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Ethical Concerns in Court-Connected Online Dispute Resolution

- Dorcas Quek Anderson*

Keywords: court ODR, fourth party, ethics, access to justice, confidentiality, transparency, informed participation, accessibility, accountability, empowerment, trust

Abstract

This article examines the burgeoning trend of creating court ODR systems, focusing on the design aspects that are likely to raise ethical challenges. It discusses four salient questions to be considered when designing a court ODR system, and the resulting ethical tensions that are brought to the fore. As a fourth party, the ODR system not only replaces existing court functions, but enlarges the scope of the courts' intervention in disputes and increases the courts' interface with the user. Furthermore, certain ethical principles such as transparency, accountability, impartiality and fairness take on greater significance in the court context than in private ODR, because of the association of the courts with substantive and procedural justice. As in any dispute resolution system, a coherent and effective court ODR system should be guided by dispute system design principles, which includes having clarity of the system's underlying values and purposes. It is therefore pertinent for each court to resolve the key ethical tensions in order to articulate the foundational values that will undergird the design of its ODR system.

I. Introduction

Online dispute resolution (ODR) systems have been increasingly embraced by the courts in many jurisdictions as the new way to enhance access to justice. Notable examples include the future Online Solutions Court in England and Wales, the Civil Resolution Tribunal in British Columbia, Utah's ODR system for small claims, and the internet courts in China. It has been observed that the use of ODR systems in the courts would radically transform the courts from institutions that primarily rely on human decision-making and physical presence to courts that "increasingly rely on digital communication, employ algorithms, and prevent disputes from arising".¹ These "new new courts" offer a fresh equilibrium that potentially enhances all realms of justice.² Concurrently, it has also been acknowledged that the very strengths of ODR systems – the use of algorithms and big data – require careful regulation in order to fulfil the promise of enhanced access to justice.

As a fourth party, the ODR system not only replaces existing court functions, but enlarges the scope of the courts' intervention in disputes and increases the courts' interface with the user. Furthermore, certain ethical principles such as transparency, accountability, impartiality and

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¹ O. Rabinovich-Einy & E. Katsch, 'The New New Courts' *American University Law Review* Vol. 65 2017, p. 188.

² *Id.*, p. 207.

fairness take on greater significance in the court context than in private ODR, because of the association of the courts with substantive and procedural justice. Consequently, the courts face unique challenges as they seek to formulate ODR policies that are consistent with their goals in delivering justice.

This article examines the burgeoning trend of creating court ODR systems, focusing on the design aspects that are likely to raise ethical challenges. It discusses four salient questions to be considered when designing a court ODR system, and the resulting ethical tensions that are brought to the fore. As in any dispute resolution system, a coherent and effective court ODR system should be guided by dispute system design principles, which includes having clarity of the system's underlying values and purposes. It is therefore pertinent for each court to resolve the key ethical tensions in order to articulate the foundational values that will undergird the design of its ODR system.

II. The main features of fully integrated court ODR systems

ODR, being a rapidly changing field, has defied definition according to existing nomenclature. Ebner and Zeleznikow highlighted how ODR evolved from the interaction between the fields of information technology and alternative dispute resolution (ADR).³ However, the latest ODR developments no longer resemble ADR, as the ODR systems do not merely translate conventional ADR processes to an online environment. Instead, a variety of ODR tools use machine intelligence to support and directly facilitate dispute resolution, thus displacing the human facilitator. ODR software may support negotiation through the matching of specific interests with potential solutions, or the provision of problem diagnosis customized to the individual. In describing these trends, Katsch and Rabinovich-Einy have highlighted how ODR offers the opportunity to analyze large amounts of data on disputing patterns at low cost, allowing greater control over the functioning of dispute resolution processes and helping to ascertain the underlying causes of disputes. These characteristics of ODR have cumulatively shifted the focus of dispute resolution to the pre-resolution stage of software design for the purpose of dispute containment, as well as the post-resolution stage of data analysis for the purpose of dispute prevention.⁴

The ODR field has in the past decade diverted its focus from creating online tools to creating ODR systems. The well-known ODR systems used by eBay and the former Rechwijzer offer a tiered method to resolve disputes through problem-diagnosis via facilitated question-and-answer framing of their dispute, then to assisted negotiation and if it fails, online mediation or online adjudication that can be conducted asynchronously. The tiered and modular ODR system, once incorporated into judicial processes, has immense potential to enhance access to justice through speedy and costly dispute resolution that is customized to fit the contours of

³ N. Ebner and J. Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution' *Hamline University School of Law Journal of Public Law and Policy* 2015 Vol. 36 No. 2, 2015, p. 6.

⁴ E. Katsch & O. Rabinovich-Einy, *Digital Justice*, Oxford University Press, USA, 2017, p. 47.

each dispute.⁵ It is therefore not surprising that various iterations of this system have emerged in many jurisdictions.

This article focuses principally on such modular ODR systems that are fully integrated into the judicial process, instead of ODR tools that preface the court process or are partially incorporated into the court infrastructure.⁶ A fully integrated court ODR system typically brings the user sequentially through the steps of triage, negotiation, mediation or facilitation, and online hearings. The Civil Resolution Tribunal (CRT) in British Columbia is probably one of the most well-developed systems. Designed to handle condominium property claims and small claims (and motor accident claims in 2019), the CRT features an end-to-end process combining dispute resolution phases and focusing on early participation by parties.

