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## **Rebooting Justice: ODR is Disrupting the Judicial System**

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# Rebooting Justice: ODR Is

# DISRU

## the Judicial System

Automated mediation with an  
online dispute resolution system  
can help resolve conflicts faster  
and at lower cost.

By Benjamin H. Barton



# PRINTING



America is facing a serious and growing access-to-justice problem in both civil and criminal courts, and the problem is not limited just to the poor. Most middle-class Americans cannot afford to successfully address even commonplace legal problems such as a contested divorce, a child custody battle or a driving under the influence prosecution. Up to this point our attempted solutions—arguing for more funding for legal services or public defenders, pressing for more pro bono work and advocating for a “civil *Gideon*” right to a free lawyer—have failed. In my book, *Rebooting Justice*, I call this the “more lawyers, more justice fallacy.”

Legislatures have continuously declined to fund either appointed criminal defense lawyers or legal aid societies to the levels necessary to address the needs of the poor, let alone the middle class, and that fact is not going to change. Meanwhile the problem has gotten steadily worse, not better. There is a much more promising solution: using technology and court reform to make it easier and fairer for Americans to address their legal problems without a lawyer, especially in what we call pro se courts. These are courts where more than half of the docket includes an

unrepresented party. Common examples include family courts, small claims court, child support court, some misdemeanor courts, some juvenile courts, debt collection courts and others. In these courts we should rethink and redesign around an obvious reality. If most of the users of the court are unrepresented, we should design processes to serve the unrepresented rather than assuming the baseline case includes a lawyer on both sides.

Every reader of this publication will be familiar with the rise and continuing importance of so-called alternative dispute resolution systems like mediation or arbitration. Online dispute resolution (ODR) uses technology to extend, and in some ways fundamentally alter, these approaches.

### **The eBay Experiment: a Case Study of ODR**

The best way to explore ODR is to discuss the origins and current status of one of the world’s leaders in the area—Modria. I have no financial interest in Modria, but I have known one of its founders, Colin Rule, since college. Rule is a somewhat unlikely leader for a technological revolution in law. He is not a lawyer and does not have a J.D. He is not a computer whiz or a particularly adept coder. Earning money has never really been his first priority. He does not even like to argue. Nevertheless, if Rule has his way, American dispute resolution will permanently change from a lawyer-driven, gladiatorial litigation system to one based upon mediated solutions. Rule is the most dangerous type of entrepreneur: the true believer. Mediation is his passion, and he hopes to launch a worldwide revolution in dispute resolution. If he succeeds, ordinary people will have more access to inexpensive and fair dispute resolution than ever before.

Rule’s first brush with mediation

came at Haverford College, a small Quaker school outside Philadelphia. He majored in peace studies and managed the campus mediation program. After graduation he worked at the National Institute of Dispute Resolution and got a master’s degree in conflict resolution and technology from Harvard’s Kennedy School. He also spent two years in the Peace Corps in Eritrea. He believes that mediation offers the opportunity for disputants to hear and understand each other and then design their own best solution to the problem. When done properly, mediation does more than merely force a settlement to a dispute: It increases understanding and peace.

This is admittedly a somewhat naive vision for the world, but Rule delivers it with gusto and a hopeful smile. He is deadly serious about the power of mediation to change lives and, eventually, the world. With the advent of ODR, he may well get the chance to prove it. Rule wrote one of the first books about ODR way back in 2002—*Online Dispute Resolution for Business*—and eventually landed a job at eBay to help design and operate its ODR program. eBay is a natural site for ODR. It has lots of low-dollar transactions that occur across state and even international lines, making litigation cost-prohibitive or impossible. Even in a very well run online auction marketplace, disputes are natural and somewhat predictable: Goods may get damaged in transit, a small percentage of sellers or buyers are crooks, internet pictures can be misleading, etc.

Settling these disputes satisfactorily is critical to the eBay business model. eBay benefits greatly from being the leader in its field. But if consumers lose faith in the product, a competitor site is just a few clicks away. If that happens too often, the advantage of being the market

leader can erode or disappear altogether.

eBay understood this and wanted to build a simple, fast and fair mediation system, but eBay presented some unusual challenges. The system had to work for small- and large-dollar disputes and for a wide range of disputants, from one-time users to people who make their living buying and selling on the site. eBay disputes are also often about much more than money.

