

ONLINE DISPUTE RESOLUTION DESIGN FRAMEWORK

Capability Provider Approach

ODR capabilities are already being provided via a full range of organization types: governmental, non-profit, for-profit, and various hybrids or combinations in partnership. It is not at all clear at this point what the best hosting model might be. ODR has its roots in the private sector, but several non-profit organizations implemented ambitious pilots during the last several years, and a number of government pilots are now underway.

To date the non-profit approach appears to be the shakiest. Several non-profit pilots focusing on divorce and related domestic relations case types have failed to attract a significant percentage of the overall demand, raising questions about the extent to which they will scale up in the future. Government hosts have the advantage of potentially mandating use. For profit hosts target viable customer segments and quickly go out of business if they are not successful.

Governmental and non-profit hosts may choose to utilize a for profit or non-profit “engine” as the core of their ODR functionality. It is expensive and difficult to develop from scratch the required functionality, especially if an organization has no prior experience in this area. A wide variety of engines have already been implemented to date with no clear trend yet.

Decision Approach

In theory an ODR site can offer one or more of the following decision processes: fully automated decision algorithms, asynchronous human in the loop decision processes, and synchronous human in the loop processes. Both types of human in the loop processes could be done using email, messaging, chat, phones, or videoconferencing.

It may be that some case types lend themselves best to one of these approaches. Alternately, users may segment into groups that prefer a particular process. For example, Baby Boomers tend to prefer synchronous human in the loop approaches, while Millennials opt most often for asynchronous approaches. If an ODR capability supports multiple case types at scale, it is likely that it will need to provide multiple processes and permit users to choose which one they prefer in each instance.

It may be especially difficult for courts to provide fully automated processes because of the strong culture of having a human make decisions. For profit providers have done the best job to date of leveraging the large academic literature on automated decision algorithms, negotiation,

and auctions. Organizations providing automated processes tend to reserve them for the simpler and more structured decision processes in a subset of case types. This approach may lend itself best to legal disputes that would typically not rise to the level of a formal court case.

Procedural Approach

To date for profit and some non-profit ODR providers have attracted significant business by utilizing decision processes that are radically simpler than what the courts offer. These organizations have the “advantage” of not being required to support the full due process that has developed over centuries. The new processes are typically faster, less expensive, and less complex. In return they offer few to no due process protections and the resolutions are typically not court enforceable.

In theory courts can decide to implement ODR using either the traditional court process with all of its existing due process requirements or some partly or entirely new court process. We know from the academic literature on disruptive innovation that it is very difficult for a court to design and implement a significantly different process for many reasons, but it is theoretically possible.

Most non-court divorce ODR providers still produce completed forms and agreements that are intended to be submitted to a court and formally approved by a judge. If their processes result in agreements that are acceptable to judges most of the time, then there is a meaningful sense in which the processes are still non-court. One advantage for these organizations is that they can optionally include non-judicial services in their core products.

Decider Approach

Aside from the decision process, the decider role may also vary significantly. Courts seem to be most comfortable using traditional judges, magistrates, or trained mediators. We are starting to see a few courts create new decider roles that better match the unique new decision processes and the skill sets they require.

Of course non-court organizations are free to use any sort of decider role without constraint. Overall perceptions of process fairness are probably more important for the success of their ODR processes than the specifics of the decider role. This is one of many areas where our experience is very limited and there will be much to learn over the next few years.

Legal Process Approach

The decision process can vary in yet another significant way. Courts are most likely to continue using a traditional adversarial process. The exceptions are case types where they are already using some variation of problem solving or collaborative approach. Most non-profits, especially ones providing divorce services, offer primarily non-adversarial processes. Users must commit at the beginning to a collaborative approach. For profit organizations offer a variety of decision processes. For them perceptions of fairness and efficiency seem to trump concerns about the adversarial nature of the process.

Of course a decision process may not be purely adversarial or collaborative. It may be a mix of approaches that are used only for parts of the overall process. Classic examples are the use of mediation or arbitration just for certain steps in a process. Courts and some non-profits sometimes mandate the use of mediation at a point in the decision process. Others make it optional or restrict it to litigants with certain characteristics. For profit providers invest much more in research about their customer segments and try to tailor their decision processes accordingly.

Process Selection Approach

For decisions about whether or not a certain process is mandatory or optional, an ODR provider must offer more than one process. Courts tend to offer only one process. Some non-profit and for profit providers support sites where some parts of the process are mandatory and others are optional. If they offer services for fixed fees, then users are often able to in effect create a custom process by combining certain standard services.

If a court creates a new process as discussed above, it may offer it along side the traditional process. If so, then the court must decide if the new process is opt in or opt out. Surprisingly, several courts have decided to make the new process opt out and essentially mandate its use except for exceptional circumstances. This is done by making the opt out bar fairly high.

Appeal Approach

The design decision here is whether or not to make the results of the ODR process a parallel or integral part of the overall court process. If the latter, then the court makes it possible for a litigant to start in the ODR process and opt out for the traditional process and its key use of due process and a judge if desired. The former approach basically gives the litigant a “do over” if they dislike the results of the ODR process.

Most non-court ODR providers cannot support court enforceable resolutions, so by definition their decisions must be treated as de novo cases if afterwards taken to a court by one of the parties. A court variation on this approach may occur within the ODR process when a court supports the resolution of disputes before they become formal court cases. If so, then one design option is to make all information collected during the pre-case phase inadmissible and require the parties to start “from scratch” with the formal case.

Case Type Scope

In theory ODR capabilities could be used in a wide variety of case types. To date they seem to have concentrated on small claims in the civil area and divorces in domestic relations. For profit providers initially targeted very structured civil issues like auction website disputes, but seem to be moving slowly toward a broader range of civil disputes. For non-court providers, the key seems to be the ability to support repeatable processes that can cost effectively scale to large volumes of users.

Discussion: ODR is probably the capability where there is the most to learn. Not only are the number of providers and pilots relatively small to date, but the range of program designs across the design decisions discussed above is still very small. The programs all tend to be designed in only two or three typical ways, leaving many design possibilities untested so far.