ways can infusion of technology into courts provide an opportunity to re-imagine and transform what 21st Century justice systems can be? Debates about what constitutes ODR are a sign of its successful entrance into the vocabulary, tools and mechanisms of many fields, and also in the eyes of the State. A growing number of national governments, state agencies, as well as other public and private entities are legislating for and developing public policy on ODR; and the definitions of ODR vary according to sectors, jurisdictions, and the goals and purview of the drafters.

Our interest is in the challenging task of describing parameters of what is referred to as ODR, knowing that this can have significant ramifications. An articulation of ODR's parameters can illustrate its reach and potential; impact curriculum for training and education; and form the basis of regulatory mechanisms. There are good arguments being made across the variety of views about what constitutes ODR. Therefore, below *we seek to map the expanse of these views*. We provide the broadest description of what is viewed as ODR, acknowledging that there are views among some scholars and practitioners that it is more circumscribed. *The intent here is to acknowledge the full continuum of what many argue is ODR. What we consider to be most important, however, is that, according to whichever definition is utilized, ODR is developed and employed scrupulously*. Harnessing technology within any dispute resolution process requires attention to ethical and practical ramifications. This requires instruments of regulation and accountability as discussed further below.

#### ODR FRAMEWORK

The roles played by technology and how it is utilized within dispute handling processes are central to a discussion about what the parameters of ODR are or should be. An essential element to be considered is the level of reliance on technology and on human actors in dispute handling. We developed an ODR Framework to illustrate these differing levels according to the amount of dependency on technology and humans (see Figure 1).<sup>36</sup> A very broad definition of ODR such as it being “inclusive of any process or intervention used to handle disputes that employ electronic communications and other information and communication technologies”<sup>37</sup> can encompass the entire ODR Framework, whereas more restrictive definitions of ODR can place limits on the parameters of technology's usage somewhere within the ODR Framework, thus shrinking the boundaries of what is considered ODR. Therefore, we hope this ODR Framework can be useful as discussions continue to ensue and decisions are made by various entities on ODR system design, software development and ODR ethics, practice

36 The Levels are differentiated by the amount of reliance on technology and humans, not on the type of technology used which can cross Levels.

37 National Center for Technology and Dispute Resolution. *Ethical Principles for Online Dispute Resolution*, <http://odr.info/ethics-and-odr/>.

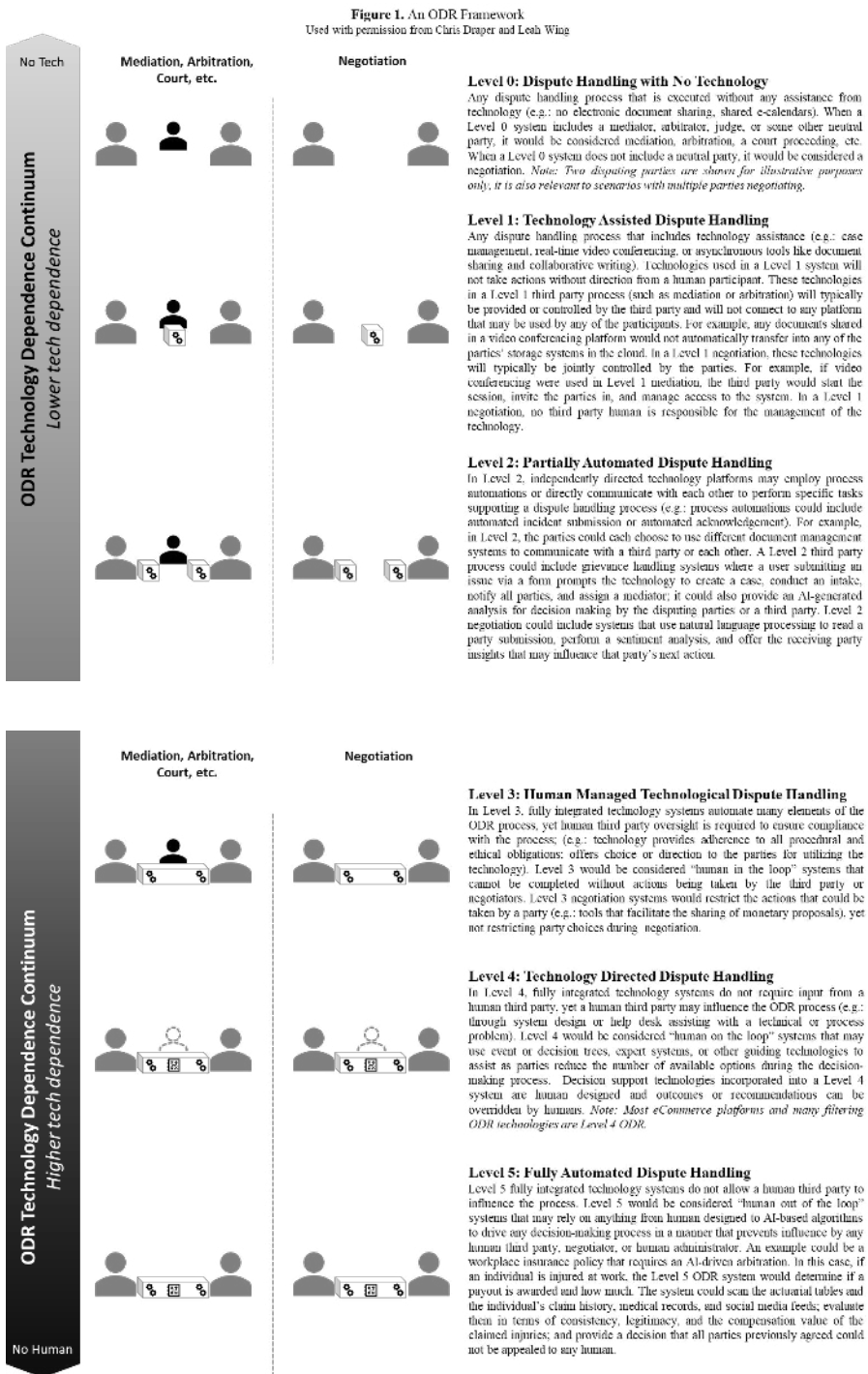
and regulation. *To be clear, this ODR Framework is meant to be descriptive of the present context and not proscriptive of what ought to be.*

