

STRENGTHENING ONLINE DISPUTE RESOLUTION JUSTICE

Noam Ebner*
Elayne E. Greenberg**

*Concern for man and his fate must always form the
chief interest of all technical endeavors.*

—Albert Einstein¹

INTRODUCTION

This article adopts a systems-design approach to focus courts and lawyers on the unexamined: how involving lawyers in the design, development and implementation of court-annexed² online dispute resolution (ODR) programs, will strengthen their justice outcomes. The phrase “ODR programs” refers to the new menu of processes for dispute resolution and litigation offered online by courts.

* Professor of Negotiation and Conflict Resolution in the Department of Interdisciplinary Studies at Creighton University.

** Assistant Dean of Dispute Resolution, Professor of Legal Practice and Director of the Hugh L. Carey Center at St. John’s School of Law. We appreciate the thoughtful critique and skilled edits of our research assistant, John T. Burger, St. John’s ’20 for the final draft of this article. We also thank Madeline Mallo, St. John’s ’19 for her diligent research assistance for the first draft of this article. We appreciate the insightful comments of our ADR colleagues during the AALS Dispute Resolution Scholarly Works-in-Progress hosted by the University of Maryland Francis King Carey School of Law on October 4–6, 2018, particularly Brian Farkas for his thorough review of the first manuscript draft. Over the course of preparing this manuscript, we spoke with more attorneys, law professors, ADR experts in practice and academia, ODR experts in practice and academia, judges, and ODR systems designers from around the world than we could ever list here; still, we remember, and are grateful.

1. Albert Einstein, Speech at the California Institute of Technology, Pasadena, California, (Feb. 16, 1931), *in* N.Y. TIMES, Feb. 17, 1931, at 6, <https://timesmachine.nytimes.com/timesmachine/1931/02/17/98321956.html?action=click&contentCollection=Archives&module=LedeAsset®ion=ArchiveBody&pgtype=article&pageNumber=6>.

2. “Court-annexed” is a term that has been used to describe programs aiming to resolve court-submitted disputes through means other than litigation. It is often associated, in the United States, with alternative dispute resolution processes. Currently, this term is sometimes used to refer to online dispute resolution programs being developed in courts. As this article shows, ODR elements and processes are sometimes so embedded in courts’ standard operations that distinguishing them from other elements of the judicial process will be challenging and artificial. Therefore, as ODR expands its presence in the judicial system, we anticipate that “court-internal” may become a more apt term.

Over the fifty years preceding the introduction of ODR into the court system, courts have increasingly relied on alternatives to litigation to help meet the challenges of an evolving system of justice. One impetus for this court-directed justice shift has been that litigants, lawyers, and courts themselves have come to realize that courts should offer litigants a menu of dispute resolution processes beyond just litigation. Such a menu could provide litigants with more responsive justice outcomes than litigation.³ A second impetus for this court-directed justice shift has been the ongoing justice crisis, precipitated by increasing court caseloads during a time of shrinking court budgets.⁴ This crisis has incentivized courts to develop a problem-solving orientation and seek more efficient, cost-effective dispute resolution procedures in lieu of litigation.⁵

As good system-design practice dictates, courts, as the overseers and primary stakeholders in our justice system, have ensured that these alternatives to litigation have been integrated into the design of our justice system in a way that preserves procedural fairness and justice outcomes, hallmarks of the court's imprimatur.⁶ Adhering to another fundamental tenet of system design, courts have customarily included litigants and lawyers, the two other justice stakeholders, as participants in the development, shaping and implementation of such alternatives.⁷ Such inclusive stakeholder participation has provided the court and the designers of such alternatives invaluable information about stakeholders' justice perspectives and concerns, that when heeded, have strengthened the justice outcomes of the proposed alternatives.⁸

Today, as courts continue to grapple with the justice crisis, they are beginning to incorporate ODR into their menu of court offerings as a system

3. Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 *CARDOZO J. CONFLICT RESOL.* 677, 695 (2017).

4. *See id.* at 684–86.

5. *Id.*

6. *See* Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 *HARV. NEGOT. L. REV.* 123, 129–33 (2009); Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 *OHIO ST. J. ON DISP. RESOL.* 1, 18–20 (2008); Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 *HARV. NEGOT. L. REV.* 175, 198–200 (1998).

7. *See* Smith & Martinez, *supra* note 6, at 129–33; Bingham, *supra* note 6, at 46–47.

8. *See* Smith & Martinez, *supra* note 6, at 127–28; *see also* CATHY COSTANTINO & CHRISTINA S. MERCHANT, *DESIGNING MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 168–89 (1996).

for cost-effective and efficient resolution of legal disputes.⁹ ODR, unlike previous court-connected alternatives to litigation, is promising to become a disruptive intervention that revolutionizes the court's delivery of justice and recalibrates the justice expectations of courts, litigants and lawyers.¹⁰ The process of introducing ODR into the court system has involved a departure from the careful and intentional engagement of justice stakeholders described above. Curiously, lawyers—major stakeholders in the justice system—are absent from the design, development, and implementation of many court-infused ODR processes. Why? One reason might be that courts have initially turned to ODR to resolve those low-dollar, high-volume cases that lawyers have traditionally shunned.¹¹ Another explanation is that ODR designers are merely expanding the use of similarly lawyerless ODR programs that litigants already rely on in their day-to-day lives to resolve consumer disputes out of court.¹² Finally, we suggest that lawyers themselves have largely ignored ODR, or ignored its significance as a justice game-changer.

Any or all of these explanations notwithstanding, this article suggests three changes necessary to ensure that justice is strengthened, rather than weakened, in the process of incorporating ODR into the court systems. First, ODR programs should no longer be touted as lawyerless. The conceptualization of ODR programs as lawyerless must be reframed to accurately capture the justice issues that may be implicated. True, ODR programs are often touted to resolve disputes without the need for lawyers. However, while ODR programs may resolve discrete presenting issues without lawyers, clients may still need lawyers to help assess the

9. See Amy J. Shmitz, "Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 181–82 (2010); see also ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES, 162 (2017) (noting that nineteen Michigan state courts have implemented such systems).

10. See Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 717–21 (2017); see also CIV. JUST. COUNCIL, ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS 5 (2015), <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> [<https://perma.cc/7DTL-LKYD>].

11. See CIV. JUST. COUNCIL, *supra* note 10, at 5 ("ODR is not appropriate for all classes of dispute but, on the face of it, is best placed to help settle high volumes of relatively low value disputes.").

12. See Susan Nauss Exon, *The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution*, 12 CARDOZO J. CONFLICT RESOL. 19, 28–29 (2010).

appropriateness of a discrete ODR program and to help the clients consider the broader justice issues that may be implicated.¹³

Second, courts, as they have done with the implementation of other alternatives to litigation, must allow and invite lawyers, as justice stakeholders, to meaningfully participate in the development and implementation of ODR. Lawyers' participation will bring an invaluable justice perspective to ODR implementation that will guide courts in their roles as purveyors, providers,¹⁴ and protectors¹⁵ of justice, as these roles expand to include ODR. Third, lawyers themselves must seize the opportunity ODR offers to fundamentally reconceptualize justice. Lawyers will be required to venture outside the safe barriers of professional protectionism, rethink their contributions to the type of justice that ODR promises, and recalibrate their skills to strengthen justice outcomes.

In this article, we will broach the unexplored topic of lawyer inclusion in designing and implementing ODR through a dispute system-design lens. We will begin in Part I by defining court-ODR and chronicling its evolution domestically and globally. As part of this discussion, we forecast how we expect ODR to change the justice system as we know it. In Part II we will explain how the three justice stakeholders—the court, litigants, and lawyers—have different receptivity to ODR. Part III will reimagine the role of lawyers and explain the distinct contributions that lawyers can make in an ODR-infused justice system. In this section, we discuss the skills lawyers will need to adapt to such a disruptive intervention. Lawyers can and should constructively participate in the development and implementation of ODR programs to help strengthen ODR justice outcomes. This discussion concludes by summarizing the many contributions lawyers can make in shaping, developing, and implementing an ODR-infused justice system.

13. See James C. Melamed, *Online Dispute Resolution*, in 2 OR. STATE BAR, ADR IN OREGON 41-1, 41-3 (Sam Imperati et al. eds., 2019), <https://www.mediate.com/pdf/ODRforLawyers.pdf> [<https://perma.cc/2K4Z-Y3SX>].

14. See the mission statement of the United States Court System: “[to] provid[e] fair and impartial justice within the jurisdiction conferred by the Constitution and Congress.” JUD. CONF. U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 2 (2015), https://www.uscourts.gov/sites/default/files/federaljudiciary_2015strategicplan.pdf [<https://perma.cc/2W3D-56BP>].

15. See *About the Court*, SUP. CT. U.S., <https://www.supremecourt.gov/about/about.aspx> [<https://perma.cc/6H3G-7QJD>] (“[T]he Court is charged with ensuring the American people the promise of equal justice under law[.]”).

I. UNDERSTANDING ODR

A. *What is ODR?*

The first step in applying any dispute system-design framework is to assess how it will impact the court-based justice system.¹⁶ In the context of ODR, this requires understanding how ODR works, its immediate and long-term implications once integrated into the court's delivery of justice, its impact on justice stakeholders, its potential unintended consequences, and its expected justice outcomes.¹⁷ In this section, we define ODR, chronicle its developmental stages and forecast its use—all in the context of the courts. ODR has already been implemented in one form or another in many real-life court projects and programs around the world and in the United States.¹⁸ These programs have largely been developed to address two needs: improving court efficiency and increasing access to justice.¹⁹

Strikingly, few of these programs include any required or assumed role for lawyers. Reviewing their websites and descriptions, they are clearly designed to be accessible and manageable to lay parties. As we posit more fully below, even the most lawyerless of all ODR programs would likely have stronger justice outcomes if lawyers were included in their design, development, and implementation.

When we discuss ODR in this article, we refer specifically to court-ODR: court-initiated uses of online technology to manage and resolve disputes submitted to them.²⁰ We stress this focus on court-ODR to distinguish it from the more general usage of the term “ODR” to refer to all uses of technology to resolve disputes²¹ (whether submitted to the courts or not). In ODR's embryonic stage, Ethan Katsh and Janet Rifkin described

16. See Smith & Martinez, *supra* note 6, at 130–31.

17. See generally *id.*

18. See *infra* Section I.B.

19. JOINT TECH. COMM., CASE STUDIES IN ODR FOR COURTS: A VIEW FROM THE FRONT LINES 1 (2017) (“ODR presents new, untapped potential for helping courts to increase fairness and access to justice while decreasing costs for both courts and parties in a dispute. Not handling at least some aspects of dispute resolution digitally is costly to courts as well as to the public.”).

20. KATSH & RABINOVICH-EINY, *supra* note 9, at 165–67. Private ODR, a similarly disruptive innovation, is beyond the reach of this article.

21. Colin Rule, *Technology and the Future of Dispute Resolution*, DISP. RESOL. MAG., Winter 2015, at 4, 5 (“ODR is the application of information and communications technology to the practice of dispute resolution.”).

ODR's core shift as introducing technology into the dispute resolution process as a "fourth party," supporting the third party.²² This revolutionary view of technology's role in dispute resolution largely focused, in ODR's early development, on using technology to enhance traditional Alternative Dispute Resolution (ADR) processes such as mediation or arbitration,²³ to replicate ADR processes online²⁴ and to provide ADR systems for contexts in which traditional legal systems could not provide recourse. During this early period, ODR's development took place, for the most part, in the private sector. The young Fourth Party, so to speak, did not groom itself for a career *in court*.²⁵

And yet, here we are. In this article, we set aside application of ODR to private commercial or other out-of-court settings, and relate only to ODR's application in the court system. Implementing court-ODR stretches our previous grasps of both ODR and the traditional role of courts. While "general" ODR is sometimes conflated with online ADR, court-ODR goes well beyond enhancing court-connected ADR programs with technology,²⁶ offering instead a true paradigm shift in addressing conflict by the courts, whose full potential has yet to be tapped.²⁷ By "ODR," we intend all the court's uses of technology to enhance dispute resolution. These uses can be party-facing or behind-the-scenes; administrative or substantive; focused on ADR-type processes or elements of judicial decisionmaking. These applications are sometimes directly called ODR, and sometimes dubbed otherwise (e.g., "e-courts," "online courts," or "case management"). It is by shedding these captions that we can truly appreciate the degree to which

22. ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 93–94 (2001).

