

**AMERICAN BAR ASSOCIATION  
TASK FORCE ON ECOMMERCE AND ADR  
RECOMMENDED BEST PRACTICES  
FOR ONLINE DISPUTE RESOLUTION SERVICE PROVIDERS**

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**I. SCOPE AND APPROACH**

A. Scope

These Recommended Best Practices are intended to assist:

- Organizations that provide online dispute resolution (ODR) services (ODR Providers), concerning disputes that occur online or disputes that lend themselves to being resolved online;
- Individuals who serve as neutrals for ODR Providers;
- Customers of those services, whether personal consumers or businesses; and
- Online merchants or marketplaces.

The term “online” refers to the use of the Internet or related communications technologies (such as email, videoconferencing, or interaction via a website or chatroom) as the primary method of communication during a transaction or related dispute resolution proceeding.

Actions that are taken by ODR Providers consistent with these Recommended Best Practices may (a) take the form of codes of conduct, codes of practice, best practices statements, protocols and similar statements; (b) be reflected in the operation of their websites and in material posted on their websites; or both. The exact form is secondary. The primary points are that the ODR Provider’s service is clearly and comprehensively presented to the consumer in a manner that is consistent with the Recommended Best Practices and in fact operates in the manner presented.

These Recommended Best Practices are not intended for traditional, face-to-face dispute resolution services, though the basic principles may apply in both online and offline environments.

These Recommended Best Practices contain many principles that are applicable in both B2B and B2C disputes. However, they particularly are intended to enable personal consumers to make intelligent choices concerning ODR providers, to help give them confidence in the efficacy of ODR and therefore in B2C commerce generally, and to encourage consumers to use ODR as a means of obtaining resolution of their complaints.

These Recommended Best Practices are also not primarily directed to the codes of conduct, best practices statements, and similar protocols of online merchants or marketplaces (although they may find the Recommended Best Practices useful). Other private and governmental entities have

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\* The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of the American Bar Association, the Section of Business Law, the Section of Dispute Resolution, the Section of International Law and Practice, the Litigation Section, or the Section of Intellectual Property Law unless adopted pursuant to the bylaws of the Association. Nothing contained herein is to be considered as the rendering of legal advice for specific cases and readers are responsible for obtaining advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.

proposed merchant guidelines and best practices for consumer protection in the context of electronic commerce, and this Task Force does not purport to duplicate their efforts. However, with respect to ODR, the Task Force does believe that it is important for online merchants and marketplaces to disclose: (1) the existence of pre-dispute ADR/ODR clauses; (2) the nature of the online merchant's dispute resolution process, including customer service and use of formal ADR/ODR processes; (3) any contractual relationships with ADR/ODR Providers; and (4) information to educate their customers about ADR/ODR methods.

## B. Approach

It is not the primary goal of these Recommended Best Practices to set minimum substantive standards. The approach taken by Recommended Best Practices is based mainly on the use of disclosure and addresses both the adequacy of the means whereby the disclosure is given and the subject matter of the disclosures.

It is recognized, however, that the fact of comprehensively listing and organizing the topics for disclosure has some effect in setting substantive standards. It is also acknowledged that, when individual ODR Providers come to the act of formulating disclosures that are readily available publicly and easily compared with those of other ODR Providers, a natural effect of a disclosure-based system is to press ODR Providers in the direction of setting strong substantive standards. These effects are intended. In addition, a "Commentary" area follows each of the Sections of these Recommended Best Practices and those Commentaries indicate, among other things, substantive standards that are encouraged. Hence, as a practical matter, the approach in these Recommended Best Practices is unavoidably a mixed system of recommended disclosures and substantive practice standards.