The ODR Framework illustrated in Figure 1 begins by stating that dispute handling processes with no reliance on technology are not ODR and it extends to those that exclusively utilize it with no human intervention. Note that technology's impact on dispute handling can include: who can or must rely on it, its role(s) (e.g. solution generation and brainstorming, diagnosis, decision-making, security, administrative functions, etc.), the phase(s) during which it is employed (e.g. prevention, management, resolution, follow-up), and the level and type of human involvement and control. These may be similar or different across the Levels and type of dispute handling process. Importantly, the expectations for making these determinations in system design and usage may differ across dispute types, sectors, jurisdictions and cultures.

While the divisions of the Levels in the Framework can help to articulate the different types of reliance on humans and technology, we recognize the relationship between humans and technologies within an actual dispute resolution process could manifest with more fluidity, with participants experiencing phases of a process that may take them up or down the Levels. However, despite the real-life experiences of fluidity and multi-directionality of ODR-in-practice, we believe it is beneficial to highlight distinctions between the Levels to assist in identifying the opportunities, risks and responsibilities that come with increasing human reliance upon technology, and in some cases, significantly decreasing reliance on humans. This is key to ethical considerations for ODR usage and regulation as discussed later. Undoubtedly, technological innovations and research on its impact on dispute handling will require revision of the ODR Framework presented in Figure 1.<sup>38</sup>

38 For purposes of illustrating the complex interrelationships in the landscape of ODR from various points of view, in each Level we have highlighted some key examples. No doubt there are other combinations possible, additional criteria that others may include, and we recognize that there will be new facets emerging as technology continues to evolve along with its applications to dispute prevention and handling.

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## ETHICS

ODR has begun to be regulated in some sectors by governmental entities and professional organizations<sup>39</sup> and we predict significant growth in regulation efforts. When ODR regulation is developed and implemented within silos, this can lead to specificity about the parameters of ODR that serve the purposes of the regulating bodies. While we recognize this can ensure accountability and support the goals of specific agencies and stakeholders, we caution that reification of old silos and disciplinary and professional boundaries risk losing sight of the fact that technology is a disruptor, breaking down conventions and providing an opportunity to draw new boundaries based on new realities. Thus, forms of regulation and accountability that do not account for the ways that technology is impacting dispute handling that are cross-jurisdiction, interdisciplinary, multi-sectoral, and international, will risk losing opportunities to harness most effectively its positive potential and reduce likelihood of unethical and harmful practices.

We urge that the regulation space for dispute handling move beyond historic divisions of “court”, “ADR” and the business sector, for example. This will require innovative thinking in writing legislation and regulations and in implementing public policy, as well as in collaborating across professional boundaries. How can we harness this new mapping of interrelatedness, this new fluidity? What mechanisms can help us ensure the creation and usage of ethical ODR software, system design, training and practice? ODR ethics has a growing body of scholarship and practical mechanisms such as Ethical Principles for ODR<sup>40</sup> and ODR guidance<sup>41</sup> designed for self-regulation and ODR Standards<sup>42</sup> crafted to promote accountability through a variety of mechanisms – some yet to be designed.

Ethical guidance and standards for regulation and accountability require attention to the entire continuum of what may be considered ODR; responsive to the realities of jurisdictional constraints and sector-specific contexts, being culturally relevant, and, as appropriate, also being open to alteration as technology rapidly changes. As we note these very challenging requirements for guidance and accountability mechanisms, we hope to stimulate creativity and encourage that we all set high

39 Numerous examples exist of initiatives undertaken to develop ODR standards and guidance for self or external regulation and include efforts by the ADR Institute of Canada, the American Bar Association, Asia-Pacific Economic Cooperation (APEC), the Council of the European Union, the European Parliament, The Federative Republic of Brazil, the International Council for Online Dispute Resolution, the Internet Corporation for Assigned Names and Numbers, National Center for State Courts (USA), the National Center for Technology and Dispute Resolution, The Republic of Colombia, The Republic of India, and the United Nations Commission on International Trade Law.

40 National Center for Technology and Dispute Resolution. *Ethical Principles for Online Dispute Resolution*, <http://odr.info/ethics-and-odr/>; Wing, L. 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field,' *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29.

41 See ODR Standards, Principles, and Guidelines archive housed at the National Center for Technology and Dispute Resolution. <http://odr.info/standards/>.

42 See for example, the International Council for Online Dispute Resolution. *ICODR Standards*, <https://icodr.org/standards/>.

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expectations for their development and implementation and, inevitably, their future revisions.

The creation and implementation of mechanisms of accountability for ODR processes, platforms and practitioners requires articulating the scope for deployment of technology within a process – including the roles and responsibilities of artificial intelligence. All the more reason that a robust and richly textured discussion continues about what constitutes ODR. We assume that ODR's parameters will continue to evolve as technology does – disrupting boundaries and what is taken for granted and expanding both risks and generative possibilities for preventing and addressing conflict. We are optimistic that decision-making bodies that consider this can help tackle the ongoing concerns about technology that at best, it can fail to adequately address inequalities in dispute handling systems and at worst, can magnify them; thus, serving an important role in ensuring ODR contributes to increasing access to justice.