23. *See id.* at 117–34. For more on this branch of ODR development, see Alyson Carrel & Noam Ebner (2019), *Mind the Gap: Bringing Technology to the Mediation Table*, 2 J. DISP. RESOL. (2019).

24. *See* KATSH AND RIFKIN, *supra* note 22, at 135–62.

25. "ADR moved dispute resolution 'out of the court.' ODR moves it even further away from court." *Id.* at 26. Katsh and Rifkin anticipated courts experimenting with ODR for the purposes we discuss in this article; however, they correctly prophesized this would only occur once ODR matured via private-sector innovation. *See id.* at 30.

26. For a helpful distinction along these lines, see, e.g., Michael Legg, *The Future of Dispute Resolution: Online ADR and Online Courts*, 27 AUSTRALASIAN DISP. RESOL. J. 207 (2016) (distinguishing between ODR and OADR—online alternative dispute resolution). *See also* Nicolas W. Vermeys & Karim Benyekhlef, *ODR and the Courts*, in *ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE* 313 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), http://www.ombuds.org/odrbook/vermeys_benyekhlef.pdf [<https://perma.cc/C8HB-28EC>] (separating court-connected ODR from dispute resolution schemes that are "alternatives" to courts).

27. *See generally* KATSH & RABINOVICH-EINY, *supra* note 9.

ODR can contribute to the court system; indeed, we can appreciate the degree to which it already doing so.

Observing and anticipating ODR's entry into the courts, what Fourth Party roles are likely to be implemented in the court system? Ebner has categorized the assistance that the Fourth Party could provide into three areas: administrative functions, communication-related functions, and substantive functions.²⁸ Using this framework, we have compiled a partial list of roles the Fourth Party could play in courts (Fig. 1):

<i>Administrative Functions</i>	
<ul style="list-style-type: none"> • Intake management • Case filing • Correcting mistakes • Monitoring participation and compliance • Scheduling deadlines, due dates, and hearings • Generating due-date reminders 	<ul style="list-style-type: none"> • Delivering court documents • Conducting e-service of process • Automating case-diversion to suitable processes • Storing data Managing court schedules and timetables (judges, administrative staff, courtrooms, etc.)
<i>Communication-Related Functions</i>	
<ul style="list-style-type: none"> • Providing communication channels with court administrators • Providing litigants affective support • Providing virtual meeting spaces for conducting online mediation • Providing inter-party communication channels for negotiation 	<ul style="list-style-type: none"> • Providing virtual courthouse, convening judge, jury, parties, attorneys, and public as required • Providing channels for submission of e-evidence • Displaying visualizations • Drafting and tracking documents Providing security

28. Noam Ebner, *Online Dispute Resolution: Applications for E-HRM*, in *ENCYCLOPEDIA OF HUMAN RESOURCES INFORMATION SYSTEMS: CHALLENGES IN E-HRM* 668 (Teresa Torres-Coronas & Mario Arias-Oliva eds., 2008).

<i>Substantive Functions</i>	
<ul style="list-style-type: none"> • Party education • Assessing parties' preferences and priorities • Suggesting options for solution • Evaluating options for solution 	<ul style="list-style-type: none"> • Predicting likely settlement or judicial outcomes • Identifying relevant case law and statutes • Assessing evidence • Conducting automated decisionmaking

*Fig. 1. Fourth Party Roles in the Court.*²⁹

Charting out these roles that the Fourth Party might play in an ODR-infused court system reveals that the Fourth Party is, in fact, *already* hard at work in our courts.³⁰ In a previous generation of modernization, focusing on digitalization reforms and case management improvements, many court systems incorporated online technology to fulfill several of the administrative roles listed in the chart, with nary a mention of ODR.³¹ The Fourth Party has already made inroads into fulfilling communicative and substantive roles as well, and this will increase as ODR permeates the underlying operating system of the courts.³²

In fact, some of those Fourth Party functions have been bundled together into software programs and are already being introduced in the courts. These programs are the building-blocks of the ODR-infused courts of the future; we describe a number of them below in order to recognize them in action. Note the various Fourth Party functions that each performs.

1. *E-filing*: An online case filing and response system allowing parties to log in to the court's system, be identified, and file or respond to a claim.

2. *Caseflow Management*: An automated or semi-automated system for controlling the process through which each case proceeds. Based on party-provided information, such a system could provide parties with legal or

29. See generally *id.*

30. See KATSH & RABINOVICH-EINY, *supra* note 9, at 155–56.

31. *Id.*

32. For example, technology being used for direct interparty communication or communication assisted by a mediator. See *infra* Section I.B.

negotiation information, channel the case to online ADR processes, refer it to face-to-face ADR, move it ahead towards a judicial decision at expedited or regular speed, and more.

3. *Initial Party Education*: Online educational processes, in which courts provide parties with information: what constitutes a cause for action, how to file a claim, what information to include, etc. As plaintiffs upload information into the system (e.g., by filing a small-claims suit related to consumer issues), the system can reactively offer them information targeting their context more specifically. It can similarly offer the respondent helpful information.

4. *Automated vs. Assisted Negotiation*: Processes in which parties negotiate via a software platform. In *automated* negotiation, parties work their way through a variety of preprogrammed options. For example, a system might pose the plaintiff a series of questions regarding the dispute type, topic, positions, interests, etc., with responses provided on drop-down menus. The system then displays some or all of this information to the defendant, followed by a dropdown menu of settlement offers they might offer. The chosen offer is shown to the plaintiff, who is provided with a dropdown menu offering a choice between ‘accept,’ ‘reject,’ and ‘counter-propose,’ and perhaps additional follow-up questions and choice-sets. In *assisted* negotiation, the system guides parties through a series of choice points. At each, rather than drop-down menus, it offers parties fields in which to describe, in their own words, such information as the dispute type, its details, their offers, their responses to offers, and their counteroffers. The information is then conveyed to their counterpart. Such systems preserve more substantial interpersonal communication between parties than automated negotiation, while providing them a dedicated communication platform.³³

5. *Online Replication of ADR Processes*: Mediation, arbitration, or other ADR processes conducted wholly or primarily online. For example, the court could assign cases to a court mediator who facilitates interaction

33. This distinction between automated and assisted negotiation has not always been made or preserved in the literature on online negotiation; still, we offer it here to conceptually distinguish different design structures that might underlie negotiation processes. Of course, ODR systems can combine elements of both forms of negotiation.

between parties via text-based interactions on a dedicated court-provided system, or to an external mediator conducting mediations via Skype.³⁴

6. *Advanced Party Education and Direct Negotiation Decision-Influencing*: Systems providing parties with advice and substantive information that may influence their decision to litigate or settle.³⁵ These systems can help parties to evaluate settlement and to prioritize their preferences.³⁶ Further, they can provide information, e.g., averages of settlement rates and values for similar cases, comparison of these outcomes with an objective analysis of the likely costs of pursuing the case through to judicial decision, and even a prediction of the precise outcome of adjudicating the case.³⁷ Taken together, these features could—while applying data specific to the court with jurisdiction over the case—predict the answer to the core settlement question of whether a judicial outcome would likely be more, or less, than a counterpart's offer.³⁸

7. *Online Replication of Court Processes*: Full or partial official court proceedings and hearings, which may largely mirror familiar court proceedings, only that any or all parties, attorneys, judge, and jury, interact

34. For discussion of how such interactions might be conducted, see Noam Ebner, *E-Mediation*, in ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE 369 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), <http://www.ombuds.org/odrbook/ebner1.pdf> (relating primarily to text-based interactions); VIRTUAL MEDIATION LAB, [https://www.virtualmediationlab.com/\[https://perma.cc/K97Q-YW97\]](https://www.virtualmediationlab.com/[https://perma.cc/K97Q-YW97]) (providing examples and guidance for conducting video-based mediation); Noam Ebner & Jeff Thompson, *@Face Value? Nonverbal Communication and Trust Development in Online Video-Based Mediation*, 1 INT'L J. ONLINE DISP. RESOL. 103, 124 (2014) (discussing challenges in video-based mediation and suggesting technological and process skills and tools for creating mediator-party trust in these processes).

35. For an expanded discussion of the ways in which ODR systems might support such decision making, see Arno R. Lodow & John Zeleznikow, *Artificial Intelligence and Online Dispute Resolution*, in ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE 73, 94 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), http://www.ombuds.org/odrbook/lodder_zeleznikow.pdf [<https://perma.cc/8LH9-Q4A7>].

36. See Emilia Bellucci & John Zeleznikow, *Developing Negotiation Decision Support Systems That Support Mediators: A Case Study of the Family Winner System*, 13 ARTIFICIAL INTELLIGENCE & L., 233, 271 (2005).

37. For example, the Re-Consider program provides parties with predictions of the judicial outcome should their case be heard by a court. See Nial Muecke, Andrew Stranieri & Charlynn Miller, *Re-Consider: The Integration of Online Dispute Resolution and Decision Support Systems*, in EXPANDING THE HORIZONS OF ODR 62, 63 (Pampeu Casanovas et al. eds., 2008), <http://ceur-ws.org/Vol-430/Paper8.pdf> [<https://perma.cc/NM7R-66X5>].

38. See Randall L. Kiser, Martin A. Asher, & Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008).

via online communication channels. Such proceedings might also incorporate some degree of asynchronicity and online evidence review.

8. *Case Decision via Algorithm*: Software that makes procedural or substantive court decisions by algorithmic processes, with or without close human oversight. It applies a decisionmaking process to information that parties have entered to the system and provides an outcome.³⁹

The full scope of ODR's anticipated effect on the court experience comes into focus when you consider not only Fourth Party functions in isolation or clustered in building blocks, but also the effect of joining such building blocks together to form the structure of a de facto court system. In the next section, we will introduce several real-world courts doing just that.

B. Examples of ODR-Infused Court Programs Globally

In this section we detail three current projects outside of the United States that demonstrate different pathways for ODR to enter the court

39. Ayelet Sela dubs software involving proactive involvement of artificial intelligence (AI) "principal ODR," as distinguished from "instrumental ODR"—platforms facilitating communication between parties without AI intervention. See Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO ST. J. ON DISP. RESOL. 91, 100 (2018).

Current court-ODR involves *only* instrumental ODR. However, out-of-court e-commerce ODR does involve principal ODR systems. See, e.g., Amy J. Schmitz & Colin Rule, *Lessons Learned on eBay*, A.B.A. SEC. ON DISP. RESOL. 33–46 (2018) (describing eBay's ODR process, in which software makes the vast majority of decisions). In court systems, we anticipate that principal ODR systems will first be implemented on the fringes of judicial decision-making, e.g., disposing cases in which there is no response to a claim, or dismissing improper filings of one sort or another. However, as systems get smarter and could be programmed to decide more substantive issues, the urge to do so will grow.