The first phase provides initial problem-diagnosis and self-help through the online tool Solution Explorer. This software uses guided pathways to help the user learn more about the dispute, and then diagnoses the problem according to relevant legal rights, and provides tools such as letter templates that can deal with the problem. If the dispute is not resolved at this stage, the user can formally commence a claim through an online intake process that will give notice of the claim to the opposing party. The claimant is then brought to the second phase in which the parties are able to negotiate directly using the online system. The third phase of facilitation introduces the human facilitator to the process. The facilitator draws on a wide range of ADR processes, including mediation and non-binding neutral evaluation, to assist the parties to reach an agreement. While a range of modes of communication are used, a large part of the facilitation takes place remotely and asynchronously. In the event that the parties cannot agree, the facilitator takes on a case management role and helps the parties narrow their issues and prepare for the next phase. The final phase of adjudication is usually conducted remotely through asynchronous communication channels. If an oral hearing is needed, it is conducted via telephone or video-conferencing.⁷

The English Online Solutions Court for civil claims below £25,000 is envisaged to be implemented by 2020. Its three-stage system has striking parallels with the CRT. Similar to the Solution Explorer, the first stage aims to provide for interactive triage through detailed questionnaires premised on customised decision trees; commoditised summaries of legal principles and an avenue for negotiation to explore early settlement. The next step entails case

⁵ E. Katsch & O. Rabinovich-Einy, *Digital Justice*, Oxford University Press, USA, 2017; O. Rabinovich-Einy & E. Katsch, 'A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution' *Ohio State Journal on Dispute Resolution*, Vol. 32 2017, pp. 695, 716-718; (2017); O. Rabinovich-Einy & E. Katsch, 'Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment', *International Journal of Online Dispute Resolution* 2014, pp. 5, 7-19.

⁶ USA Joint Technology Committee, 'ODR for Courts' (29 November 2017), retrieved from <<https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>>, p. 10.

⁷ See generally S. Salter and D. Thompson, 'Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunals', *McGill Journal of Dispute Resolution* Vol. 3 2016-2017, pp. 113, 116, 129, 133; S. Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) *Windsor Yearbook of Access to Justice B. Access* Vol. 34, 2017, pp. 112, 120, 129.

officers facilitating the settlement of the dispute using ADR processes. The final stage of adjudication may take place in a physical or online setting.⁸ Most recently, Utah created a similar system for small claims, which will be discussed in greater detail below. Many other iterations of these ODR systems are being implemented in the US courts and elsewhere, resulting in a radical evolution in the experience of justice.

III. The impact of the fourth party on the experience of justice

The tiered ODR systems have transformed the nature of court dispute resolution in significant ways. Foremost is the infusion of the philosophy of dispute prevention into the entire court process. The sequence of processes has been thoughtfully arranged to progress steadily from dispute avoidance via problem diagnosis, to dispute containment through the use of ADR, and finally to dispute resolution through adjudication.⁹ There is also the gradual escalation of effort as the court user progresses from one dispute resolution phase to another. This innovative re-organization of the court process encourages disputants to consider settlement at an early stage instead of considering ADR only after legal proceedings have been filed. It also results in the proportionate allocation of court resources to more complex disputes that cannot be resolved earlier with through self-help and negotiation.

More significantly, technology as the “fourth party” has substantially altered the nature of the court’s interaction and interface with the disputants.¹⁰ The fourth party, a term coined by Katsch and Rifkin, casts light on the role played by technology in changing the dynamics of dispute resolution.¹¹ The court ODR system as a fourth party also has a discernible impact on the scope and nature of the court’s approach to dispute resolution. It has substituted some of the courts’ existing functions such as case management and referral of cases for ADR, thus freeing up resources for more targeted human intervention by the courts. Additionally, the fourth party has added more functions to the court by providing resources for self-help and problem-diagnosis. Notably, the Solution Explorer in the CRT has played an instrumental role in this regard. In its first year of operation, 94% of the parties resolved their dispute at this preliminary stage without requiring further intervention by the CRT.¹² Learning from this experience, the Utah ODR system also commences with education and evaluation of the problem by providing access to resources and unbundled legal services.¹³ Accordingly, the

⁸ Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (December 2015), paras 6.07-6.12; Lord Justice Briggs, *Civil Court Structure Review: Final Report* (July 2016) paras 6.61-6.66; Sir Terence Etherton, ‘The Civil Court of the Future’, speech delivered at the Lord Slynn Memorial Lecture, 14 June 2017.

⁹ Civil Justice Council, *Online Dispute Resolution for Low Value Claims*, 2015, paras 5.1-5.8.

¹⁰ D. Quek Anderson, ‘The Convergence of ADR and ODR in the Courts: The Impact on Access to Justice’, *Civil Justice Quarterly* Vol. 38 No. 1 2019, pp. 126-143.

¹¹ E. Katsch & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (USA: Wiley Publishing, 2001).

¹² USA Joint Technology Committee, ‘ODR for Courts’ (29 November 2017), retrieved from <<https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>>, p. 4.

¹³ D. Himonas, ‘Utah’s Online Dispute Resolution Program’, *Dickinson Law Review*, Vol. 122 No. 3, 2018, p. 882.

ODR system as the fourth party potentially broadens the scope of the courts' intervention in disputes. These and other implications of the involvement of the fourth party will be further examined below in relation to the salient questions to be addressed in designing an ODR system.

It is evident that the fully-integrated ODR systems offer unprecedented opportunities for the thoughtful and imaginative application of dispute system design principles to meet the goals of the courts, and, as noted by Rabinovich-Einy, generate legitimacy in court processes.¹⁴ Designing court processes on a clean slate potentially shifts the “center of gravity from distinctions between process types to questions regarding the central features that span the various dispute resolution processes, both formal and informal”.¹⁵ Indeed, the freedom that the courts have to create an ODR system to fit their particular goals throws into sharp relief the need to clearly articulate the core principles of court dispute resolution. The next section therefore turns to consider the fundamental ethical principles that should underpin the design of court ODR systems.

IV. The Ethical Principles for Court ODR

Before exploring the central principles and values that should be the foundation for designing Court ODR, it is instructive to review the ODR ethical principles that have been formulated. The National Center for Technology and Dispute Resolution (NCTDR) created seventeen ethical principles for ODR in 2016, and these standards subsequently formed the basis for the ODR Standards created by the International Council for Online Dispute Resolution.¹⁶ Related principles have been discussed by other commentators, such as Rainey who annotated the US Model Standards for Mediators for ODR purposes, and Zeleznikow, Bellucci and Ebner, who suggested a set of principles that should undergird the creation of fair negotiation support tools.¹⁷ These principles have been framed broadly to accommodate a wide range of ODR tools and systems. The table below summarizes the key principles that have emerged:

Accessibility	Fairness	Protection from Harm
Accountability	Honesty	Security

¹⁴ O. Rabinovich-Einy, ‘The Legitimacy Crisis and the Future of Courts’, *Cardozo Journal of Conflict Resolution* Vol. 17 No. 23, p. 45.

¹⁵ *Id.*, p. 71.