Moreover, when eBay began, it had to overcome a naturally skeptical public, and handling disputes between buyers and sellers was a critical issue. eBay estimates that fewer than 1 percent of its transactions generate a dispute, but even that is still a *ton* of disputes on a platform as popular as eBay. For example, the year that Rule was hired eBay had more than 40 million disputes! eBay is also an unusual e-commerce company because it is the marketplace, not the seller. Most customer service operations want to persuade the customer to buy another product from the seller. eBay just wants you to come back to sell or buy again, to and from whomever. This means that eBay usually does not really have a strong stake in a dispute,

**ODR attempts to replace human-driven resolution systems like court, mediation or arbitration. Lawyers and judges frequently forget that they are just one type of dispute resolution, not the only show in town.**

the company just cares that both parties are satisfied and return to eBay.

Dispute resolution was thus a huge priority, but eBay could not possibly operate in the old-fashioned way of having a customer service department handling cases individually by human beings. At eBay's rate of growth it would have required tens of thousands of employees just to handle these disputes. Solving the disputes individually was also quite time and fact intensive.

Nor could eBay count on courts to handle the disputes. eBay handles transactions from all around the world, often in denominations that are too small to justify even a small claims case. Even larger value cases would be dogged by issues of jurisdiction, service, etc. Likewise, most eBay disputes involved complete strangers who had not done business together in the past and would not do business together in the future. This made settlement less likely and hard feelings and suspicion much more likely, so counting on the parties to "just work it out" was unlikely to succeed.

Thus, eBay badly needed some kind of automated system and hired Rule to create the first really large-scale online dispute resolution system. The challenges were obvious. Many experienced mediators thought a computer-driven system was bound to fail. For long-time mediators there is no more uniquely "human" process than mediation. Likewise, many mediators felt strongly that mediation works best when all of the parties are physically together in the same room to negotiate. The parties tend to be more receptive and empathetic when facing each other across a table. By contrast, anyone who has spent anytime arguing politics in a comments section knows that computerized disputes tend to turn personal and ugly quite quickly.

The opportunities, however, were great as well. eBay had a ton of data about usage and dispute patterns. It also had some of the best programmers in the world, so it could harness this data to think about the best way to settle disputes.

### **The eBay ODR Process**

Rule decided to go with a four-step process—two automated and two run by humans. The first step was to try to reach unsatisfied customers as soon as possible, to nip any simple problems in the bud. In the first step, the user describes the problem, and eBay's algorithm tries to figure out if there is an obvious solution. For example, millions of people complain about late deliveries every year. The eBay dispute resolution program finds the shipping information from the order number and then explains the situation to the user. Often the package is *en route*, and the user has misunderstood when it would arrive. This happens especially often in international transactions. eBay is such a global marketplace that users

will unwittingly order a pair of pants from England or Hungary and then forget that it may take a week or so for the package to arrive. Because eBay has reams of data, it is always updating this step in the process. After all, the more problems that can be solved automatically, the better for everyone.

If the computer cannot find an easy solution, it contacts the other party to the dispute and they are asked to explain their side of the story. At this point, the algorithm tries to find a mediated solution. Again, eBay has handled millions of these disputes, and the computer “learns” from each one—if the dispute is mostly over money, what offers help push the parties into settlement? Should the computer immediately suggest the “final” solution or try to get the parties to go back and forth to settle on a number? What sorts of information or discussion points help parties come off of their initial positions? Do disputes that involve pictures settle more often? What sort of verbiage by the “mediator” tends to calm things down? All of these issues were considered and studied in the second step of the process, and the algorithm continuously learned from the disputes.

eBay has been very successful with the computer-driven part of the process. More than 90 percent of disputes are settled with no human interaction at all. If the dispute can't be settled, a human mediator was step three. The human mediator did not start from scratch, however. The mediator reads everything that has already been said by both parties and the computer's attempts at settlement before trying one last time with the human touch. If the dispute just can't be mediated, the final step is a human arbitrator. The arbitrator again looks at the entire record of everything that has happened thus far and then chooses a solution to the dispute.

eBay customers have expressed a high level of satisfaction with the process—even if they lost. eBay did more than just send its customers an email survey about the process. The company actually followed the behavior of users with disputes to see if they returned to eBay. This study showed that users who “won” their dispute were more likely to return to eBay again than a regular user of eBay. This result was heartening, but unsurprising. Everyone likes winning. The stranger result was that even users who “lost” were more likely to return to eBay. Why? Rule speculates that the eBay ODR process is so effective that it improves user trust in eBay, even when it delivers bad news. Rule argues that ODR is thus not just a necessary expense for eBay, it is a core component of its success.