For the time being, court-ODR program designers and administrators stress that all decisions are made by humans. See, e.g., John Zeleznikow, *Don't Fear Robo-Justice. Algorithms Could Help More People Access Legal Advice*, CONVERSATION (Oct. 22, 2017), <https://theconversation.com/dont-fear-robo-justice-algorithms-could-help-more-people-access-legal-advice-85395> [<https://perma.cc/CA7X-CUJX>] (citing the initiators of an ODR project in British Columbia (discussed below) as saying that "one of the common misconceptions about the system is that it offers a form of 'robojustice'—a future where 'disputes are decided by algorithm' when, in fact the system is human-driven: From the experts who share their knowledge through the Solution Explorer, to the dispute resolution professionals serving as facilitators and adjudicators, the CRT rests on human knowledge, skills and judgment.").

A similar quote is attributed to former Lord Justice Fulford. Paul Magrath, *Is the Online Court the Future of Litigation?*, LAWYER (July 13, 2016), <https://www.thelawyer.com/online-court-litigation> [<https://perma.cc/S2TF-CHEA>] ("Giving a speech at the Law Society [regarding the British online courts discussed below], he dismissed fears about "Cyber judges" and "robot courts" and explained that, despite the increasing use of algorithms and machine learning techniques . . . , every decision respecting a person's substantive rights would still be made by a judge.").

system: the Civil Resolution Tribunal in British Columbia, Canada; the Online Court in the U.K.; and the Internet Court in Hangzhou, China.

*1. Canada: The Civil Resolution Tribunal*⁴⁰

British Columbia passed the Civil Resolution Tribunal Act in 2012, and the tribunal (CRT) commenced operation in 2016. The CRT is authorized to resolve small claims cases in a variety of legal categories, with a maximum value of Can\$25,000. In its current pilot phase, however, it is handling claims up to Can\$5,000.

It is also authorized, however, to handle motor vehicle injury disputes valued at up to Can\$50,000, as well as to resolve a variety of types of cases with no value-cap: disputes related to condominium properties (e.g., nonpayment of fees, voting and meetings disputes, and enforcement of bylaws), and to societies and cooperative associations.

The CRT's process demonstrates how sequencing ODR building blocks can result in a legal process that does not require the assistance of counsel. Indeed, attorney participation is *specifically precluded* in many CRT proceedings.⁴¹ CRT proceedings involve four phases: assisted self-help, intake, settlement-encouragement, and adjudication.

i. Assisted Self-Help: Before officially filing a claim, potential plaintiffs must access the CRT's Solution Explorer software. After conducting an automated intake process to understand the topic and context of the complaint, the system engages in party education by providing them with legal information about such claims and resources for resolving the issue on their own (e.g., letter templates for contacting the other side directly to request action or remedy).

ii. Intake: Claimants fill out a request for dispute resolution, by responding in text fields to preset questions such as "One sentence summary of the claim," "When did you become aware of the claim?" "What have you

40. The CRT website is a user-friendly source for information about the CRT and its processes. See *Welcome to the Civil Resolution Tribunal*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/> [<https://perma.cc/7NY5-QXVG>].

41. Only in motor vehicle injury claims are parties automatically allowed to be represented by a lawyer. In other cases, special permission must be requested in order to be represented. See *Can I Have Someone Help Me Use the CRT?*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/tribunal-process/starting-a-dispute/helpers-representation/#can-i-have-a-representative> [<https://perma.cc/XK89-U5TD>].

done so far to resolve this?” and “What do you want?” Claimants pay a fee, submit the claim, and are provided with a package of forms to convey to the other party involved in the dispute.

iii. Settlement Encouragement: Parties are encouraged to reach out to their counterpart to resolve the claim. They are provided information on negotiating constructively and preparation sheets for doing so. In the future, the CRT will incorporate an assisted negotiation platform for interparty communication. If parties are unable to reach agreement through independent negotiation, they are contacted by a CRT facilitator to help them resolve their issues. Communication can be online, in person, by phone or however the facilitator deems constructive. If parties do not reach a resolution, the facilitator helps them prepare the case for adjudication.

iv. Adjudication: A tribunal member decides the case, usually on the basis of documents and electronically submitted evidence. If an oral hearing is required, it will usually be held by phone or through videoconferencing. Parties are notified of the decision online, via the system.

2. The U.K.'s Online Court

Lord Justice Briggs has spearheaded the initiation of a fully online court as part of the comprehensive England and Wales Civil Courts Structure Review.⁴² This court would initially have jurisdiction in civil claims ranging up to £25,000.⁴³ A current pilot of the Online Court (also called the Online Solutions Court), is operational.⁴⁴ In this court, claims go through three phases: intake, case management, and adjudication.

i. Intake: This court is intended to be largely lawyer-free (although representation is not precluded). Accordingly, its intake process aims to allow unrepresented parties to craft an appropriately comprehensive claim

42. See LORD JUSTICE BRIGGS, JUDICIARY OF ENG. & WALES, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT (2016), <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [<https://perma.cc/5QW2-UC5F>]; see also LORD JUSTICE BRIGGS, JUDICIARY OF ENG. & WALES, CIVIL COURTS STRUCTURE REVIEW: INTERIM REPORT (2015), <https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf> [<https://perma.cc/2C3F-G9W8>].

43. Note that this is far beyond the U.K.'s small claims court claim limit of £10,000.

44. See Dan Bindman, *Plan for 28-Month Online Court Pilot Emerges as MR Foresees Live-Streaming Court of Appeal*, LEGAL FUTURES (June 23, 2017), <https://www.legalfutures.co.uk/latest-news/plan-28-month-online-court-pilot-emerges-mr-foresees-live-streaming-court-appeal> [<https://perma.cc/B6AX-9PSK>].

document via a flow of drop-down menus and text fields. This eliminates the claimant's traditional onus of filing an expert-composed formal document written in legalese. The claimant submits evidence by uploading documents and photos. The defendant is then notified of the claim and is similarly guided through a flow of menus and fields to submit their defense.

ii. Case Management: The case is reviewed by a case officer who recommends diversion to telephonic or face-to-face ADR processes, as suitable.

iii. Adjudication: The judge assigned to the case decides it, usually solely on the basis of the evidence submitted online. Alternatively, the judge may decide to hold a telephonic, video, or (in limited cases only) in-person hearing.

3. *China: The Hangzhou Internet Court*⁴⁵

In August 2017, China established an online court based in the city of Hangzhou. Chinese procedural law dictates that suits against companies must be filed in their principal place of business or in the place where they have their registered address. By situating the online court in Hangzhou—the domicile of many Chinese e-commerce giants including Alibaba—the system provides remedy to parties seeking to bring suit against these companies who were previously frustrated by distance or case value.⁴⁶

This court addresses certain disputes arising from online activity, including consumer disputes arising from online shopping, product-liability claims related to products bought online, and suits against internet service providers. Claim value is capped similarly to an equal-level brick-and-mortar court's jurisdiction,⁴⁷ allowing the Internet Court to adjudicate many civil and financial claims valued up to approximately \$7,200,000.

45. The Hangzhou Internet Court website provides information about the HIC and its processes. See *The Litigation Platform of Hangzhou Internet Court*, NETCOURT.GOV, <https://www.netcourt.gov.cn/portal/main/en/index.htm> [<https://perma.cc/937U-XMCK>].

46. Dani Deahl, *China Launches Cyber-Court to Handle Internet-Related Disputes*, VERGE (Aug. 18, 2017, 4:33 PM), <https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes> [<https://perma.cc/WEY8-6D8Z>]; see also Sara Xia, *China Establishes its First Cyber-Court in Hangzhou: Thank You Alibaba*, CHINA L. BLOG (Aug. 16, 2017), <https://www.chinalawblog.com/2017/08/china-establishes-its-first-cyber-court-in-hangzhou-thank-you-alibaba.html> [<https://perma.cc/ZB3T-JZ8V>].

47. The Internet Courts are special courts with jurisdiction to handle cases on a list of topics that would otherwise be in the level of the primary level of courts in the Chinese system, Basic Courts.

The court process begins with intake, with the claimant filing a claim by completing online forms. Within fifteen days, a mediator contacts the claimant and the defendant to conduct online mediation via text, telephone, or videoconference. Only if mediation fails does the defendant respond, via the system, to the complaint, after which an actual judicial hearing is held via videoconference, open to the public via a live video stream.⁴⁸

Pleas and evidence are all submitted online. Fitting its administrative and evidentiary rules to its forum and its fuses, parties can use their AliPay ID, an account within Alibaba that is comparable to a PayPal account, to identify themselves and pay court fees and other costs. Recently, the court has accepted blockchain-based evidence.⁴⁹

Appeals on decisions are made to the Intermediate Court. The list of topics can be found at *Guangdong High Court Clarified the Jurisdiction of Guangzhou Internet Court*, CHINACOURT.ORG (Sept. 28, 2018), <https://www.chinacourt.org/article/detail/2018/09/id/3515866.shtml> [<https://perma.cc/499W-EY4E>]. The Basic Court's case jurisdiction in terms of value cap is set at approximately \$14,400,000 for cases in which both parties are from the court's province. When one party is extrajurisdictional, as are most of the Online Court's plaintiffs, the cap is halved to approximately \$7,200,000. We've chosen to highlight the practical limit rather than the theoretical cap to stress that even as it serves its function of providing recourse to distant plaintiffs, the court handles cases of considerable value, compared to the court ODR programs in the U.K and Canada discussed above.

48. See Kieren McCarthy, *China's Cyber Court Opens for Business; A Gavel-Free Zone?*, REGISTER (Aug. 21, 2017), https://www.theregister.co.uk/2017/08/21/chinas_cyber_court_opens_for_business/ [<https://perma.cc/77UU-F8LE>].

49. This decision was affirmed by the Chinese Supreme Court, cementing this trend. See Wolfie Zhao, *China's Supreme Court Recognizes Blockchain Evidence as Legally Binding*, COINDESK (Sept. 7, 2018), <https://www.coindesk.com/chinas-supreme-court-recognizes-blockchain-evidence-as-legally-binding/>. Blockchain creates a decentralized, digital ledger for transactions. If, for example, a money transfer takes place between two parties, each step (e.g., the initiation of the transfer and its arrival at its destination) is recorded as data stored in a unit called a block. The data in the block is recorded, time-stamped, encrypted, and preserved on multiple nodes on peer-to-peer computer networks. When related steps take place, they, too, are preserved in the form of blocks. These new blocks are linked to the blocks containing the previous data, to form a chain of blocks which combine to form a record comprising a complete history of the transaction. There is no way to delete blocks or the chain, as each exists on many nodes. There is no way to alter blocks or the chain undetected; any change will be noted with a time stamp, and any individually altered ledger would be easily recognizable as different from all others stored at other nodes.

In the United States, Vermont, Arizona and Ohio have passed legislation recognizing blockchain ledgers for evidentiary purposes. Ariel Watson, *What Blockchain Means for Digital Evidence Sharing, Security and Verification*, CELLEBRITE (June 5, 2019), <https://www.cellebrite.com/en/blog/what-blockchain-means-for-digital-evidence-sharing-security-and-verification/> [<https://perma.cc/B8TZ-A2KN>].

The system was designed to be navigated by laypeople, and the court provides guidance to disputants who require it.⁵⁰ While lawyers are not required in the Internet Court, they are also not precluded from representing clients.⁵¹

Professor Fang Xuhi's description of the Hangzhou court helps us to visualize the courtroom of the future. He explains that this court uses technology

to make a series of steps in the litigation process available on the Internet. These include complaint filing, the case filing Approval Process, service, mediation, evidence submission, direct or cross-examination, pre-trial preparation, trial, ruling and enforcement, etc. The records and documents are automatically generated. The videos of the hearing serve as trial records. AI [artificial intelligence] technology is used to draft judgments. In cases of online shopping disputes, digital evidence is transmitted by just one click from online shopping websites such as Taobao.com to Hangzhou Internet Court database . . .⁵²

In the Internet Court, person-power is reduced to reduce cost and increase efficiency. In the Court's hearings, there are neither court clerks nor stenographers. Instead, speech-recognition software converts spoken words into documents at the end of the session.⁵³

The Internet Court's efficiency and effectiveness are impressive. As Professor Fang notes,

As of April 30, 2018, the Hangzhou Internet Court handled a total of 7,771 Internet-related disputes and closed 4,798

50. See, for example, the tutorial video provided on the Beijing Online Court's website, explaining its litigation process. *Online Lawsuit*, BEIJING INTERNET CT. (May 9, 2019), https://english.bjinternetcourt.gov.cn/2019-05/09/c_194.htm.