¹⁶ National Center for Technology and Dispute Resolution, *Ethical Principles for Online Dispute Resolution*, retrieved from <http://odr.info/ethics-and-odr/#_ftn1>; 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.

¹⁷ D. Rainey, ‘Third Party Ethics in the Age of the Fourth Party’, *International Journal of Online Dispute Resolution* Vol. 1 No. 1, 2014, pp. 37-56; D. Rainey, ‘Model Standards of Conduct for Mediators: Annotated for Online Dispute Resolution’, *International Journal of Online Dispute Resolution*, Vol. 3 No. 1, 2016, pp. 30-40; N. Ebner & J. Zeleznikow, ‘Fairness, Trust and Security in Online Dispute Resolution’, *Hamline Journal of Public Law and Policy* Vol. 36, 2015, pp.143-160; N. Ebner and J. Zeleznikow, ‘No sheriff in town: Governance for the ODR field’, *Negotiation Journal*, Vol. 32 No. 4, 2016, pp. 297-323; J. Zeleznikow & E. Bellucci, ‘Legal Fairness in Alternative Dispute Resolution – Implications for Research and Teaching’, *Australasian Dispute Resolution Journal*, Vol. 23, 2012, pp 265-273.

Competence	Impartiality / Neutrality	Transparency
Confidentiality	Informed Participation / Highlighting & Clarifying the Shadow of Law	Limited Discovery
Empowerment	Innovation	Trust
Equality	Integration	

Which of these principles are most apposite for court ODR systems? This question in turn raises the deeper issue of which ODR standards are most consonant with the goals of dispute resolution within a justice system. This fundamental question, while integral to the approach to dispute systems design, risks being overlooked by the courts in their efforts to enhance access to justice. In this respect, Ebner and Zeleznikow underscored the importance of developing theoretical models for ODR in helping it become a more mature domain, because issues such as fairness and trust have critical practical ramifications.¹⁸ The same concern arguably applies to court ODR. In fact, there is probably a more compelling need to articulate the pertinent ethical principles because ODR is being used by public institutions that are closely associated with the delivery of procedural and substantive justice.

I turn then to discuss a few ODR standards with the view to examining their relevance to the courts. Many of these standards were applied by the courts when they incorporated ADR into its process in the past few decades. For instance, the principle of impartiality or neutrality has been discussed in relation to the use of ODR platforms that are controlled or owned by one disputing party, thus causing perceptions about conflict of interest, as well as the design of systems that do not perpetuate existing biases existing in the training data.¹⁹ Mediators who utilize ODR platforms have to be sensitive to the potential perceptions of bias towards parties who are more adept in using technology.²⁰ Similar concerns about the courts' impartiality were raised in the earlier academic debates concerning judicial involvement in settlement activities. In the United States, trenchant criticism was levelled against the practice of trial judges conducting their own judicial settlement conferences. Their involvement in confidential settlement discussions was deemed to run the risk of their pre-judging of the case based on confidential information, thus jeopardizing the parties' perception of their impartiality. Australian scholar Sourdin further argued that allegations of bias are more likely to arise when the judge conducted a mediation with private sessions. She highlighted a recusal case in which

¹⁸ N. Ebner & J. Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution', *Hamline Journal of Public Law and Policy* Vol. 36, 2015, pp.159-160.

¹⁹ N. Welsh, 'ODR: A Time for Celebration and the Embrace of Procedural Safeguards', Conference presentation at the International Forum for Online Dispute Resolution, The Hague, May 2016, available at: <<http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr>>, *Ethical Principles for Online Dispute Resolution*, retrieved from <http://odr.info/ethics-and-odr/#_ftn1>; 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, p. 26.

²⁰ D. Rainey, 'Model Standards of Conduct for Mediators: Annotated for Online Dispute Resolution', *International Journal of Online Dispute Resolution*, Vol. 3 No. 1, 2016, p. 33; S.N. Exon, 'Ethics and Online Dispute Resolution: From Evolution to Revolution', *Ohio State Journal on Dispute Resolution*, Vol. 32 No. 4, 2017, pp. 624-625, 636-638.

the it was stated that the judge seeing the parties in private “acts in a matter contrary to the fundamental principle of natural justice that a judge must not hear representations from one party in the absence of the other”, leading a “fair-minded observer [to] apprehend that the judge has been told something by one party in the absence of the other and that information may affect his reasoning.”²¹ Hence, the unique standing of the judge and the courts in the eyes of the public, coupled with the court users’ expectations of the absence of bias by the decision-maker, renders the impartiality principle acutely important in court dispute resolution.

The related principles of accountability and transparency also resonate strongly in the court context. The Ethical Principles for ODR elaborate on the need to make transparent the identities, affiliations and conflicts of interest of the parties and systems, and the data security and privacy policies. Exon further suggested the need for transparency of participant identity and physical location in online mediation.²² The call for transparency stems from the goal of making an ODR system to be accountable to the communities and institutions they serve. Accountability concerns have led to calls for ODR systems to be able to explain the role played by algorithms in reaching a decision. Again, both accountability and transparency are particularly integral principles for the courts, due to the association of the courts with open justice and the transparent explanation of the legal principles underlying its decision. Recognizing the profound importance of these principles, the US courts’ Joint Technology Committee recommended that the parties need to know how the ODR court process works before they use it, in order to have informed participation. It also recommended that the processes and algorithms affecting court decisions should be made available for scrutiny.²³

Another critical dispute resolution value is empowerment. The Ethical Principles of ODR suggest that ODR systems and processes should be designed and implemented in ways that seek to enable growth and positive change for individuals, relationships, systems and society, thereby increasing access to justice and enhancement of choices and effective decision-making opportunities. Empowerment, self-determination and party autonomy are not an unfamiliar issues to the courts. Dispute resolution scholars have discussed the question of mandatory mediation programs, examining their impact on procedural justice, settlement rates and on the foundational principle of self-determination within mediation. Party choice is inextricably linked to the concept of procedural justice, as the disputants’ perceptions of fairness have been shown to be enhanced when the disputant has a “voice” or the opportunity to present his or her story and has been listened to and understood, and when the party has been treated with respect and dignity.²⁴ Procedural justice is, in turn, closely connected to the ethical principles of

²¹ T. Sourdin, ‘Judicial Involvement in Settlement Conferences: Opportunities and Issues’, *Civil Justice Quarterly*, Vol. 38. No. 1, 2019, pp. 82-83.