Nevertheless, the intention is to rely mainly on disclosure. There are several reasons for this disclosure-based approach:

1. The ODR community as a whole is quite new and has not generated a sufficient database of information on which to base confidently extensive substantive standards particularly applicable to ODR.
2. Different ODR Providers focus on different markets (service, product, merchant type, geography, etc.) and a single set of substantive standards may not be appropriate in all cases.
3. The ODR community lacks a clear business model or models for sustained profitable operations and appears to be evolving so as to develop such models. Premature standard setting may retard that evolution.
4. From the point of view of the Bar, a consumer's decision to use an ODR Provider (or to make an online purchase taking into account of availability of an ODR mechanism) is a contract decision. A central issue in any contract decision between a vendor (the merchant or the ODR Provider or both) and a vendee (the consumer) is whether the vendee has sufficient information on which to make an informed and intelligent choice. The Bar is not a consumer protection regulatory agency. Its proper concern is more with the fairness of the various processes involved than with the appropriateness of the substance, as might be more the proper concern of a regulatory agency.

5. Disclosure has an important enforcement consequence in that, under US law, if a business fails to adhere to the public disclosures that it makes concerning its services, it may, under many circumstances, be engaged in an unfair or deceptive act or practice in or affecting commerce under Section 5 of the Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended). This is also the case under the consumer protection laws of many states and non-US jurisdictions.

## **II. TRANSPARENCY AND ADEQUATE MEANS OF PROVIDING INFORMATION AND DISCLOSURE**

- A. All information and disclosures, regardless of form, should be accurately and completely stated, should be presented as clearly and simply as the substance permits, and should present the most important points in an appropriately conspicuous manner.
- B. All information and disclosures presented electronically should employ identifiable and accessible formats.
- C. All information and disclosures on the websites of ODR Providers not related to individual cases should be printable and able to be downloaded electronically.
- D. If the ODR Provider handles a substantial number of B2C disputes, regular periodic statistical reports should be published online that permit a meaningful evaluation of the proceedings and that respect the confidentiality of the participants and the individual proceedings.
- E. With respect to other disputes, particularly those resolved by arbitration, participants should be encouraged to allow the decisions to be published with any confidential or propriety information deleted.

COMMENTARY: ODR Providers are encouraged to use tables, charts, graphs and similar formats that facilitate analysis and comparisons by consumers. These summary reports should include, e.g., (a) number of cases received, resolved, and pending; (b) the number of cases resolved in favor of the business; (c) the number of cases resolved in favor of the consumer; (d) average length of time the proceeding was pending; and (e) average costs, if any, to consumers.

It is understood that ODR Providers' existing case management systems may not be capable of generating detailed statistical data, and that it may be costly to develop such systems. This Recommendation therefore is prospective in nature, and recognizes the financial and practical concerns involved. It is recommended that until new systems are developed, ODR Providers publish reports that, at a minimum, relate (1) the number of total cases; (2) the number of cases resolved in favor of the business; and (3) the number of cases resolved in favor of the consumer.

With respect to Section II D, an annual report is suggested as a minimum. However, quarterly or semi-annual reports followed by a consolidated annual report are encouraged.

## **III. MINIMUM BASIC DISCLOSURES**

ODR Providers should disclose the following minimum level of information:

- A. Contact and organizational information. This includes:
  1. A mailing address, including physical location, not just a post office box number;
  2. E-mail address, and

3. Jurisdiction of incorporation or registration to do business.
- B. Terms and conditions and disclaimers;
- C. Explanation of services/ADR processes provided
1. Description of the types of services/processes provided (e.g., mediation, arbitration, early neutral evaluation, blind bidding);
  2. Published rules of procedure for all services/processes provided;
  3. Nature of the outcome of each service/process and its legal consequences (e.g., whether binding or non-binding on each party), and an explanation of further possible avenues of action (e.g., appeal); and
  4. If the ODR Provider or an individual neutral is engaged in legal services such as client counseling and advocacy, or is affiliated with a law firm or other organization that provides such services, identify the methods employed to separate neutral services and legal services to avoid conflicts of interest
- D. Affirmation that the ODR proceeding will meet basic standards of due process, including (1) adequate notice to the parties; (2) an opportunity for the parties to be heard; (3) the right to be represented or to consult legal counsel at any stage of the proceeding; and (4) in an arbitration, an objective decision based on the information of record.
- E. Any prerequisites for accessing the service, such as membership, or geographic location such as residency in a particular country or state.
- F. Any minimum value for the dispute to be submitted to the ODR provider for resolution.