51. Indeed, the tutorial video shows unrepresented clients managing their case on their own without legal assistance or representation. *Id.* Contrast the tutorial with the pictures of court hearings and comments in Guodong Du & Meng Yu, *How to Litigate Before the Internet Courts in China: Inside China's Internet Courts Series—02*, CHINA JUST. OBSERVER (Jan. 25, 2019), <https://www.chinajusticeobserver.com/a/how-to-litigate-before-the-internet-courts-in-china> [<https://perma.cc/P5TR-FAVN>], in which parties have legal representation. Precise data on the rates of representation and self-representation, however, are currently unavailable.

52. Fang Xuhui, *Recent ODR Developments in China*, 4 INT'L. J. ONLINE DISP. RESOL. 32, 34 (2017).

53. *Id.*

cases. The average time of a trial was 25 minutes, and the average trial period was 46 days, which saved between a quarter and three-fifths of the time compared with the traditional trial mode. A total of 98.5% of the cases are closed in the first instance without an appeal. . . . Thanks to legal technology, all of the cases were litigated under just six judges.⁵⁴

Building on the Hangzhou court's success, China is rapidly establishing additional online courts.⁵⁵

C. In the United States

In the United States, dozens of courts are beginning to pilot ODR programs on a state-by-state or courthouse-to-courthouse basis. The United States system's lack of a central institutionalizing force promoting court-ODR⁵⁶ contrasts with the top-down decisionmaking we've observed in Canada and China, and with the country-wide, top-down approach we've observed in the U.K. In part, this U.S. developmental dynamic is a result of the fragmented structure of the U.S. legal system that requires innovations to be introduced, trialed, deliberated, and implemented by each individual state. It is also a result of ODR's grassroots level of entry. In some places, ODR providers have convinced individual courthouses at the county level to implement trials. In others, state systems have decided to take a toe-in-the-water approach by implementing programs in individual counties.

We suggest that these piecemeal initiatives are one reason that the United States appears, at first glance, to lag behind some countries in ODR development.⁵⁷ Yet, a more nuanced look indicates that courts throughout

54. *Id.*

55. A second Internet Court in Beijing has begun to hear cases, with a third, in Guangzhou, due to open shortly. *China's 2nd Internet Court Opens in Beijing*, DAILY MAIL INT'L (Sept. 10, 2018), <https://dailymailnews.com/2018/09/10/chinas-2nd-internet-court-opens-in-beijing/> [<https://perma.cc/672H-LHMN>].

56. As Professor Amy Schmitz has explained this phenomenon, "In the U.S., individual state, county, and city courts act as laboratories for new initiatives aimed at improving access to justice as well as judicial efficiency. This is one of the tenets of federalism." Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67 BUFF. L. REV. 89, 105 (2019).

57. See, e.g., Robert Ambrogi, *Is There a Future for Online Dispute Resolution for Lawyers?*, LAWSITES (Apr. 11, 2016), <https://www.lawsitesblog.com/2016/04/future-online-dispute-resolution.html> [<https://perma.cc/4VNL-5AGX>].

the United States are actively experimenting with ODR. The National Center for State Courts estimates that jurisdictions in at least forty U.S. states are currently exploring possibilities for incorporating ODR in their court system. Moreover, it assesses that at the present time thirty-five states either already have operational ODR programs or have plans to implement them within a short period of time.⁵⁸ As of mid-2019, about fifty courthouses around the United States reportedly had an operational ODR program.⁵⁹ We note that the success of each toe-in-the-water court experiment results in rapid spread of ODR to other counties in the same state.⁶⁰ Indeed, while writing this article, we have become aware of an ever-increasing number of program initiatives at different levels, currently in committee or drawing-board stages. Many have developed over the past year, such as proposals to implement ODR for small claims and other cases in the New York State Unified Court System.⁶¹

One example of an operational ODR program for typical civil cases is the Franklin County Municipal Court in Columbus, Ohio. The court's small claims division launched an ODR program in late 2016 for claims related to city income tax; following the program's success, its jurisdiction was expanded to all small claims court cases in early 2018.⁶² If the claimant opts in to an ODR option, a court mediator contacts the other party to invite them to participate. If the other party agrees, both are granted access to a

58. Correspondence between authors and Paul Embley, Chief Info. Officer & Tech. Div. Dir. at the Nat'l Inst. for State Courts (Dec. 15, 2018) (on file with authors).

59. Based on the list of "Courts Using ODR," this data is shared with the caveats that many of the programs listed are likely self-reported, and there is no one fieldwide definition of what constitutes an ODR program. *Courts Using ODR*, NAT'L CTR. FOR TECH. & DISP. RESOL. <http://odr.info/courts-using-odr/> [<https://perma.cc/SS3P-MJ8R>].

60. For example, the success of the Online Traffic Pleading program in the 14A District Court of Michigan's Washtenaw County catalyzed a second ODR initiative focusing on outstanding warrants. Word of these programs' success rippled outward and, as of late 2017, thirty Michigan counties were moving forward with similar ODR programs. *See generally* 14A DIST. COURT WASHTEAW CTY. MICH., <https://www.washtenaw.org/946/14A-District-Court> [<https://perma.cc/4GGB-XH4C>]. *See also* KATSH & RABINOVICH-EINY, *supra* note 9, at 162 (noting that nineteen Michigan state courts have implemented such systems).

61. *See* JOINT TECH. COMM., *supra* note 19; *see also* David Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2 J. DISP. RESOL. 77, 77-102 (2019).

62. *See* Alex Sanchez, *A Letter from the Franklin County Municipal Court*, ONLINE DISP. RESOL., FRANKLIN CTY MUN. COURT (Oct. 1, 2016), <https://sc.courtinnovations.com/OHFCMC> [<https://perma.cc/4DYV-Q8K7>]; *see also* *ODR and Mediation Data Project*, FRANKLIN COUNTY MUN. CT., <https://sites.google.com/view/fcmcdataproject/about> [<https://perma.cc/8QHB-8WF9>].

“Negotiation Center,” a system offering elements of automated negotiation alongside a text-based communication channel through which the parties can interact in an effort to resolve the case. If they cannot resolve the issue on their own, they may call a mediator who may join them on the platform, connect by phone, or meet via Skype, as parties prefer. If the process does not produce agreement, the case proceeds to adjudication.⁶³

Another notable example is Utah’s statewide small-claims court ODR program, planned to be the state’s *only* small claims option. The program was piloted in Salt Lake City in 2018, and expanded to two other courthouses in late 2019.⁶⁴ This system utilizes ODR building blocks including an intake system and some elements of automated negotiation. Once both parties have logged onto the system, a human facilitator guides parties through an online, text-based, mediation-like process. Parties can exchange documents and files, in addition to text-based messages. If they reach agreement, they can ask that it be entered as a judgment of the court. If they are unable to reach agreement within two weeks, the neutral summarizes their positions in a joint trial-preparation document, adds it to the case file, and the case is scheduled for a traditional face-to-face hearing.⁶⁵

Besides individual court initiatives such as these, it is worth noting an initiative jointly conducted by the National Center for State Courts and the Pew Charitable Trust Civil Justice Initiative.⁶⁶ The purpose of this collaboration is to conduct significant ODR initiatives in five states or major jurisdictions. In each, the partnership will provide technical support for setup, initiation and implementation of the court ODR project, along with

63. See JOINT TECH. COMM., *supra* note 19; see also Giuseppe Leone, *Small Claims Courts 2.0—Online Dispute Resolution at Franklin County Municipal Court, Ohio*, YOUTUBE (Jan. 18, 2018), https://www.youtube.com/watch?v=pp_Wi0e23k8 (Giuseppe Leone interviewing Alex Sanchez, Manager of the Small Claims Division & Dispute Resolution Dept. at Franklin County’s Municipal Court; providing details going beyond that offered by the court’s website and the report cited above, particularly about integrating online mediation into the system).

64. See JOINT TECH. COMM., *supra* note 19; see also *ODR Pilot Project*, UTAH CTS., www.utcourts.gov/smallclaimsodr [<https://perma.cc/U3G6-6K6Q>].

65. See Bob Ambrogio, *Utah Courts Begin Unique ODR Pilot for Small Claims Cases Tomorrow*, LAWSITES (Sept. 4, 2018), <https://www.lawsitesblog.com/2018/09/utah-courts-begin-unique-odr-pilot-small-claims-cases-tomorrow.html> [<https://perma.cc/6YTW-B7GE>]; see also Deno Himonas, *Utah’s Online Dispute Resolution Program*, 122 DICK. L. REV. 875, 894 (2018).

66. See NCSC/Pew Charitable Trusts *ODR Project Announcement*, NAT’L CTR. FOR TECH. & DISP. RESOL., (July 10, 2018), <http://odr.info/ncscpew-charitable-trusts-odr-project-announcement/> [<https://perma.cc/NGS6-X37W>].

in-depth evaluation. The initiative's overall goal is to identify best practices for establishing and maintaining ODR systems in courts. While it is challenging to anticipate the precise path that each state or jurisdiction will follow in implementing ODR, the direction of the overall current is clear, and its force is increasing.

D. Connecting the Dots: The Vision of an ODR-Infused Court System

As ODR pilots take hold and ODR spreads, we posit that our legal system will evolve into ODR-infused justice systems. ODR enters the court system with a bold vision of redesigning the way courts handle cases, prevent conflict, and administer justice—start to finish. Thus, an ODR-infused court system cannot be described simply as “a digital version of the traditional courthouse” or just “another alternative to litigation.” Rather, an ODR-infused court provides a fundamentally different justice experience to judges, parties, and lawyers.

What does this different justice experience include? We suggest it will generally feature some or all of the following elements: First, the legal proceedings, in part or entirety, will be conducted online. Second, much of the process will be demystified and accessible to lay parties. Parties will be constantly educated by the court system about the law, their options, and their alternatives. Third, parties will be constantly offered opportunities to resolve their issues through a variety of processes involving direct or facilitated conversations or through the wisdom of algorithms. Such a seamless process will cost parties less and result in more settlements, and, perhaps, better-quality settlements. This will all require less administration and less judicial decisionmaking, allowing the court system to do more with less. It will reduce time to settlement, and result in enhanced justice in terms of parties' access, experience of the process, and overall satisfaction. These new justice mechanisms will eventually be built so smoothly and pervasively into parties' justice experience that they will not perceive ODR to be an artificial, alternative, extra-judicial, “diversion” from the legal process.

Throughout this evolution, we suggest that expectations, access, process, and the substance of justice will change. ODR's adoption into the courts will not only change parties' individual justice experiences, but it will also radically alter basic functions of the court. In the new justice system,

courts will assume an even greater settlement focus than they presently hold.⁶⁷ Judges, accordingly, will increasingly function as overseers rather than decision-makers. In turn, people will turn to courts more as coordinators of resolution options and less as adjudicators of justice.

Courts will assume a more dominant role in disseminating relevant information to parties about the dispute resolution processes available to help settle their case—displacing traditional elements of the lawyers’ role. This unmediated information flow between parties and the court will help ensure that parties receive objective and unbiased information about the dispute resolution options available. Moreover, the information on court homepages and ODR intake pages will help dispel any myths clients harbor regarding adjudicated justice and replace these with more objective and realistic justice expectations. Such settlement-focused information should neutralize a lawyer’s effort to be adversarial and adjust clients’ justice expectations. “Why can’t you settle?” might replace “Why can’t we take this all the way?” as a client’s complaint to their attorney.