²² S.N. Exon, ‘Ethics and Online Dispute Resolution: From Evolution to Revolution’, *Ohio State Journal on Dispute Resolution*, Vol. 32 No. 4, 2017, p. 661.

²³ USA Joint Technology Committee, ‘ODR for Courts’ (29 November 2017), retrieved from <<https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>>, p. 16.

²⁴ N.A. Welsh, ‘Do You Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation’, *SMU Law Review*, Vol. 70, 2017, pp. 721-762.

informed participation and empowerment. The mediation process has been closely associated with party empowerment and self-determination. Compulsion into a consensual process has therefore been viewed unfavorably by some.

The principles of empowerment and informed participation have also been at the heart of the criticism of how court-connected mediation has been conducted. Commentators have written about how court-connected mediation in the US frequently involved evaluative interventions, and reduced the parties' autonomy and participation in what is meant to be a highly participative process.²⁵ Katsch and Rabinovich-Einy aptly summed up the situation, stating that “[t]he reality of court-annexed mediation was very different than the promise for a context-specific tailored process that maximized party autonomy, participation and control”. They elaborated that “the adoption of ADR in courts has led to the erosion of the formal-informal distinction, and much of what transpires in courts has become ‘semi-formal’, with efficiency being the primary driving force for settlement-encouragement”.

In sum, the history of court dispute resolution, which includes the incorporation of consensual processes into the court system, has demonstrated the importance of certain ethical principles for the justice system. The prominent principles, which are closely intertwined with expectations about the courts, are highlighted below. Although these principles also appear in the general ODR context, the court's failure to adhere to them could potentially have more serious ramifications on the court's standing and consequently, public confidence in the justice system.

Accessibility	Fairness	Protection from Harm
Accountability	Honesty	Security
Competence	Impartiality / Neutrality	Transparency
Confidentiality	Informed Participation / Highlighting & Clarifying the Shadow of Law	Limited Discovery
Empowerment	Innovation	Trust
Equality	Integration	

V. Four salient questions on the design of court ODR

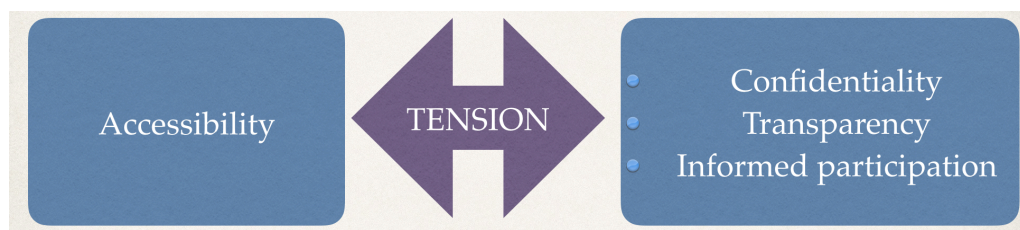
²⁵ N. A. Welsh, ‘Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?’, *Washington University Law Quarterly*, Vol. 79, 2001, pp. 787-861; N. A. Welsh, D. Stienstra & B. McAdoo, ‘The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions’, in *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Sourdin & Zariski eds., 2013), pp. 59-62; C. Menkel-Meadow, ‘For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conferences’, *UCLA Law Review*, Vol. 33, 1985, p. 498; J. A. Wall Jr & D. E. Rude, ‘Judicial Mediation: Techniques, Strategies, and Situational Effects’, *Journal of Social Issues*, Vol. 41 No. 2, 1985, pp. 47-63.

It has been argued in the previous section that certain ethical principles relating to dispute resolution take on greater significance in the court context vis-a-vis private ODR systems. It is therefore critical for a court ODR system to be designed according to these fundamental values. This section will examine four important questions to be resolved in the design of the court ODR system. As will be evident below, each question involves multiple tensions between existing ethical principles. These underlying ethical conundrums have to be addressed before a coherent ODR system may be designed.

a. A seamless track or differentiated processes?

The first design question relates to the arrangement of the different stages in the ODR system. Should the court ODR system be fashioned as a seamless track or should the differences between dispute resolution processes remain distinct? The latter philosophy seemed to be distinctive during the growth of ADR in the courts, which coincided with the emergence of the multi-door courthouse concept. Sander envisaged such a courthouse performing the role of screening cases and matching the particular dispute to the most appropriate dispute resolution process. However, the advent of ODR has modified the architecture of court system from a multi-door courthouse to a seamless end-to-end process. As English commentator Sorabji noted, the future Online Solutions Court in England is designed as a “sequential multi-door courthouse”, as the court is no longer matching a dispute to a process but arranging for disputes to move through different processes in stages.²⁶

The seamless ODR system tends to render the distinction between different dispute resolution processes less pronounced. In the conventional court system, each dispute resolution process is self-contained, has its own unique setting and is clearly separate from the next stage. For instance, the mediation process could be conducted by a volunteer mediator or an external mediator. The mediation would be governed by its own set of rules, and there will be a clear separation between mediation communications and subsequent trial proceedings. By comparison, the shift of dispute resolution process from the physical realm to the online environment obviates the need to change physical locations as the court user proceeds from negotiation or mediation to the online trial. This development begs the question of whether the court ODR system should be designed to substantially reduce the differences between the processes, or to intentionally accentuate their differences. The final design choice ultimately hinges on resolving tensions between the following key ethical principles



²⁶ John Sorabji, ‘The Online Solutions Court – a Multi-Door Courthouse for the 21st Century’, *Civil Justice Quarterly*, Vol. 36 No. 1, 2017, pp. 86, 100.

Accessibility vs confidentiality

A seamless ODR system will offer great accessibility and convenience to the user. A most user-friendly system will likely allow information entered in one phase to be ported over to the next stage of the ODR system, reducing the need for the user to repeatedly provide. However, the accessibility principle is constrained by the need to ensure the confidentiality and inadmissibility of information and communications in the negotiation and mediation stages. This tension requires the ODR system to be designed with care so as to ensure that the stages within the ODR system are not porous and that the communications within each process remain self-contained.