COMMENTARY: This Section is intended to set forth the basic minimum level of information without which it would be difficult for a consumer to make a reasonable decision to participate in the service offered by the ODR Provider. Each of the remaining Sections is intended to present the additional information that ODR Providers should, in the view of the Task Force, make available as a matter of best practice.

Among the intended principal effects of the procedures that are disclosed are the following: All disputants should be given a reasonable and fair opportunity to be heard. The ODR proceedings should be perceived as treating all parties at least as equitably and fairly as a formal government administrative or legal procedure. Published rules of procedure should clearly ensure that all parties' rights are protected. There should be no unreasonable barriers to access, including unreasonable costs, geographic, linguistic or other barriers. In this regard, ODR Providers should look to existing offline protocols for guidance (e.g., AAA Consumer Due Process Protocol, ABA Managed Care Protocol, or industry associations, etc.) With respect to Section III A, the listed contact and organizational information is often lacking either entirely or partially, on ODR Provider websites. This puts the consumer in the unacceptable position of not knowing exactly who the party is with which the consumer is contracting.

#### **IV. USE OF TECHNOLOGY AND THE ONLINE ENVIRONMENT FOR DISPUTE RESOLUTION**

ODR Providers should disclose:

- A. Specific Disclosures Regarding Current Technology

1. Systems requirements (hardware and software) for using the ODR Provider's service
2. Any limitations on accessibility to ODR systems, such as hours of operation or specific methods of access.
3. If they employ systems that accommodate the disputants' differences in language and culture and, if so, what these are and how they function.
4. Any specific electronic techniques offered to enhance the efficacy of ODR and, if so, what these are and how they function.
5. If they provide techniques for accessibility to persons with disabilities or with low levels of literacy, and, if so, what these are and how they function.
6. If they employ security to ensure the identity of the participants and to preserve confidentiality and privacy of the participants and, if so, what they are and how they function.
7. If they have back up and arrangements for alternative emergency access.

#### B. Specific Disclosures Regarding Training in Use of Online Systems

ODR Providers should disclose:

1. If they educate potential participants in online procedures to help assure access to all users, and if so, by what means (such as through provision of instructions, tutorials, help files, and support personnel via email or telephone.)
2. If they provide training in the use of the ODR system to neutrals
3. If they provide training in adapting the neutrals' skills to the online environment (such as training to help overcome the challenges of communicating without face-to-face meetings.)

COMMENTARY: Section IV addresses the current technological practices of the ODR Provider. However, ODR Providers are encouraged to disclose their policies and plans for encouraging and incorporating new technological advances into their ODR processes.

The technological area is one in which context sensitive help files and tutorial can be the most effective mean of providing meaningful information and disclosure to consumers. The use of such techniques is encouraged.

#### V. COSTS AND FUNDING

ODR Providers should disclose:

- A. All costs of the process, what portion of the cost each party will bear, and the terms of payment.
- B. In B2C disputes, if there is no cost to the consumer, or if the costs are subsidized, the source of the funding.
- C. In B2B disputes, if the costs will not be borne equally by the parties, explain the distribution.

COMMENTARY: Costs of an ODR process should not be so high as to foreclose the opportunity to resolve a dispute; cost should be commensurate with the value of the dispute,

while taking into account the need to avoid frivolous claims. Investment in and costs of operating the ODR service, as well as a reasonable profit, also should be considered in setting the costs of the dispute.

## **VI. IMPARTIALITY**

ODR Providers must disclose all matters that might raise a reasonable question about the impartiality of the ODR Provider or its neutral(s). Specifically ODR Providers should disclose the following:

### **A. Relationship to others concerning providing ODR services**

1. If the ODR Provider provides ODR services under a contractual relationship with other organizations, such as merchants, trade associations, etc.
2. If the ODR Provider provides any referral compensation (referral fees, rebates, commissions, etc.), and if so:
  - a) to whom it is paid, and
  - b) the amount of the compensation or the basis for calculating the amount of the compensation.
3. An ODR Provider shall take reasonable steps to cause its Neutrals to disclose whether the Neutral or a person closely affiliated with the Neutral (e.g. spouse, relative, or business partner, etc.) has any conflicts of interest, including but not limited to:
  - a) Any direct personal, business, professional or financial relationship with a party or its representative;
  - b) Any direct or indirect interest in the subject matter or outcome of the dispute, including contingent fee arrangements; and
  - c) Any personal knowledge that the ODR Provider or Neutral has of facts relevant to the dispute.