Each jurisdiction will determine the volume and types of cases deemed suitable for online-based resolution. One anticipated justice effect of the ODR-infused court system is an increase of cases submitted to the court, overall, given that access to recourse has finally been simplified.⁶⁸ Initially, we expect a sharp stratification of legal cases; those with lower dollar values

67. While it is common to encounter claims that “95% of the cases filed in court ultimately settle,” a more correct way to say this is that only 1.8%-5% of cases filed are processed through to judicial decision. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 517 (2004). As Professor Michael Moffitt correctly points out, not all of the remaining cases are settled; “[i]nstead, some of the remaining cases are dismissed on motion or are abandoned, for example.” Professor Moffitt reaffirms the centrality of settlement in the system, saying “[s]till, every credible study of which I am aware has concluded that settlement is at least the modal means by which most forms of civil litigation are resolved.” However, he suggests that—despite a lack of consensus of the actual overall civil settlement rate in the United States—those studies that have been conducted indicate that the civil settlement rate is in the range of sixty-five percent to seventy percent. Michael Moffitt, *Settlement Malpractice*, 86 U. CHI. L. REV. 1826, 1828 (2019).

We suggest that ODR will increase settlement rates on both ends by diminishing the number of cases that vanish from the system unresolved for one reason or another as well as shrinking even that small pool of cases that proceed to trial; In addition, the path to settlement will be less arduous for the courts and parties.

68. Orna Rabinovitch-Einy & Ethan Katsh, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 CARDOZO J. CONFLICT RESOL. 637, 648 (2017) (positing that litigants previously opting to “lump it” to avoid the arduous process of getting justice may now elect to proceed with claims, as ODR facilitates obtaining justice).

that now often proceed without lawyers will be diverted to ODR processes that provide basic legal information and efficient resolutions. However, we do not expect this sharp stratification to endure, as we discuss below.

Connecting the dots of court-ODR initiatives shows the following: First, piloted with relatively low-value cases,⁶⁹ they were all designed simply and clearly, so that litigants could interface with the system on their own. Second, depending on the system, lawyer participation is precluded (CRT), rendered superfluous by design (U.K.), or unrequired and utilized only in complex cases (China's Internet Courts). Third, the systems themselves provide parties with procedural and substantive information about their case, replacing the traditional lawyer-as-sage role. Moreover, the systems interface between this information and the parties directly, doing away with the traditional lawyer-as-intermediary role. Fourth and finally, while all these design and role elements fit in well with their pilots' anticipated users, the programs were never intended to remain constrained to the audiences and case-values of their pilots.⁷⁰

What comes next? We believe that legislators and courts, buoyed by the success of resolving lower-value cases with ODR, will expand ODR programs' jurisdiction to include more, and higher-value, cases. Consequently, we anticipate that courts will continue, implicitly or explicitly, to encourage lawyerless case-conduct unless presented with pressing reasons to do otherwise. This expansion of jurisdiction and case-value, already underway in some venues,⁷¹ will offer parties the option for

69. See *supra* Section I.B. (demonstrating this with regard to all of the court-ODR programs with the exception of China's Internet Court).

70. This not only holds true from the perspective of court administrators, but also converges with the perspectives of early ODR conceptualizers and system designers: ODR's application to low-value cases was never the end-goal, only a foot in the door. Nicolas W. Vermeys & Karin Benyekhlef, *ODR and the Courts*, in *ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE 321* (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), http://www.ombuds.org/odrbook/vermeys_benyekhlef.pdf [<https://perma.cc/8XE5-MWLC>] ("But small-claims, although currently the best suited to be settled through the use of ODR platforms because of their low value and relative simplicity (as opposed to more complex cases involving injunctive and other interlocutory measures), should only be the beginning of the court-annexed ODR adventure, not its end.").

71. For an example-in-progress of expansion in courts, we've already noted China's opening of a second Internet Court and its work on a third. For an example-in-progress of expansion in jurisdiction and increase in case-value, we note that British Columbia's CRT was originally granted jurisdiction in strata disputes as well as small-claims cases valued up to Can\$25,000. As mentioned, its pilot program dealt with cases valued at under Can\$5,000. See *Civil Resolution Tribunal Act*, BRITISH COLUMBIA, <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation->

autonomous dispute management in realms that were previously reliable sources of income for lawyers. We see this as a fundamentally disruptive process. At the very least, it will be a *displacing* process for many lawyers who have previously engaged in low-to-mid-value litigation. We expect this will constrain their activity in these cases to specific roles such as providing advice or drawing up final agreements without representing the whole case, essentially forcing an unbundling of legal services. This displacing will affect not only litigators, but their assistants and teams as well.

Exploring the effects of ODR's entry into court systems not only provides context, but also helps to understand the magnitude of the broader disruptive changes hovering over the horizon. This wider understanding can then be folded back to consider how to guide court-ODR's development such that justice is continuously strengthened.

We cannot imagine a significant reimagining of justice that does not involve some change in substantive law. First, we expect to see recommendations for changes in substantive law aimed at reducing conflict in cases where big data, garnered through ODR, has revealed an unwarranted conflict-generating effect of a particular law or particular formulation of it. Second, as AI develops and we see first shifts towards automated decisionmaking, we expect to see certain laws redesigned to require less judicial discretion, thus facilitating machine decisionmaking.⁷²

This evolution will have wider effect on the court's overall role in government and society. We anticipate the court becoming a far more proactive player in society, performing a combination of conflict analysis, prevention, mitigation, and resolution, writ large. ODR grants the ability to capture vast quantities of data about parties, disputes, and resolution. ODR brings settlement data, hitherto private and largely unreviewed, under

updates/civil-resolution-tribunal-act [<https://perma.cc/6E78-VY8R>]. After its successful pilot, the CRT's jurisdiction has expanded to new types of cases (adding disputes involving motor vehicle accidents, non-profit organizations, and co-op associations) and to higher-value cases (motor vehicle accident claims valued at up to \$50,000). This expansion occurred after only two years of operation. See Shannon Salter, *Small Claims: Coming Soon to the CRT*, CIV. RESOL. TRIBUNAL (Apr. 8, 2017), <https://civilresolutionbc.ca/small-claims-coming-soon-crt/> [<https://perma.cc/N6G6-N96Y>]. We consider this a telling example of things to come.

72. See Kalev Leetaru, *Will AI-Powered Law Enforcement Force US to Rewrite Our Laws?*, FORBES (Aug. 13, 2018), <https://www.forbes.com/sites/kalevleetaru/2018/08/13/will-ai-powered-law-enforcement-force-us-to-rewrite-our-laws/?curator=TechREDEF#516673537323> [<https://perma.cc/4Y2B-3D6Q>].

researchers' microscopes. ODR-gathered data will drive court improvement and conflict prevention. Moreover, as this information will likely be publicly accessible, justice can be strengthened through the data's careful monitoring for existing biases towards parties or outcomes in a system's algorithms.⁷³ By creating a more transparent environment than the traditional legal system, ODR's entry into the court system will provide the entire system with a sorely-needed boost of public trust.

Gathering and analyzing data will enable the justice system not only to streamline and improve on its traditional dispute and resolution processes, but also to identify *why* conflicts occur. This data will allow the justice system to preemptively engage in conflict *prevention*.⁷⁴ Such prevention may include recommended changes in procedural or substantive law, or changes in other systems for implementing social policy such as education, welfare, and law enforcement. Courts have largely avoided the role of conflict prevention, and their entry into this realm will necessitate new forms of interaction between court systems and policymakers, legislators, and administrative bodies. This far-reaching vision of ODR's evolutionary potential vision is rapidly being formulated in theory⁷⁵ and has been tested successfully in the private sector.⁷⁶

Such an evolution has wide effects on all players and stakeholders in the justice system. In the next section, we will explain justice stakeholders' varying degrees of receptivity and responsiveness to the ODR evolution.

73. For more on transparency and its benefits to ODR, as well as the benefits of transparent ODR to society, see Nancy Welsh, *ODR: A Time for Celebration and the Embrace of Procedural Safeguards*, ADR HUB (July 4, 2016), <http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr> [<https://perma.cc/KE65-M6JW>].

74. See KATSH & RABINOVICH-EINY, *supra* note 9, at 165–67.

75. See *id.* at 148–69.

76. One example of this might strike a chord with some readers: As large amounts of data were captured from the millions of cases moving through eBay's system, analysts recognized that a recurring obstacle to resolving eBay-related disputes was the question of who would cover return shipping costs of a faulty or poorly described item being returned—the buyer, or the seller? In response, eBay improved the information sellers provide about their return policies and thus greatly reduced the recurrence of such secondary conflict. See AMY SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* 45–46 (2017). Consider the net effect on the justice system if such covert sticking points were identified in adjudicated case types such as motor vehicle injury claims or consumer protection claims, and addressing them resulted in tens of thousands of fewer cases reaching advanced stages of litigation.

II. CHANGING STAKEHOLDER'S JUSTICE EXPECTATIONS AND RECEPTIVITY TO ODR

In the previous section, we detailed how ODR has already begun to reshape the justice system. In this section, we shift focus to the changing justice needs of the justice system's stakeholders: courts, clients and lawyers. We explain why two stakeholders in our legal system, the courts and clients, are welcoming or receptive to ODR as a justice innovation that supports their increasing preference for efficiency. In direct contrast, we will discuss how the third stakeholder, the legal profession, has responded with denial and an overall reluctance to adapt in the evolving ODR-infused justice system.

A. The First Justice Stakeholder: Courts

Courts, both nationally and globally, are seriously considering how ODR can help them meet their unmet access-to-justice responsibilities. As courts grapple with overflowing dockets, increasing numbers of unrepresented litigants, and shrinking budgets, they are turning to ODR to see if it can provide litigants with expedient and affordable justice.⁷⁷ ODR service providers, policy organizations, and research foundations are seizing this justice opportunity, persuading courts to adopt new technology by demonstrating ODR's capacity to deliver justice more quickly and efficiently.⁷⁸ Amidst this justice environment, courts are willing to pilot the promise of ODR. Notably, the designs of many ODR procedures offer justice without lawyers, addressing the problem of the unrepresented. In this realm, ODR offers courts a previously unimaginable opportunity to unhook *access to justice* from *access to lawyers*.

Courts are also increasingly receptive to ODR because court-annexed ADR programs have yet to become the default recourse process courts had hoped it would be.⁷⁹ ADR has provided the court with some case-management relief, but has largely not lifted the burden of courts' ongoing

77. See KATSH & RABINOVICH-EINY, *supra* note 9, at 149–65; JOINT TECH. COMM., *supra* note 19.

78. See NAT'L CTR. FOR TECH. & DISP. RESOL., *supra* note 68 (noting that in 2018, the National Center for State Courts and the Pew Charitable Trust partnered to help courts develop ODR).

79. See KATSH & RABINOVICH-EINY, *supra* note 9, at 43.

access-to-justice challenges. Parties continue to file suit, rather than privately arrange for mediation.⁸⁰ Litigants often refuse court-referred mediation.⁸¹ When they agree to such mediation, there are far too many cases in which lawyers misuse mediation and arbitration as litigation substitutes.⁸² Even in courts that require attorneys to inform their clients about ADR options, attorneys comply with the procedure of the rule without enacting its spirit.⁸³ Thus, many parties remain unaware and ill-informed about the value of ADR for their particular cases, and too many court-connected programs remain underused.⁸⁴ One posited reason for lawyers' misuse and underuse of ADR is that lawyers, as part of their legal education, have not received adequate training about ADR and the more collaborative advocacy approach it requires.⁸⁵ For all these and perhaps other reasons, ADR's promise of settling cases has never achieved the full fruition that courts had hoped for.⁸⁶

80. See generally Donna Shestowsky, *When Ignorance is not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017) [hereinafter Shestowsky, *Ignorance*]; Donna Shestowsky, *The Psychology of Negotiation: Using Persuasion to Negotiate More Effectively*, in THE NEGOTIATOR'S DESK REFERENCE (Andrea Kupfer Schneider & Christopher Honeyman eds., 2017).