The CRT system seems to be designed with the awareness of the above tension. Although a key design feature is to allow the user to only enter information once wherever possible,²⁷ the CRT rules also state that the discussions for the purpose of settlement are confidential and must not be disclosed during the tribunal decision process.²⁸ It is notable that the CRT relies heavily on the facilitator's intervention. If the parties fail to reach a resolution with the facilitator's help, the facilitator prepares them for the tribunal hearing, which is likely to include consideration of which earlier information and documents should be submitted for the formal hearing. This example underscores the importance of alerting the parties to the general confidentiality of information shared prior to a trial, and their need for prudence in deciding which information should be admitted as evidence. Otherwise, the seamless nature of the ODR system may inadvertently diminish the much-needed separation between the pre-trial and post-trial phases.

Utah's ODR system for small claims is also instructive as an example of balancing the confidentiality and accessibility principles. At the education or self-help stage, the user is notified that the information shared will not form part of the court record. Similar to the Solution Explorer of the CRT, this stage directs the party to answer simple questions that will provide information on their dispute and direct them to the relevant resources. If the matter is still not resolved, all the parties are able to communicate in a chat room. Again, parties are informed that all information shared is considered confidential. In the event that negotiation does not lead to a settlement, the parties are specifically asked to indicate which documents that were shared should be made public for the next stage. The facilitator also helps the parties decide which documents are appropriate to be uploaded for the purpose of a trial. Once a trial is scheduled, the parties are unable to access the earlier communications in the chat room.²⁹ While this system has been designed to integrate different processes into one track, it has

²⁷ ; S. Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) *Windsor Yearbook of Access to Justice B. Access* Vol. 34, 2017, pp. 120.

²⁸ Civil Resolution Tribunal Rules, rule 27.

²⁹ D. Himonas, 'Utah's Online Dispute Resolution Program', *Dickinson Law Review*, Vol. 122 No. 3, 2018, p. 882; The National Center for State Courts, 'Utah Online Dispute Resolution Pilot Project', December 2017, retrieved from <<https://cdm16501.contentdm.oclc.org/digital/collection/adr/id/63>18%20ODR%20for%20courts%20v2%20final.ashx>>.

concurrently preserved the distinction between the pre-claim and post-claim stages, as well as between settlement and trial stages.

The tension between confidentiality and accessibility also emerges in respect of how the information shared will be used by the courts. Several commentators have emphasized how the concept of confidentiality in ODR systems differs vastly from confidentiality in a physical ADR setting. Rule has noticed how the assurance of confidentiality is less tangible in the online setting compared to a physical mediation session, when the mediator may “tear up the notes” at the conclusion of the session.³⁰ Furthermore, as Katsch and Rabinovich-Einy explained, ODR systems offer the courts the unparalleled opportunity to collect and study big data and identify important patterns that will contribute to dispute prevention, as well as monitor the outcomes involving vulnerable disputants.³¹ This very advantage of ODR results in reduced confidentiality of users’ information. The court ODR system will therefore have to highlight to the users that there is limited confidentiality, and that information shared may be anonymized and aggregated for the purpose of data analysis. In addition, the user has to be assured of measures taken to ensure the security of data in the system. Elaborating on this point, Rule has pointed out that the courts “may have to consider assuring users when the data relating to negotiation will be deleted” after a certain duration, so as to assuage their concern about information being released subsequently through an unpredictable channel.³² Rainey has also observed that the confidentiality standard is perhaps the most difficult standard to deal with in the online context. It requires the use of platforms that meet reasonable industry standards for security and privacy protection, and also necessitates explanation to the user about the risks to privacy and confidentiality inherent in using online applications.³³ As such, the courts face a difficult task in ensuring as well as assuring users of the security of data shared in its ODR system. The increased accessibility offered by the system brings about the attendant heavy responsibility to adhere to the confidentiality as well as security ethical principles.

Accessibility vs transparency and informed participation

As evident from the preceding discussion, confidentiality, transparency and informed participation are closely connected principles. The court user has to be informed and educated about confidentiality and other aspects of the ODR system. The NCTDR’s Ethical Principles on ODR describe informed participation as requiring explicit disclosure of the risks and benefits of the system and ensuring that the participants understand information relating to participation in the process.

³⁰ C. Rule, ‘Ethical Dilemmas in Technology-Based Negotiations’, in *The Negotiator’s Desk Reference* (C. Honeyman and A. Schneider eds, 2017) p. 553.

³¹ O. Rabinovich-Einy & E. Katsch, ‘The New New Courts’ *American University Law Review* Vol. 65 2017, p. 211.

³² C. Rule, ‘Ethical Dilemmas in Technology-Based Negotiations’, in *The Negotiator’s Desk Reference* (C. Honeyman and A. Schneider eds, 2017) p. 553.

³³ D. Rainey, ‘Model Standards of Conduct for Mediators: Annotated for Online Dispute Resolution’, *International Journal of Online Dispute Resolution*, Vol. 3 No. 1, 2016, p. 36.

Again, it is no easy task to adhere to the spirit of the principles of transparency and informed participation. Any online portal may explain features of its system in text form. However, whether the user genuinely understands these explanations hinges on how prominent the alerts are, whether the system requires the user to confirm understanding of the explanations and the clarity of the language used. Consider the integral role of the opening statement in the conventional mediation process. The mediator's opening statement has been regarded as central in explaining how mediation works, confirming understanding, clarifying doubts and establishing trust. Some mediation practitioners have further proposed that the statement be modified to an interactive conversation that will engage the disputants and ensure a greater degree of informed participation. By contrast, there is less media richness within online systems and consequently less ability for contextual cues to be grasped by participants and the court.³⁴ It is thus challenging to design a court ODR system to ensure that explanations are read by the users (instead of being skimmed through like most online terms and conditions) and also genuinely understood. As argued in the previous section, the need to adhere to transparency is more compelling for the courts compared to private institutions. Accordingly, greater care has to be taken to ensure that the system is designed to facilitate understanding of its features.

