

To: The Honorable Thomas R. Mulroy, President, Chicago Bar Association
From: ADR-ODR and Conflict Resolution Skills Committee, Subcommittee on Online Dispute Resolution
Re: Recommendations for October Summit
Date: October 5, 2017

MEMORANDUM

*Issue: **The emergence of ODR***

Recommendation

The Subcommittee recommends that the CBA **form a task force to investigate the development of a pilot ODR program in Cook County.**

Background

Online Dispute Resolution (ODR) refers to a broad and flexible set of systems that are meant to integrate technology into various approaches towards and steps of the dispute resolution process. These processes and programs are proliferating, including in court systems, with an established precedent internationally in countries such as the UK, the Netherlands and Canada, and increasing adoption stateside. Software companies and courts are developing online platforms in 25 countries and ODR is currently resolving millions of e-commerce, insurance, auto accident, domain name, online gaming, property tax, and “sharing economy” customer disputes each year.

With the introduction of e-filing, and the investment in technology and infrastructure to support that process, there is a tremendous opportunity to develop ODR processes that work alongside or even integrate into it. This Subcommittee lacks the resources and decision-making authority to fully consider all of the details necessary to produce a thoughtful and well-designed program. To that end, we recommend that the CBA form a task force, consisting of a coalition of judges, attorneys, ADR professionals, and academics.

Where this subcommittee can lend our expertise, however, is outlining what criteria a subsequent task force should consider in trying to bring a pilot program to life. Below are nine major questions which the task force should seek to answer.

1. What will be the goals of the program?

ADR programs, including ODR, can exist to serve different goals. Determining what the goals of the program is should be the first step, as that answer will influence every other decision to be made about the program. For instance, is the program aimed to improve efficiency of judicial resources? If so, then the focus may be on a process which streamlines program entry and attempts to reduce the number of court appearances. Will there be an emphasis on participant satisfaction? The task force should come up with concrete goals to refer back to in making decisions about the ODR pilot program.

2. What type of cases will the program address, and what process will it use to address them?

Certain case types lend themselves more readily to ODR, particularly in a pilot phase. Some of the considerations involved here include case volume, complexity and litigant access to counsel. The

subcommittee strongly recommends examining Small Claims as a potential starting point. ODR should be defined as including online tools that allow consumers and businesses to resolve disputes. Focusing on Small Claims will be a strong starting point, as it allows both non-represented and represented litigants to achieve resolution at a lower cost in a shorter time. (The definition of a “Small Claim” can be explored by further working groups who have broader experience in these matters -- some areas that seem suitable are: debt collection, rent, and property damage claims.)

Dispute Resolution Method: ODR methods run the gamut from mediation to arbitration to monitored settlement, and many programs utilize some hybridization. While it is not necessarily important that the method involved in such a program ‘fit neatly into a box’, it is important to consider what method(s) you want the program to employ to determine what needs you have for this program. The goal of the program is not to replace existing face-to-face mediation efforts, but to take advantage of current technologies to implement new methods of dispute resolution to reach more people who may have not been reached by existing programs. Within this methodology, the program should incorporate from beginning to end, educational components that are focused on educating all stakeholders -- disputants, attorneys, existing court clerical staff and the judiciary. One clear focus should be viewing this ODR initiative as part of an overall system that makes justice accessible to more people at a reasonable cost that matches the scope of the dispute with which they are involved.

System Design: Related to the above items, the actual design of the system is crucial to achieving the program goal. ODR developers are capable of creating highly customized systems, but they look to courts and other decision-makers to help design a process that serves their needs and interests. The system should give disputants several different opportunities to negotiate a settlement using various tools along the way, e.g. asynchronous email, guided negotiation, online mediation, face-to-face mediation, adjudication, and ultimately a trial. The task force should also consider how this program might integrate into the new e-filing system.

3. What is the cost of the program, and who will bear it?

Typically, courts have contracted with outside providers to develop the system, as they have the expertise and capacity to build and maintain these sophisticated software platforms. Rough cost estimates the Subcommittee has obtained pegs the price on a per case basis anywhere from \$5 to \$50 per case, depending on the complexity, length to adjudication and number of parties involved. The Task Force should conduct its own research on costs, including what process the development would take (i.e. will an RFP need to be put out?), and whether the program will be funded directly by the Court, paid for by disputants, or covered by a grant (among other potential solutions).