81. See Shestowsky, *Ignorance*, *supra* note 80.

82. See, e.g., Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61 (2012); Tom Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1.

83. Elayne Greenberg, ... *Because "Yes" Actually Means "No": A Personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution*, 102 MARQ. L. REV. 197 (2018).

84. See, e.g., Shestowsky, *Ignorance*, *supra* note 80.

85. See GLOB. POUND CONFERENCE SERIES, GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES 16 (2018), <https://www.immediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf+&cd=1&hl=en&ct=clnk&gl=us> [<https://perma.cc/VLG7-3XBU>].

86. One aspect of ODR's promise is its repackaging of ADR processes in online form and offering them to parties in a seamless process that avoids the sense of diversion to a lesser forum. The court introduces and explains these online ADR processes to parties directly—bypassing attorneys' filtering and process-participation norms. As we've stated above, though, this is only one part of court-ODR's promise. ODR should not be conflated, particularly in its court manifestations, with online ADR; it involves many more elements and building blocks. While this is not an article on ADR, it is interesting to note—from a systems-design perspective—that two significant sets of differences between the ODR systems detailed above are the *degree* to which each incorporates ADR-replication building blocks, and their *variety*.

For example, the CRT system includes an online mediation-like process, and plans to add an assisted negotiation process. China's Internet Courts introduce the norm of conducting an online mediation process early on in every case. The Franklin County Municipal Court's program combines automated negotiation, assisted negotiation, and online mediation. Utah's small-claims court program replicates only mediation online, amongst other ODR building-blocks. The England and Wales Online Court's system did not innovate online ADR replications, relying instead on diversion to face-to-face and telephonic mediation services, both of which existed in the previous structure of the court system.

It remains to be seen whether courts will view ODR as the default justice provider of the future or as an adjunct to physical courthouses.⁸⁷ Be that as it may, courts are beginning to see ODR as a viable mechanism by which to provide litigants justice. And, as we will explain in the following section, ODR delivers to litigants a form of justice they are already experiencing as consumers.

B. The Second Justice Stakeholder: Clients

Increasingly, clients are seeking a more efficient and affordable dispute resolution procedure, which ODR promises to provide. Clients' changing justice expectations have been caused, primarily, by three parallel but distinct social phenomena. First, as the internet has increased human connectivity, clients have developed familiarity and comfort with resolving consumer disputes online.⁸⁸ Second, a growing number of disenfranchised clients cannot afford a lawyer and are denied access to justice.⁸⁹ Third, clients have had a longstanding dissatisfaction with the quality and escalating costs of legal services and have taken affirmative steps to seek

In that sense, there is little new in the U.K. court system from an ADR perspective; the system's innovation lies in a host of other non-ADR related building blocks. These examples demonstrate how deciding the types and nature of ADR-replication elements in the overall mix of an ODR system's building blocks is one frame through which to hone the court system's capacity to meet its needs. They also demonstrate how online ADR is but one set of building-blocks available for court-ODR system design. *See supra* Part I.A.

87. *See* JOINT TECH. COMM., *supra* note 19 (contrasting different models of ODR adoption into courts, ranging from standalone implementation of certain building-blocks, to partial integration of technology in the court system's work, to full implementation—in which ODR underlies the essential design of the court process in its entirety).

88. Like anyone else, legal clients are likely to have gone through online dispute resolution processes as consumers at eBay, Amazon, or other online marketplaces. The earliest marketplace to incorporate ODR between buyers and sellers was eBay, which now handles over sixty million disputes each year through ODR. *See* Arthur B. Pearlstein, Bryan J. Hanson & Noam Ebner, *ODR in North America*, in ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE 445 n. 22 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011). For a description of the eBay system and its design evolution and considerations, see AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017).

89. *See* JULIE MACFARLANE, REPRESENTING YOURSELF CAN., THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS 39 (2013), <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [<https://perma.cc/BS8L-2YCN>].

alternatives.⁹⁰ These three experiences have reshaped clients' dispute resolution expectations, enhancing their receptivity to ODR justice.⁹¹

First, clients are gaining an increasing comfort and reliance on ODR in their day-to-day lives. Although there have yet to be critical numbers of litigants who use court-connected ODR, there are increasing numbers of consumers who have experience using consumer ODR. Consumers now regularly use the internet to not only make purchases, but also to resolve disputes arising out of those purchases. PayPal and eBay collaborated to pioneer an ODR system to resolve their sixty million disputes per year,⁹² acculturating consumers to see ODR as an accepted way to resolve consumer disputes. And, consumers now can achieve justice at any time of day through remedies like credit card chargebacks⁹³ and posting negative reviews about their experience with a provider, all from the comfort of home.⁹⁴ Noticeably, consumers do not use lawyers for any part of these dispute resolution processes. This social phenomenon has given clients familiarity and experience with consumer ODR.⁹⁵ Why would they not expect the same efficiency and accessibility from their court-based justice system?⁹⁶ We anticipate that consumer experience with online dispute resolution in their private transactions and dispute activity will render them

90. See, e.g., Michael Zuckerman, *Is There Such a Thing as an Affordable Lawyer?*, ATLANTIC (March 30, 2014) <https://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/> [<https://perma.cc/RF7A-DSGF>]; Clark D. Cunningham, *What Do Clients Want from Their Lawyers*, 2013 J. DISP. RESOL. 143; Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1345 (1997); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994).

91. The National Center for State Courts forecasts that “[t]he public will likely be the most enthusiastic stakeholder group” with regards to ODR. JOINT TECH. COMM., ODR FOR COURTS 21 (2017), <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx> [<https://perma.cc/JW63-MV2S>]. Our discussion below lays out converging causes for this enthusiasm.

92. See SCHMITZ & RULE, *supra* note 88, at 34.

93. See *id.* at 15.

94. Colin Rule & Harpreet Singh, *ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress*, in ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE 175 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012), http://www.ombuds.org/odrbook/rule_singh.pdf [<https://perma.cc/3Y5N-JVR5>] (discussing posting on reputation sites such as Yelp and TripAdvisor, and the relationship between these sites and ODR).

95. See *id.* Consumers' familiarity with online dispute resolution contrasts noticeably with parties' lack of awareness of court-connected ADR.

96. See *id.*; KATSH & RABINOVICH-EINY, *supra* note 9, at 153.

receptive to ODR justice when they encounter it as clients in court.⁹⁷ Beyond this, millennials, the next generation of clients, will have even greater comfort with technology⁹⁸ and thus with ODR.

Second, low-income and poverty-level parties with a legal claim simply have limited access to justice. A primary reason that people don't engage lawyers is the cost.⁹⁹ The Justice Index indicates that as many as two-thirds of litigants in the United States are self-represented.¹⁰⁰ Nationwide, for every 10,000 people living in poverty, there are approximately .64 legal-aid lawyers available to represent them.¹⁰¹ In many instances, however, litigants need the assistance of an attorney to navigate the justice system successfully. Access to lawyers and access to justice have become one and the same. Moreover, as the digital divide is narrowing, and the gap between those who have and those who lack internet access has become marginal through smartphone proliferation and publicly available internet access, ODR offers an increasingly viable justice option for clients in poverty.¹⁰²

Third, over the past thirty years, paying clients have had a growing dissatisfaction with the accessibility,¹⁰³ quality, and affordability of legal services. Legal consumers have increasingly demanded from their attorneys

97. See, e.g., SCHMITZ & RULE, *supra* note 88.

98. See Shawna Benston & Brian Farkas, *Mediation and Millennials: A Dispute Resolution Mechanism to Match a New Generation*, 2 J. EXPERIENTIAL LEARNING 157 (2018). Farkas and Benston suggest that millennials are more inclined than previous generations to collaborate and avoid risk; collaborative problem-solving in the online setting may appeal to them.

99. See, e.g., MACFARLANE, *supra* note 89, at 39; see also NATALIE ANNA KNOWLTON, LOGAN CORNETT, CORINA D. GERETY & JANET L. DROBINSKE, INST. FOR ADVANCEMENT AM. LEGAL SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 12–14 (2016), http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [<https://perma.cc/7NZA-D42Y>]; *Support for Self-Represented Litigants*, JUSTICE INST., <https://justiceindex.org/2016-findings/self-represented-litigants/#site-navigation> [<https://perma.cc/MCH4-3WVU>].

100. See *Support for Self-Represented Litigants*, *supra* note 99 (stating, under the “About the Index” tab, “[i]n our states, as many as two-thirds of the litigants appear without lawyers”)

101. *Attorney Access Index*, JUST. INDEX (2016), <https://justiceindex.org/2016-findings/attorney-access/#site-navigation> [<https://perma.cc/BQ75-ZE2K>]; see also KNOWLTON ET AL., *supra* note 99, at 14.

102. See Liz Soltan, *Digital Divide: The Technology Gap Between the Rich and the Poor*, DIGITAL RESPONSIBILITY (2016), <http://www.digitalresponsibility.org/digital-divide-the-technology-gap-between-rich-and-poor/> [<https://perma.cc/783G-WNW8>].

103. See, e.g., *Access to Justice Commission*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/atj-commissions/ [<https://perma.cc/3HQH-38ZF>].

more cost-efficient resolutions.¹⁰⁴ Others have opted to forego attorneys and represent themselves.¹⁰⁵ For those dissatisfied consumers of legal services, both ODR and attorneys who redesign the delivery of their legal services are more attractive alternatives than the status quo.

Thus, we see that litigants are receptive to ODR because of three social phenomena: increased use of ODR in everyday lives; limited access to justice; and growing dissatisfaction with lawyers. As explained next, these social phenomena have converged to reshape litigants' justice interests.

1. How have clients' justice interests changed?

The three social phenomena described above have reshaped clients' justice interests in five fundamental ways. First, efficiency has become a priority in a client's choice of justice resolutions,¹⁰⁶ to the extent that they are willing to forego traditional notions of justice to benefit from ODR's

104. Leigh McMullan Abramson, *Is the Billable Hour Obsolete?*, ATLANTIC (Oct. 15, 2015), <https://www.theatlantic.com/business/archive/2015/10/billable-hours/410611/> [<https://perma.cc/N8B4-L86G>].

105. See, e.g., Alan Feuer, *Lawyering by Laymen; More Litigants Are Taking A Do-It-Yourself Tack*, N.Y. TIMES (Jan. 22, 2001), <https://www.nytimes.com/2001/01/22/nyregion/lawyering-by-laymen-more-litigants-are-taking-a-do-it-yourself-tack.html> [<https://perma.cc/VAQ3-Y3NS>]; Frederic Lederer, *Improving Access to Justice Via Technology*, A.B.A. NEWSL. (May 17, 2018), http://www.abajournal.com/news/article/improving_access_to_justice_via_technology [<https://perma.cc/VH7V-EUFS>] (citing the cost of lawyers and slowness of justice as contributing reasons that litigants don't have access to justice is).