The tension between accessibility and informed participation also arises because of how ODR systems could involve the combination of a variety of dispute resolution processes. As explained above, the online environment tends to reduce the distinction between the different processes. In addition, the free reign to design dispute resolution processes with assisted negotiation and decision-making tools brings great potential to create hybrid dispute resolution processes. The SmartSettle system is a case in point. It allows negotiators to make proposals while also indicating their settlement preferences privately. The system can inform each negotiator when he or she is reaching the zone of potential agreement, and will also reward negotiators who move quickly to this zone. If no settlement is reached at the final negotiation session, the parties can agree to accept the outcome determined by the "Expert Neutral Deal-Closer".³⁵ This innovative system effectively combines negotiation with neutral evaluation or expert determination. Technology brings the capability to mix and combine different ADR processes that used to exist separately in the physical realm. Under the CRT and Utah ODR systems, the negotiation process is kept separate from the subsequent facilitation process, but the facilitation process seems to allow for hybrid dispute resolution methods. The CRT facilitator uses a variety of tools, including mediation and neutral evaluation to help the parties reach an agreement. With the parties' consent, the facilitator may also issue a binding decision.³⁶ Although the human agent is currently performing the facilitation function in the

³⁴ N. Ebner, 'Negotiation via Videoconferencing', in *The Negotiator's Desk Reference* (C. Honeyman and A. Schneider eds, 2017) pp. 154-155; N. Ebner, 'ODR and Interpersonal Trust', in M.S. Abdel Wahab, E. Katsh & D. Rainey (eds.) *ODR: Theory and Practice*, The Hague: Eleven International Publishing, 2012, pp. 212-214.

³⁵ Smartsettle website, retrieved at <<https://smartsettle.com/products/smartsettle-one/>>.

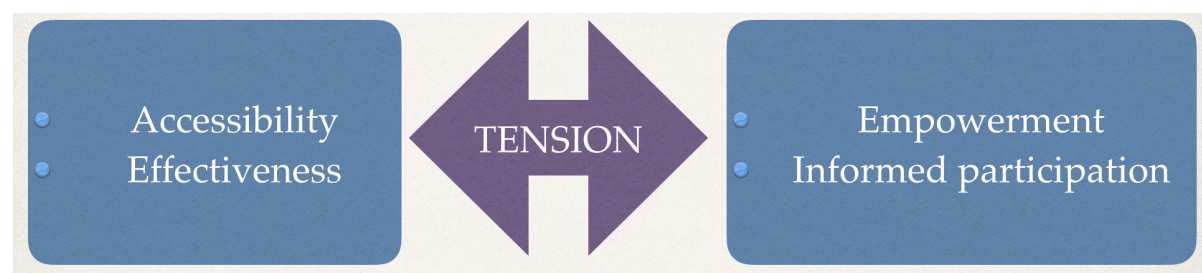
³⁶ S. Salter and D. Thompson, 'Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunals', *McGill Journal of Dispute Resolution* Vol. 3 2016-2017, pp. 132-133; S. Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) *Windsor Yearbook of Access to Justice B. Access* Vol. 34, 2017, p. 121.

CRT, it is easily foreseeable to have well-designed software fulfil the same role of using hybrid dispute resolution processes in the future.

While this may appear to be a change of form more than substance, it could lead to less well-defined hybrid ADR processes that may not necessarily be aligned to the litigant's expectations concerning the mode of dispute resolution. Informed participation may be compromised as a result. This danger has been earlier highlighted by dispute resolution scholars who criticised the evaluative practices in court-connected mediation programs. Although ODR certainly affords the courts the opportunity to start afresh on a clean slate, the courts need to guard against the same pitfall of favoring efficiency over procedural justice, and failing to maintain the distinction between radically different dispute resolution options. After all, the ODR systems are created by the same courts that earlier introduced court-annexed mediation. The lack of clarity about what each dispute resolution stage entails and the failure to inform the user about what type of process he or she is entering will pose a severe threat to the principle of informed participation.

b. Compulsion or voluntary participation?

The second question relates to the degree of party choice in the ODR system. As argued earlier, the question of compulsion versus party autonomy has earlier emerged in relation to mandatory mediation and the practices in these mediations. The same question concerning the degree of party choice confronts the courts in two ways when creating an ODR system. First, should participation in the entire ODR process be mandatory? Secondly, should the user be permitted to opt out of certain stages of the ODR process? They involve consideration of the following tensions between ethical principles:



Opting out of the entire ODR system

The first issue throws into sharp relief the tension between accessibility and effectiveness on the one hand, and empowerment and informed participation on the other hand. The current fully-integrated Court ODR systems such as the CRT adopt an opt-out approach in order to ensure high utilization rates. The highly successful CRT system was initially envisaged as a

voluntary, opt-in, system for condominium disputes. However, condominium property stakeholders pointed out that such a scheme would allow one party to veto the other's choice to use the CRT, forcing the initiating party to commence legal proceedings in the Supreme Court of British Columbia. Hence, all condominium disputes have to go through the ODR system, unless there are exceptional circumstances, including the need to establish a precedent, the involvement of human rights and other constitutional issues, and the CRT's inability to accommodate any party's difficulty in the use of electronic tools.³⁷ Learning from this experience and other similar systems, the US Courts' Joint Technology Committee recommended limiting the grounds for opting out to very exceptional situations, so as to ensure that ODR is the mainstream and not alternative mode. In the words of one ODR pioneer, "If you want to doom your ODR pilot, make it 'opt in'".³⁸

The conflict between effectiveness, accessibility and empowerment is most palpable in crafting the appropriate grounds for opting out of the ODR system. Because the courts would like the disputants to gain access to an effective ODR system, it has to curtail the parties' choice to elect the conventional court system. The limited grounds to opt out should therefore be situations when physical court proceedings are more appropriate for the dispute. The grounds in the CRT Act are strikingly similar to the English jurisprudence regarding when it is reasonable to refuse to participate in ADR. The new ground for opting out relates to the parties' ease of using electronic tools. Paradoxically, this reason impinges on the principle of accessibility itself. A system that promises greater access to justice has to be sensitive to disputants who lag behind others in accessing technology. Welsh expressed it well when stating that it is necessary that the state offers multiple channels or paths to justice for disputants who are not comfortable with ODR or prefer the "old-fashioned" contact with a human being.³⁹ Notably, the CRT experience shows that providing live assistance and other ways to accommodate these difficulties helps to diminish the parties' need to opt out of the ODR system. The degree of access to justice evidently varies according to the user, and it is essential for a court system to be responsive to the different needs.