### **B. Selection process of neutrals**

1. How individuals are selected to become part of the panel of neutrals eligible to handle disputes.
2. How a particular neutral is selected to handle a particular dispute.
3. The process by which neutrals are required to certify that they have no conflicts of interest and have disclosed all matters that reasonably might affect impartiality with respect to a particular dispute.
4. Procedures for disqualification of a neutral for cause.

### **C. Ethical standards for neutrals**

1. Identify and/or link to the ethical rules by which the neutrals are bound.

**COMMENTARY: Impartiality of ODR Providers:** This section suggests that an ODR Provider should disclose the existence of contractual relationships to provide ODR services on a continuing or repetitive basis to or involving a particular organization. For example, if a merchant contracted with and pays an ODR Provider to arbitrate disputes between the merchant

and its customers, that relationship should be disclosed so customers are aware of it. This Recommended Best Practice does not suggest that an ODR Provider must disclose every party to whom it previously has provided ODR services, training programs, etc., which would be overly burdensome and perhaps contrary to the confidential nature of ADR. Further, this Recommended Best Practice is intended to be prospective if for financial and practical concerns it is not possible to capture and disclose information about existing contractual relationships. ODR Providers should use their best efforts to apply this Recommended Best Practice retrospectively, where feasible.

**Impartiality of Neutrals:** This section affirms as a substantive standard that all neutrals must act impartially and must disclose any conflicts of interest. It is understood that even if an ODR Provider has a contractual relationship to provide ODR services on a continuing or repetitive basis to a particular organization, the neutrals assigned to individual disputes arising under this contractual relationship will be bound by the same substantive standard to act impartially and disclose any conflicts of interest. If the neutrals are bound by a published set of ethical rules, ODR Providers are encouraged to post the full text of such rules, or at a minimum include a link to a page where the full text is posted. If the parties wish to know more about the selection process of a neutral in general or for a particular matter, that information should be available.

## **VII. CONFIDENTIALITY, PRIVACY AND INFORMATION SECURITY**

ODR Providers should be prohibited from disclosing any personally identifiable information without the party's affirmative consent. ODR Providers should disclose:

- A. Confidentiality Policies Concerning Information About Participants Provided to the ODR Provider
  1. Their general privacy policies.
  2. If they are members of any Privacy Seal or Privacy Trustmark program(s) and if so, provide a link to the program.
  3. If customer information may be released by the ODR provider, and the circumstances under which that information may be released.
  4. If any ODR proceedings being conducted by the neutrals are monitored by the ODR Provider, and under what circumstances.
  5. If the ODR Provider reviews customer information as part of a quality control process, and who conducts the review.
  6. If the ODR Provider's website uses technological means to identify the participant and/or track the participant's online behavior (e.g., session cookies, persistent cookies, web-bugs, clear gifs, and the like), and whether the ODR Providers provides an opt-out opportunity.
- B. Confidentiality Concerning Specific Proceedings
  1. The scope of confidentiality accorded to the ODR proceedings, including mediated settlement agreements and arbitration decisions, and the basis for protection from disclosure.

2. If arbitration decisions will be published, the manner and location of publication, and any limitations on accessibility (e.g., subscriber-only access).
3. If aggregate data without personally identifying information will be released.

#### C. Confidentiality Concerning Both Participants and Proceedings

1. Records retention/disposition policy, particularly concerning retention of information concerning individual participants, as well as records related to specific proceedings.
2. What forms of security for all online processes, particularly from theft or disclosure of information provided by participants and information or documents related to specific proceedings.
3. What kinds of security mechanisms have been put in place to safeguard participant information.