106. The preference for efficiency is evidenced by consumers' willingness to purchase on eBay despite their knowing that they will likely not find remedy through traditional judicial systems. They prefer the efficiency of eBay's resolution system over the slow and inaccessible court process. Similarly, those surveyed in the Pound Conference rated efficiency as their top priority. See Amy J. Schmitz & Colin Rule, *Lessons Learned on Ebay*, A.B.A. SEC. ON DISP. RESOL. 28 (2018); See *GPC Series: Global Data Trends and Regional Differences*, GLOBAL POUND CONFERENCE (2017), https://www.globalpound.org/wpfd_file/gpc-series-global-data-trends-and-regional-differences/ [<https://perma.cc/T7XC-ZDQ4>] [hereinafter *GPC Series*] (noting how Pound Conference clients said that efficiency is a priority).

more efficient blend of justice.¹⁰⁷ Second, clients want to avoid litigation.¹⁰⁸ Third, clients desire prophylactic measures to avoid conflicts.¹⁰⁹ Fourth, clients continue to desire a sense of fairness; they will participate in ODR if it appears to be fair, and they will also demand that ODR processes be perceivably fair.¹¹⁰ Finally, in this digital age, clients still have a need for human contact as they resolve their disputes.¹¹¹ These changing justice interests will help facilitate the acceptance of ODR programs that reflect these needs.

These changing client justice interests have been confirmed by the findings of the 2018 Global Pound Conference Series. This conference was organized to better understand the prioritized considerations of individual, corporate, civil, and commercial clients when they opt to use a dispute resolution process to resolve a presenting legal dispute.¹¹² The resulting report identified four client preferences.¹¹³ As their primary consideration, clients prefer to select a process that will help resolve their dispute efficiently.¹¹⁴ As a second consideration, clients prefer attorneys who listen to them and collaborate with them about dispute resolution processes.¹¹⁵ As a third consideration, clients prefer in-house counsel who focus on conflict

107. See *Online Dispute Resolution Offers a New Way to Access Local Courts*, PEW RES. CTR. (Jan. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts> [<https://perma.cc/3H2H-3E44>] (explaining that “more than 80 percent of respondents [to a national survey] said they want more online access to local courts . . . rather than come to the courthouse”). For a comparable tradeoff between priorities, consider the ubiquitous tradeoff between security and efficiency: many of us have had our accounts hacked, and our identities compromised, and yet we still conduct online business transactions and online dispute resolution in consumer disputes.

108. See *GPC Series*, *supra* note 106. This finding is not necessarily as novel as the others. See, e.g., John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV. 4 (Jan.-Feb. 1990), <https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court> [<https://perma.cc/WMK3-T63A>].

109. See *GPC Series*, *supra* note 106.

110. See WELSH, *supra* note 73.

111. See, e.g., Kai-Fu Lee, *The Human Promise of the AI Revolution*, WALL STREET J. (Sept. 14, 2018), <https://www.wsj.com/articles/the-human-promise-of-the-ai-revolution-1536935115>; Clay Routledge, *The Curse of Modern Loneliness*, NAT’L REV. (Aug. 14, 2018), <https://www.nationalreview.com/2018/01/digital-age-loneliness-public-health-political-problem/> [perma.cc/TPD4-47E8].

112. *GPC Series*, *supra* note 106.

113. *Id.*

114. See *GPC Series*, *supra* note 106, at 1, 8. The 2016-17 meeting surveyed more than four thousand stakeholders to assess the needs of corporate and individual users of civil and commercial dispute resolution. The conference conveners caution that the data collected did not comply with the rigors of academic research. The data, instead, represents central themes. *Id.*

115. See *id.* at 11 (discussing lawyers’ views of their roles as advocates, not collaborators).

prevention.¹¹⁶ Finally, as a fourth consideration, clients prefer lawyers who, when conflicts do arise, use dispute resolution efforts that are actually devoted to the use of pre-dispute protocols¹¹⁷ and who use less-costly mixed adjudicative and non-adjudicative processes to help resolve these conflicts.¹¹⁸ Clients voiced their desire that adjudicative processes only be used when all else has failed.¹¹⁹ This mixture of conflict anticipation, prevention, diagnosis, and alternative resolution is one that ODR is poised to provide far more effectively than traditional court systems ever could.¹²⁰

An unanswered question is whether clients' increasing desire for efficient justice resolutions will change clients' expectations of procedural justice—whether in court, ADR, or ODR.¹²¹ Professor Nancy Welsh explains that procedural justice is a client's perception of whether the dispute resolution process is fair, a perception comprising four dimensions: Did the party have the opportunity to express themselves? Did the decisionmaker listen and understand what the party said? Was the process impartial and free from bias? Was the party treated in a dignified way?¹²² Professor Welsh suggests that these essential elements of procedural justice have not fundamentally changed in the age of ODR. She further cautions that when ODR designers and lawyers are suggesting ODR to their clients, they remember that clients still want to be assured that any ODR process will satisfy their procedural justice concerns.¹²³

We suggest that the prioritization and characterization of these four procedural justice components might shift in the ODR evolution. A recent Pew Research Center report predicted that people's overriding attraction to the internet's convenience will continue to outweigh their fears of the real

116. See *id.* at 19 (“Parties . . . identif[y] in-house lawyers as the group with the potential to be the most influential in bringing about change in the dispute resolution practice.”).

117. One example of a pre-dispute protocol would be to include in contracts multi-step dispute resolution clauses. Such clauses would require parties to try to resolve any disputes that arise out of their contract through negotiation or mediation *before* resorting to adjudicative processes to resolve their disputes.

118. See *id.* at 14.

119. See *id.*

120. See KATSH & RABINOVICH-EINY, *supra* note 9, at 149–69.

121. See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 16 (2011).

122. See *id.*

123. See WELSH, *supra* note 73.

security risks associated with its use.¹²⁴ This same transformation might lead to some people reprioritizing other safeguards they valued in the pre-internet world. For example, in the ODR evolution, some clients may be satisfied they have been “treated in a dignified way”¹²⁵ so long as the ODR platform clarified each process and resolved their conflict in a timely manner. They might experience “having an opportunity to express themselves”¹²⁶ after being given the opportunity to enter their information into the ODR platform, even though they did not directly engage with a human decision maker.¹²⁷ Having the decisionmaker listen and understand¹²⁸ in the ODR context might be satisfied by the sense that the platform’s artificial intelligence was able to process their perspective. Thus, in the ODR-infused courthouse, clients will still have a need for procedural justice; however, their assessment of procedural justice may be somewhat different than in a brick-and-mortar setting.¹²⁹

In addition to clients’ increasing comfort with technology and their growing desire to resolve their disputes efficiently, clients will develop a stronger need for human contact. We appreciate that this runs counter to much of the discussion about people and systems embracing technology. Immersion in technology leaves people feeling disconnected, and seeking interpersonal connection.¹³⁰ An ironic byproduct of our increased

124. See Lee Rainie & Janna Anderson, *The Internet of Things Connectivity Binge: What are the Implications?*, PEW RES. CTR. (June 6, 2017), <http://www.pewinternet.org/2017/06/06/the-internet-of-things-connectivity-binge-what-are-the-implications/> [https://perma.cc/UJ9J-JRLE].

125. *Supra* note 121 and accompanying text.

126. *Supra* note 121 and accompanying text.

127. As explained in the following paragraph, “having an opportunity to express themselves” by entering information into an ODR platform is distinguishable from the ongoing human need for interpersonal contact.

128. *Supra* note 121 and accompanying text.

129. In this, we agree with Ethan Katsh and Orna Rabinovich Einy, who succinctly summed up all we can currently say with confidence on this issue in stating, “The questions have yet to be answered as processes change and users’ reactions are studied. One thing, however, seems certain: preferences and values will change.” KATSH & RABINOVICH-EINY, *supra* note 9, at 164.

130. Professor Sherry Turkle of the Massachusetts Institute of Technology, who studies the impact of the internet on society and human relationships, has summed this up succinctly: “We are increasingly connected to each other, but oddly more alone: in intimacy, new solitudes.” SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* 19 (2011). This is not solely a sociological observation. Asked to name the biggest disease in America today, then U.S. Surgeon General Vivek Murthy, answered “[i]solation.” See THOMAS FRIEDMAN, *THANK YOU FOR BEING LATE: AN OPTIMIST’S GUIDE TO THRIVING IN AN AGE OF ACCELERATIONS* 26, 450 (2016); see also Kai-Fu Lee, *The Human Promise of the AI Revolution*, WALL

connectivity to and through the internet is that people feel more lonely and have a greater need for human contact.¹³¹ That need is only likely to increase in the next generation.¹³² Internet-based communication and social networking applications are adjuncts to human relationships,¹³³ but they are not substitutes.

Therefore, now more than ever, clients prefer lawyers who are skilled in relating to the client, rather than those who only have substantive expertise in the law.¹³⁴ Similarly, parties who navigate their disputes largely on their own, via technology, may still have a need for human legal guidance. The next section examines whether the third justice stakeholders, lawyers, are ready for and receptive to this change.

C. The Third Justice Stakeholder: The Legal Profession

In stark contrast to courts' and clients' curiosity about and receptivity to ODR, the legal profession as a whole has largely ignored ODR's entry into the courts. However, the reality of today's legal practice is about change.¹³⁵ More generally, the glacial and inconsistent adaptation of the legal profession to technological advancements has hindered the profession's full participation in developing the new justice system. While some lawyers have begun to adapt to the new technology-immersed realities

STREET J. (Sept. 14, 2018), <https://www.wsj.com/articles/the-human-promise-of-the-ai-revolution-1536935115>.

131. See Clay Routledge, *The Curse of Modern Loneliness*, NAT'L REV. (Jan. 16, 2018), <https://www.nationalreview.com/2018/01/digital-age-loneliness-public-health-political-problem/> [<https://perma.cc/QP9P-P3QM>].

132. See Jean W. Twenge, *Have Smartphones Destroyed A Generation?* ATLANTIC DAILY (2017), <https://www.theatlantic.com/magazine/archive/2017/09/has-the-smartphone-destroyed-a-generation/534198/> [<https://perma.cc/5HRB-FSZS>].

133. See Anna M. Lomanowska & Matthieu J. Guitton, *Online Intimacy and Well-Being in the Digital Age*, 4 INTERNET INTERVENTIONS 138 (2016), <https://www.sciencedirect.com/science/article/pii/S2214782916300021> [<https://perma.cc/P8S8-WADE>].

134. See RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 76 (Oxford University Press, 2d ed. 2017).

135. Richard Susskind, *Foreword in ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE*, at v-vii (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), <http://www.ombuds.org/odrbook/susskind.pdf> [<https://perma.cc/GHR5-DY23>] (explaining that litigators feel threatened by ODR).

of twenty-first-century legal practice, others have been more resistant.¹³⁶ Depending on the size of the firm and the comfort of the firm's decisionmaking lawyers, certain law firms are embracing technology to improve their practice of law,¹³⁷ primarily in the realms of in-house communications, case management, and legal research. Other firms are beginning to appreciate that with increased technological connectivity there is less need for traditional office space. Such firms are rethinking the value of maintaining a costly brick-and-mortar footprint in the digital age.¹³⁸ Few lawyers appreciate, however, how the cumulative import of these technological changes is helping to advance our legal system into an ODR-infused justice system.

The American Bar Association (ABA) has begun to recognize the importance of having technologically competent lawyers in this changing legal practice. In the ABA's 2012 revision of the Model Rules of Professional Responsibility, the ABA revised the definition of "lawyer competence" to include some level of technological savvy.¹³⁹ Over half of U.S. states have adopted corresponding rules¹⁴⁰ Explicitly, Rule 1.1 Comment 8: Maintaining Competence provides that to "maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."¹⁴¹ However, the rule's wording is broad and subject to

136. See Steve Lohr, *A.I. is Doing Legal Work. But It Won't Replace Lawyers, Yet*, N.Y. TIMES (Mar. 19, 2017), <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html> [<https://perma.cc/Z9KM-AY4B>].