The tension between accessibility and empowerment is likely to be more accentuated as ODR systems are increasingly utilized to deal with more complex disputes with higher stakes. The success of court ODR systems has thus far been evident in dealing with large volumes of relatively uncomplicated disputes. To manage the tension well, it is probably important to monitor the effectiveness of the ODR system for more complex cases, in terms of perceptions of fairness and confidence in the process. The curtailment of the freedom to choose a court

³⁷ S. Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) *Windsor Yearbook of Access to Justice B. Access* Vol. 34, 2017, p. 118; and Civil Resolution Tribunal Act section 12.3.

³⁸ USA Joint Technology Committee, 'ODR for Courts' (29 November 2017), retrieved from <<https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>>, p. 30.

³⁹ N. Welsh, 'ODR: A Time for Celebration and the Embrace of Procedural Safeguards', Conference presentation at the International Forum for Online Dispute Resolution, The Hague, May 2016, available at: <<http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr>>, *Ethical Principles for Online Dispute Resolution*, retrieved from <http://odr.info/ethics-and-odr/#_ftn1>

forum has to be justified by the continued effectiveness of the ODR system. Additionally, the grounds for opting out probably have to be carefully crafted to avoid conveying the impression that parties in higher value disputes have greater choice to opt out compared to others involved in small claims.⁴⁰

Choosing your own adventure or having the adventure chosen for you?

The question of choice also arises another way: can the user bypass certain phases in the ODR process? Systems such as the upcoming Online Solutions Court and CRT are able to guide the users along a pre-designed path traversing different stages.⁴¹ However, as argued above, the current court ODR systems have brought a marked shift of emphasis from the earlier philosophy of matching the forum to the fuss, to having a sequenced pre-designed pathway. An analogous comparison will be between choosing your own adventure to having the adventure pre-planned for you. What if a party does not want to undergo facilitation or mediation? Alternatively, what if one party wishes to have face-to-face mediation instead of asynchronous facilitation? Will the system be sufficiently flexible to deal with requests to bypass stages or modify the stages, and what factors will be considered before allowing such requests? These and other related questions will have to be carefully considered by the courts to achieve the right calibration between effectiveness and empowerment for a variety of disputes. A pre-designed path may be effective for some circumstances, but it may inadvertently create a one-size-fits-all model that lack the flexibility to respond to variations in disputes.

c. The court's role: impartial adjudicator or proactive problem-solver?

One distinctive characteristic of the highly successful court ODR systems is the provision of guided triage that empowers users to resolve the dispute. The Solution Explorer tool in the CRT uses guided pathways to help the disputant learn more about disputes, and then to diagnose the problem in terms of the relevant legal rights and provide self-help tools. Similarly, the initial stage of the future Online Solution Courts envisages giving guidance about dispute resolution and offering commoditised summaries of legal principles. The latest Utah system for small claims has placed even greater emphasis on education. Apart from providing customized self-help resources and legal services at the start of the process, this system also assigns a facilitator to the case once all the parties have joined the web portal. One of the facilitators' key functions is to provide limited legal advice and provide individualized education and assistance. Utah Supreme Court Justice Deno Himonas commented that relevant

⁴⁰ *Id.*

⁴¹ S. Salter and D. Thompson, 'Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunals', *McGill Journal of Dispute Resolution* Vol. 3 2016-2017, pp. 127-128.

rules may have to be amended to allow the facilitator to give limited legal information even though he or she is not acting as counsel for either party.⁴²

Cumulatively, these systems have effectively resulted in ODR as the fourth party expanding the scope of the courts' intervention in disputes by educating the parties. This development is transforming the court's role from an impartial and detached adjudicator to a more pro-active problem-solver. Notwithstanding the great gains to be reaped from education, this change results in considerable tension between the following ethical principles:



The court's assistance in problem-solving has to be delicately balanced against ensuring its actual and perceived impartiality. There is the risk of the courts being seen as assisting one party more than the other or intervening excessively to the extent of compromising its evenhandedness. The court's impartiality is integral to public confidence, particularly in common law court systems that are more adversarial in nature. This danger may not be an acute concern in small claims or claims involving self-represented disputants. However, this tension warrants serious consideration once the ODR system is extended to other types of legal claims where lawyers could be involved and there is the expectation of more limited court intervention. It raises a more profound question of whether the courts should level an uneven playing field when there is information asymmetry. Even if it should, should it do so in all types of cases?

To avoid the perception of partiality, the courts could probably take practical steps to dissociate itself from the provider of the resources. For instance, they could collaborate with external agencies so that the resources provided are not attributed to the courts. In this respect, Utah's system provides access to licensed paralegal practitioners that are not employed by the courts. During the pilot of the small claims project, the facilitators were volunteers who did not represent the courts or either of the parties.⁴³ The perception of evenhandedness could also have a discernible impact of the design of the online self-diagnosis tools. Although the system provides individualized and customized triage, it could simultaneously assure users that all parties in the dispute are provided with the same information, resources and decision-making support tools.

⁴² D. Himonas, 'Utah's Online Dispute Resolution Program', *Dickinson Law Review*, Vol. 122 No. 3, 2018, p. 892; The National Center for State Courts, 'Utah Online Dispute Resolution Pilot Project', December 2017, retrieved from <<https://cdm16501.contentdm.oclc.org/digital/collection/adr/id/63>>18%20ODR%20for%20courts%20v2%20final.ashx>, p. 11.

⁴³ The National Center for State Courts, 'Utah Online Dispute Resolution Pilot Project', December 2017, retrieved from <<https://cdm16501.contentdm.oclc.org/digital/collection/adr/id/63>>18%20ODR%20for%20courts%20v2%20final.ashx>, p. 11.

d. The overarching question: how should a court ODR system engender trust?