COMMENTARY: ODR users frequently question the privacy commitments of ODR Providers prior to engaging in the ODR process. ODR Providers are encouraged to identify the laws, regulations, standards and/or guidelines regarding privacy (data protection) and information security applicable to them or to which they voluntarily adhere. Examples of such standards or guidelines are those of TRUSTe and BBBOnline. Examples of privacy (data protection) laws are the Gramm-Leach-Bliley Act in the United States, the Personal Information Protection and Electronic Documents Act (PIPEDA) in Canada, and the laws of the various Member States of the European Union resulting from the transposition into national law of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data. ODR Providers should consider that (1) privacy laws often contain information security requirements; (2) privacy and information security requirements may also stem from consumer protection and telecommunications laws; and (3) strong requirements in these areas may derive from sub-national laws, such as state or provincial laws.

With respect to Section VII C, ODR Providers are encouraged to state specifically whether they employ SSL or SET protocols, a Virtual Private Network, or other means to protect data in transmission, whether they employ a fire-wall and anti-virus software, and what back-up practices and other technological and non-technological means of providing information security they employ.]

### VIII. QUALIFICATIONS AND RESPONSIBILITIES OF NEUTRALS

#### A. *Responsibilities.* Neutrals shall:

1. Disclose all conflicts of interest and act with impartiality and independence;
2. Adhere to applicable ethical guidelines of their jurisdiction and any other guidelines specified by the ODR Provider;
3. Act promptly and manage the dispute effectively; and
4. Maintain communication with the parties.

#### B. *Qualifications.* ODR Providers should disclose:

1. The minimum qualifications required for inclusion on the ODR Provider's panel of neutrals, such as education level, lawyer/non-lawyer, prior ADR experience and the like.
2. The qualifications (including ADR training, degrees or certificates, level of experience, and areas of expertise) of individual neutrals.
3. If the ODR Provider provides additional training for neutrals, and the type of training provided.
4. If they require that their neutrals have had training specifically with respect to use of the online medium (and how it differs from traditional face-to-face ADR) and the technology used by that ODR Provider.

COMMENTARY: With respect to Section VIII A, possible sources of disclosure standards regarding conflicts of interest are the American Bar Association, the American Arbitration Association, the CPR/Georgetown Legal Ethics Commission, the Association for Conflict Resolution (ACR (formerly SPIDR, AFM and CREnet)), and the International Bar Association Ethics for International Arbitrators.

## **IX. ACCOUNTABILITY FOR ODR PROVIDERS AND NEUTRALS**

ODR Providers should disclose:

### **A. Accountability for Neutrals**

1. What steps they take to require neutrals to fulfill their responsibilities promptly, maintain communication with the parties, and comply with the stated ethical guidelines.
2. If they provide a process to allow participants to file complaints for neutrals' failure to comply with the above requirements.
3. If they provide an appeals process for arbitral decisions rendered by the neutrals.

### **B. Accountability for ODR Providers**

1. If they comply with published guidelines, such as the guidelines of relevant trustmarks, and the full text of (or link to) of any such guidelines or trustmark requirements.
2. If they provide a process for participants to file complaints concerning the ODR services rendered, both with the ODR Provider itself, and with any relevant external organizations (such as trustmark providers).
3. If compiled, provide the percent of cases in which the parties are satisfied with the process.

COMMENTARY: ODR Providers should display all relevant trustmarks.

## **X. ENFORCEMENT**

ODR Providers should disclose:

- A. If they provide any assistance in enforcing any agreement, award or decision reached or rendered through an ODR process.

- B. Whether they cooperate with law enforcement officials so instances of fraud can be detected and prosecuted.

COMMENTARY: With respect to X.A., some ODR Providers may determine that enforcement is best left to the parties and courts. Other ODR Providers may determine that it is in their best interest to have their awards enforced, and therefore may choose to provide assistance in a manner that does not affect the ODR Provider's neutrality. For example, at the request of the prevailing party, an ODR Provider may provide certified copies of awards and other documents for use in seeking enforcement before a national court. Further, some ODR Providers may agree to send a reminder letter to a party that has not complied voluntarily with an award. But if an ODR Provider renders assistance, the type and extent of that assistance should be disclosed, and any related costs.

As part of their periodic disclosure ODR Providers are encouraged to provide statistical information regarding the experience participants have had in enforcing prior decisions rendered by the ODR Provider.

## **XI. JURISDICTION AND CHOICE OF LAW**

ODR Providers should disclose the jurisdiction where complaints against the ODR Provider can be brought, and any relevant jurisdictional limitations.