### **Moving ODR Into the Courts**

In June 2017, Tyler Technologies, one of the largest providers of court technology and software in the world, bought Modria. It bought Modria for a reason: to roll ODR out to as many court systems as it can and to make its

**ODR does not have to immediately be better than a human-driven process to have a lot of value because a computerized process is so much cheaper than a human-driven one.**

suite of computerized case management products more attractive and efficient. Over time Tyler foresees adding an ODR step to every litigation in America. Since in-person mediation and arbitration are now quite common, the idea is less crazy than it sounds, especially given the cost differential between computerized dispute resolution versus human- or lawyer-driven processes. Remember that ODR does not have to immediately be better than a human-driven process to have a lot of value because a computerized process is so much cheaper than a human-driven one.

ODR has already gotten a beachhead in several other American contexts. There is an ODR process for property tax disputes in several large U.S. counties, including Davidson County, Tennessee (Nashville); Orleans Parish, Louisiana (New Orleans); and Durham County, North Carolina. The American Arbitration Association chose Modria to design an ODR process for its New York no-fault automobile insurance cases. The system is now handling more than 100,000 cases a year involving

lawyers, insurance adjusters and significant disputed amounts.

Nor is Modria the only company in this space. Court Innovations is a Michigan company that sells an ODR system named Matterhorn. The company was born out of the University of Michigan's Online Court Project. All over the American Midwest, county and city courts are using Matterhorn to help streamline issues like suspended driver's licenses, parking or speeding tickets, family court orders and small claims issues.

For example, if you fail to appear for a scheduled court appearance in Grand Rapids, Michigan, the court will likely issue a warrant for your arrest. Typically, what happens is that the next time you interact with the police—say, for a traffic violation—the officer will run your name through Matterhorn's databank, find your outstanding warrant and arrest you. You will be booked and held until you can appear in court again, and maybe longer, depending on the circumstances. If your children are in the car with you, or there is not another driver with you and they impound your car, the consequences multiply.

The Matterhorn process allows a user to look up whether he or she has an outstanding warrant. If he or she does, it can arrange for the user to have a new court date to have the warrant lifted, without the threat of arrest. The user is spared the cost, embarrassment and other collateral consequences of incarceration, and the police and the jails are saved the trouble and expense as well. Matterhorn claims better compliance, happier court-users and less work for court employees.

## ODR Has Gone International

ODR is even more prevalent internationally. British Columbia provides an ODR process in its consumer

protection bureau. Consumers with a complaint about a business are asked to try ODR. If they agree, Consumer Protection BC (for British Columbia) contacts the business and invites them to participate. From there, the ODR platform does the rest and small claims court is saved a matter.

MylawBC.com is the ODR platform for British Columbia's Legal Services Society. The program offers interactive advice about topics including separation, family violence, mortgage debt and wills. The program also includes a "dialogue tool," a negotiation platform for couples considering separation and/or divorce. The program facilitates guided online chats aimed at getting couples to discuss their situation, start financial disclosures and possibly draft a separation agreement. The program provides an overview of key legal concepts, legal rights and a tailored negotiation toolkit. If the case can't be settled, the program provides a route to court, along with links to self-help guides.

In 2015 the U.K. announced an online HM Courts and Tribunal Service project. The U.K. is designing a new court system from scratch to handle all disputes under £25,000. The goal will be to use ODR to have a computer take the first crack at settling disputes before a case can come into any court. The Master of the Rolls, Sir Terence Etherton, calls the project the "online solutions court" and a "problem-solving" answer to access-to-justice issues. "It will be problem-solving in the sense that the Online Court, through stage 1 and 2 of the process, will help the parties find the appropriate solution to their dispute." Etherton argues that this "problem-solving purpose is the next step in the evolution of the [courts and is] the heart of modern case management." As of early 2018 two pilot projects are already online, one handling

online divorces and another starting with slightly smaller (£10,000) disputes. If these projects are successful, the rollout to more disputes will continue.

Both Australia and the Netherlands have also experimented with ODR for divorces, and the early results in terms of settlements and satisfaction are quite promising. Most of Singapore's courts are online. The United Nations Commission on International Trade Law has also sought to make ODR the industry standard for cross-border e-commerce and business-to-business disputes. The European Union is creating a single ODR site that will handle all disputes that arise from internet commerce.

## Final Thoughts

I love writing and talking about ODR because I think it is emblematic of the most deeply disruptive of the many technological advances being made in the market for legal services. It does more than mechanize document review or standardize legal forms. It attempts to replace human-driven dispute resolution systems like court, mediation or arbitration. Lawyers and judges frequently forget that they are just one type of dispute resolution, not the only show in town. The potential impact on access to justice is immense. **LP**



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