The final question in the design of Court ODR is a wide one that encompasses the preceding three issues: how should the system be crafted to engender trust in the courts' system? As with any new and unfamiliar process, trust in the court ODR system is paramount in ensuring its success. In this connection, Eber and Zeleznikow rightly argued that trust has to be established on many fronts: trust that the ODR technology will not fail; trust that the system will be competent and capable of resolving the dispute; confidence that the system is user-friendly; and trust that the process will not involve unanticipated time and costs.⁴⁴

Trust within negotiation and dispute resolution has generally been understood as comprising affective and cognitive elements. The former refers to the confidence that the other person will act in one's interest because of the emotional bonds shared between them. Cognitive-based or calculus-based trust, on the other hand, is grounded in beliefs in another person's ability, reliability and comprehension of the situation.⁴⁵ Ebner has very helpfully underscored how the medium of communication makes it difficult to build and maintain trust in the online environment. The lean media of e-mail, text-based communication and video-conferencing tend to supply fewer contextual cues compared to face-to-face communication. The reduced interactivity in the online environment – particularly in asynchronous communications – also poses a challenge to building trust. Ebner has referred to studies suggesting that online negotiators experiencing lower levels of trust compared to their face-to-face counterparts.⁴⁶ Another study by Rockman and Northcraft indicated that individuals interacting through a leaner medium are more likely to engage in deceptive and defective behavior.⁴⁷ Collectively, these studies underscore the paramount importance of overcoming the trust deficiencies that tend to plague ODR systems. It is even more pressing for the courts – public institutions that have their legitimacy closely connected with trust – to pay close attention to the impact of the medium of communication on the level of trust between the user and the courts, and the trust between disputants as they interact via the ODR system.

⁴⁴ N. Ebner and J. Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution' *Hamline University School of Law Journal of Public Law and Policy* 2015 Vol. 36 No. 2, pp. 154-156.

⁴⁵ R.J. Lewicki, in *The Negotiator's Desk Reference* (C. Honeyman and A. Schneider eds, 2017) pp. 206-207; N. N. Ebner, 'ODR and Interpersonal Trust', in M.S. Abdel Wahab, E. Katsh & D. Rainey (eds.) *ODR: Theory and Practice*, The Hague: Eleven International Publishing, 2012, pp. 212-214; K.W. Rockmann and G. B. Northcraft, 'To be or not to be trusted: The influence of media richness on defection and deception', *Organizational Behavior and Human Decision Process* Vol. 107, 2008, pp. 106-122, referring to D. J. McAllister, 'Affect- and cognitive-based trust as foundations for interpersonal cooperation in organizations', *Academy of Management Journal*, Vol. 38 No.1, 1995, pp. 24-59; J. D. Lewis & A. Weigert, 'Trust as a social reality', *Social Forces*, Vol. 63, 1985, pp. 967-985.

⁴⁶ N. N. Ebner, 'ODR and Interpersonal Trust', in M.S. Abdel Wahab, E. Katsh & D. Rainey (eds.) *ODR: Theory and Practice*, The Hague: Eleven International Publishing, 2012, pp. 215.

⁴⁷ K.W. Rockmann and G. B. Northcraft, 'To be or not to be trusted: The influence of media richness on defection and deception', *Organizational Behavior and Human Decision Process* Vol. 107, 2008, pp. 106-122.

A recent study by Sela has shown that variations in the technology used generate differences in litigants' procedural experience and affect their perceptions about the fairness of the court process. She argues that asynchronous text-based processes lead to more positive experiences as the litigant has the opportunity to thoughtfully prepare and edit his or her communications with the court, and the lack of interruption gives the litigant greater opportunity to express himself or herself. However, her study showed some fascinating results when comparing video communication with text messages. The litigant who communicated to the judge in text form, but also received video communication from the judge, had a more positive experience than the litigant using solely text messages. Furthermore, two-way video communication between the court and the litigant did not improve the litigants' experience.⁴⁸

Sela's research underscores the complexity of understanding the impact of the media on the litigant's trust in the courts. A combination of different communication modes may have different results from using the use of merely one medium of communication. In addition, the findings on the impact of two-way video communication is noteworthy, suggesting that courts should be cautious in assuming that video conferencing is a superior form of online communication in all circumstances. In the same vein, Ebner and Thompson have called for greater circumspection by ODR providers in believing that real-time video conferencing would not pose any challenge to communication and trust. They argue that this mode does not fill in the full range of cues and psychological impact that is lacking in text-based communication. Mediators who expect video communication to be equivalent to face-to-face communication may inadvertently forgo the conscious filtering of contextual cues provided by the video communication, thus undermining the trust-building process.⁴⁹

In sum, the complex findings of the evolving research show that the courts need to pay greater attention to the design of their ODR systems in terms of modes of communication. The court staff or judges who utilize the system also have to be acutely aware of the impact of different media on the disputants' procedural justice experiences and their trust in the courts. More significantly, it is crucial to consider when targeted human intervention should occur within the ODR process to deal with any potential trust deficits. The CRT and Utah systems rely on human facilitators to provide live assistance and mitigate any possible distrust and unease. These systems reflect not only the complexity but also the great potential in combining both technology and human intervention in ODR systems to facilitate the building of trust.

VI. Conclusion

The use of ODR in the courts is probably still in a nascent stage. Notwithstanding the use of technology to create tiered systems comprising different stages of dispute resolution, the main

⁴⁸ A. Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation', *Cornell Journal of Law and Public Policy*, Vol. 26, 2016, pp. 331-388.

⁴⁹ N. Ebner and T. Thompson, '@Face Value? Non-Verbal Communication and Trust Development in Online Video-Based Mediation', *International Journal of Online Dispute Resolution*, Vol. 2, 2014, pp. 103-124.

focus of the latest systems is on technology-facilitated triage and problem-diagnosis, and the sequenced arrangement of stages to give the parties the opportunity to resolve the dispute as early as possible. The ODR systems have yet to incorporate assisted negotiation tools or decision-making tools (for the judges) into each stage. These future developments are likely to raise further questions about transparency, impartiality and informed participation. Nevertheless, ODR systems in their current forms already create considerable ethical difficulties to be resolved because of how they have transformed the court's role in the delivery of justice, changed the dynamics of the courts' interaction with the litigants and modified the traditional dispute resolution modes. This article has sought to increase the awareness of the great impact of ODR design on the experience of justice. The intricate details of the ODR design ultimately stem from how the courts define their role and conceptualize the nature of the delivery of justice, as well as a sound understanding of the key ethical principles relating to court dispute resolution. These foundational values should not be overlooked in the bid to effectively enhance access to justice.