4. Who will design and manage the program?

Although the use of ODR can potentially be cost- and labor-saving, the program will still require day-to-day oversight. Case management, scheduling, data collection and follow-up are just a few of the tasks. How many staff will be needed to administer this program? Will the court staff these professionals themselves? Will they look to partner with another organization, such as a community mediation center like CCR? It makes good sense to involve the managers of the program in the design of it as well.

5. Which stakeholders are vital to the program, and how will their buy-in be cultivated?

Vital stakeholders will include judges, the Cook County Clerk's Office, attorneys practicing in the proposed fields, disputants, advocacy groups, and organizations currently providing ADR services such as Family Mediation Services and Center for Conflict Resolution. These stakeholders should be represented on the task force and should be involved from the first stages of development of an ODR program in order to ensure program success. Bringing representation from each of these groups and organizations to the task force is the most likely way to ensure buy-in on all levels. Bar Associations will be vital to working with the private bar.

6. How will disputants, attorneys and judges become educated about and incentivized to use the platform?

ODR is largely foreign to the general public, and even remains novel and mysterious to the legal community. In order for the program to have any success, therefore, it needs a way to explain how it exists within the legal system, and what some of its potential advantages are. A few ideas to explore around this concept include: creating an explanatory page and/or video embedded in the program platform itself; having the CBA put on trainings where the developers can show the platform; and incentivizing participants to use ODR by waiving their appearance fee, or charging attorneys a fee for which they will get a rebate when they file cases using the platform.

7. What steps will the program take to ensure that the program advances Access to Justice?

The subcommittee has identified three areas in which ODR could stand to impact Access to Justice efforts. We recommend the task force bear these considerations in mind, and look for ways to leverage the platform to make justice more accessible.

Unrepresented Litigants: In cases where at least one side is pro se, ODR can provide educational tools, and package the dispute resolution process as something more accessible. After all, the average person is more likely to have had experience using an automated dispute resolution system, such as one used on an e-commerce site, or a phone-based platform used for a bank or utility company to dispute charges, than navigating the court system.

Access to Technology: Mobile computing will increasingly become the norm, and for many lower-income disputants, is already the primary way they access the internet. Accordingly, the ODR platform needs to be mobile-friendly to truly reach the underserved. Security also needs to be a consideration; many users might be accessing the platform at a public library or courthouse, and therefore need a way to protect sensitive data. Finally, the platform should be as accessible to individuals with disabilities as possible.

Cultural Factors. Is the language used by the platform and the program simple to understand? The ABA has recommended that the language presented should be at 5th/6th grade reading levels. What languages will the platform be in? After English, the most common languages in Chicagoland area are Spanish, Polish, Arabic, Tagalog and Chinese.

8. How will this program impact physical space in the courthouse?

Ensure computers are set up at help desk and in clerk's office to allow people to file cases. Explore the possibility of court spaces to allow parties to participate in video mediation.

9. Consider what role artificial intelligence and algorithmic decision-making will play, and how does the program avoid corruption in those process?

A potential benefit of ODR is that the software can use algorithmic and machine-based learning to guide in the adjudication process, from determining which cases are appropriate for mediation, to even making determinations in certain small-dollar cases. While this presents an opportunity for the court to conserve resources and to resolve cases in a fair and unbiased way, this sort of decision-making requires oversight and careful analysis to ensure that it is free from corruption and implicit bias. The subcommittee considers this to be a secondary element of ODR, but one that the Task Force should nonetheless address, if at least to develop a policy statement and set a tone for future explorations into this subject matter.

Conclusion

We have posed these questions in the hopes that they can give a task force composed of decision-makers and stakeholders guidance on how to thoughtfully embed technology into the Court's dispute resolution services. This initiative can be undertaken in steps; not all the components need to necessarily be rolled out at once. Ideally, a pilot will help the court identify other areas of the court experience that can be improved through technology, and then give them a model to adapt these services to fill that need. This subcommittee believes that Cook County, which is home to a robust legal community and will soon have the infrastructure to file electronically, has the potential to build upon these advantages and create an innovative program that gives disputants access to justice.