137. *Id.*

138. See, e.g., Andrew McIntyre, *NYC Brick and Mortar: Less Space Per Lawyer*, LAW360 (Sept. 4, 2018), https://www.law360.com/legaethics/articles/1064787/nyc-brick-mortar-less-space-per-lawyer?nl_pk=2bfa25dd-c8a6-4c4d-8d28-01f969b2d612&utm_source=newsletter&utm_medium=email&utm_campaign=legaethics [<https://perma.cc/7KH2-66SF>].

139. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8. (AM. BAR ASS'N 2012).

140. Sarah Andropoulos, *Most States Now Require Tech Competence for Lawyers. What Does That Mean For You?*, JUSTIA (Feb. 9, 2017), <https://onward.justia.com/2017/02/09/states-now-require-tech-competence-lawyers-mean/> [<https://perma.cc/Y5XC-FC2G>].

141. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8. (AM. BAR ASS'N 2012).

interpretation and has failed to spark widespread interest in advancing lawyers' technological competence.¹⁴²

A select group of lawyers, however, is heeding the signs and beginning to incorporate more advanced innovations, such as the application of AI to legal practice. For example, Above the Law recently advertised a webinar in which lawyers could learn how the top firms are maintaining their competitive edge by using AI and analytics.¹⁴³ In another illustration, entertainment lawyers who are negotiating contracts for Netflix stars must now balance the stars' preferences with data-driven analysis about viewer preferences.¹⁴⁴ As a third example, contract lawyers, always seeking to perfect the ironclad contract, are amassing large quantities of contract-terms data. This data is then used to create AI algorithms which will choose those contract terms that are more likely to secure best outcomes.¹⁴⁵

We observe that the legal profession's uneven adoption of technology in legal practice has its roots in the profession's longstanding resistance to change. In part, this resistance to change somewhat explains why the large majority of lawyers have taken no action and have remained silent about the lawyerless design of the pilot ODR programs. Far away from the cutting edge of legal and court technology, they are simply unaware of these programs. Even those lawyers who are aware of ODR's development, though, have largely ignored the intent to "delayerize"¹⁴⁶ justice, which is clearly a design feature of some of the ODR systems currently operating. Sometimes, the system's designers and administrators overtly acknowledge this intent; other times they embed such delayerization in the design itself

142. See, e.g., Elayne Greenberg & Noam Ebner, *Ethics Meets the "O" in DR*, 11 N.Y. DISP. RESOL. LAW. (2018).

143. See Thomson Reuters, *How Top Firms Are Using AI and Analytics to get the Competitive Edge*, ABOVE THE LAW (Nov. 8, 2018), <https://abovethelaw.com/2018/11/how-top-firms-are-using-ai-and-analytics-to-get-the-competitive-edge/> [<https://perma.cc/BX9Q-V2VR>].

144. See Shalini Ramachandran & Joe Flint, *At Netflix, Who Wins When It's Hollywood vs. The Algorithm*, WALL STREET J. (Nov. 10, 2018), <https://www.wsj.com/articles/at-netflix-who-wins-when-its-hollywood-vs-the-algorithm-1541826015?mod=searchresults&page=1&pos=2>.

145. See Spencer Williams, *Predictive Contracting*, 2019 COLUM. BUS. L. REV. 621.

146. Richard Susskind introduced this term to connote handing a traditional lawyer task over to non-lawyers to discharge. See SUSSKIND, *supra* note 134, at 37. We expand it here and apply it to connote a *system* that takes traditional "lawyer tasks," fulfills some of them itself via its online platform, and reassigns some of them back to parties themselves.

while delivering the message verbally in more placating tones to assuage its impact on attorneys.¹⁴⁷

However framed, the lawyerless intent and design have resulted in lawyers being largely absent in the planning stages, not consulted on implementation decisions, and sidelined in the basic design.¹⁴⁸ Even those lawyers in the know have not taken up arms against ODR's lawyerless design. We suggest that this apathy is owed to a misperception of courts' intentions with regards to ODR, a misperception with its roots in the earliest period of ODR's court debut. ODR systems have been initially introduced as vehicles providing justice for litigants with legal cases that are financially unattractive to lawyers. When ODR resolves such cases, it alleviates the blame cast on lawyers for posing financial barriers to justice. Hence, silence.

147. To demonstrate the range of such messaging, consider statements by leading figures in court and ODR system design: Shannon Salter, chair of British Columbia's CRT (in which legal representation is highly restricted), said she knows some lawyers fear ODR will take away their work, especially if it can be expanded to more complex and lucrative disputes.

"My response to that, as a lawyer, is society doesn't owe you a living," Salter said. "If you make your living because justice processes haven't changed since William the Conqueror and they're still byzantine and they're still complex and you happen to know how to navigate them, that is not an interest that society should protect. So if by simplifying processes we take away your work, you need to change the nature of your work."

British Columbia ODR System Handles 14,000 Cases in First 7 Months, A.B.A., (Feb. 4, 2018) https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/british_columbiaodr/ [<https://perma.cc/D5S3-Q24X>].

Lord Justice Briggs, architect of the U.K.'s (largely lawyerless) Online Court spoke more placatingly, while delivering essentially the same message:

It should not be thought that, merely because the Online Court may be designed in a way which enables people to litigate without lawyers, lawyers are intended to be excluded from it. On the contrary, such a design should encourage solicitors and barristers to provide unbundled and more affordable services to those thinking of using the Online Court.

Lord Justice Briggs, *Civil Justice: My Vision for the Online Court*, L. SOC'Y GAZETTE (May 16, 2016), <https://www.lawgazette.co.uk/practice-points/civil-justice-my-vision-for-the-online-court/5055277.article> [<https://perma.cc/FWG4-G48T>].

Sir Richard Susskind, information technology advisor to the Lord Chief Justice of the United Kingdom and chair of the Civil Justice Council's Online Dispute Resolution Advisory Group, put it bluntly, yet not unkindly: "Our Group could see that ODR might threaten the livelihood of some litigators. But we felt this should not discourage our search for more accessible and proportionate systems for dispute resolution. It is not the purpose of the courts to provide an income for lawyers." Richard Susskind, *Virtual Courts for the Internet Generation*, TIMEUK (Apr. 24, 2014), <https://www.thetimes.co.uk/article/virtual-courts-for-the-internet-generation-nzwlskf9kg7>.

148. For a description of a case in which lawyers did participate to some extent, see Larson, *supra* note 61 and accompanying text.

Such passivity, however, entails a steep price for the legal profession. ODR, with its lawyerless design, will continue to be introduced into courts—and with its spread, the number, types, and value of cases that courts manage through ODR systems will increase dramatically. As ODR demonstrates that it can provide justice for low-value cases, we expect value caps to gradually rise. After all, if an ODR program saves the court system money and satisfies parties, there is no inherent or compelling reason not to explore expanding use of the same platform to higher-value cases. This will occur incrementally and repeatedly, until ODR caps rise into the economic zone that includes those cases that have traditionally been profitable for attorneys. Facing a sharp loss of revenue and employment in an already contracting market, the legal profession will instinctively respond in a sharp, protectionist manner. This, we anticipate, is when the “ODR Wars” will flare, with lawyers and bar associations vigorously rallying to block or limit ODR’s adoption by the courts. Given the extent of court investment in ODR by that point, and ODR’s successful track record, we doubt these efforts will be successful. Moreover, they are more likely to hinder justice than promote it.

If lawyers are going to continue to play a central role in the delivery of justice, they must be a constructive part—at the earliest phase possible—of the process of incorporating ODR into the court: as individuals, as members of bar associations, and as members of the profession. Rather than obstructing ODR’s advancement, they must participate in conversations and workgroups in which they help plan and assess ODR by providing their unique expertise in protecting the justice interests of parties. They can offer solutions to new evidentiary challenges and provide procedural checks when court system designers’ planning naturally flows towards maximizing efficiencies. Along the way, they can identify elements of the new legal process that might be particularly suited to be handled by legal professionals, as well as innovate new roles for lawyers. The next part identifies the specific lawyering skills that can contribute and adapt to these justice changes.

III. REIMAGINING LAWYERS' CONTRIBUTIONS TO ENHANCED ODR JUSTICE: CHANGING ROLES AND REPRIORITIZED SKILLS

This part discusses the evolving roles lawyers can assume and the skills that will enable lawyers to add value to the development and implementation of ODR.¹⁴⁹ Lawyers, as justice stakeholders, can contribute to the changing justice needs of courts and litigants in an ODR-infused justice system by filling emerging new roles for lawyers, reprioritizing their skills, and putting those skills and roles to work in considering how to strengthen ODR justice outcomes. Initial research affirms that clients value lawyers who adapt to these changing roles.¹⁵⁰ This discussion will highlight the multiple legal skills they can contribute in order to adapt to these justice changes.

A. Current Roles for Lawyers in an Emerging ODR Justice System

Today, lawyers should begin to play an active role, participating or consulting in the design and implementation process of court-ODR programs. As court-connected ODR programs are being developed, lawyers can make invaluable contributions from their real-life experience about the practical safeguards that should be included in any court-ODR design.¹⁵¹ Some may push back, asserting that court administrators and many ODR designers are, in fact, lawyers who participate in ODR design and implementation.¹⁵² We agree, and nonetheless suggest that there is value

149. See Dana Remus & Frank S. Levy, *Can Robots Be Lawyers? Computers, Lawyers and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501 (2017); Steve Lohr, *supra* note 136 (arguing that legal technology reduces the number of lawyer hours needed to perform tasks, and some unbundled legal services will be provided by technology; still, the need remains for lawyers who can strategize, creatively problem-solve and empathize).

150. See, e.g., Remus & Lee, *supra* note 149; *AI Vs. Lawyers*, LAWGEEX, <https://www.lawgeex.com/AIvsLawyer/> [<https://perma.cc/KPC6-47SF>] (explaining that lawyers and AI compete at timed issue spotting to see who completed the task more accurately); see also James Manyika et al., *Harnessing Information for a Future That Works*, MCKINSEY & CO. (2017), <https://www.mckinsey.com/featured-insights/digital-disruption/harnessing-automation-for-a-future-that-works> [<https://perma.cc/BUC4-67PY>] (explaining that industries affected by technology should encourage employees to adapt to such innovations in order to “improve performance”).

151. See Larson, *supra* note 61.

152. See Noam Ebner and Elayne Greenberg, *Where Have All The Lawyers Gone? The Empty Chair at The ODR Justice Table*, 6 INT’L J. ONLINE DISP. RESOL. 154 (2019).

added by including the different justice perspectives provided by practicing lawyers and the organized bar.

B. Evolving Roles for Lawyers in an ODR-Infused Justice System

Even though full litigative representation may decline in an ODR-infused court justice system, there will still be a need for lawyers who provide efficient and affordable bespoke legal counsel.¹⁵³ For example, lawyers will play a role in providing a standalone diagnostic session, in which they counsel the client without representing them in the actual process. As counselors, lawyers will be needed to advise clients about whether they have a claim in the first place, the likely settlement range and the most advantageous types of evidence to procure the desired outcome. Lawyers will also be needed to counsel about whether or not it is more advantageous to participate in an ODR settlement-oriented process such as online mediation, rather than insisting on judicial proceedings. A third type of counseling role for lawyers might be for lawyers to provide behind-the-scenes negotiation advice or tactical participation advice throughout the ODR process.¹⁵⁴ Lawyers' ability to fill these roles should inform the design of ODR systems and contribute to strengthening justice outcomes.

As the court continues to evolve towards a settlement focus rather than an adjudication focus, two types of lawyers that already exist in today's legal culture will play an increasingly elevated role. The first is dispute system design specialists,¹⁵⁵ with skills to solve, and prophylactically minimize the reoccurrence of, organizational and interorganizational legal problems.¹⁵⁶ The second type is settlement counsel,¹⁵⁷ given settlement's

153. See SUSSKIND, *supra* note 134, at 141; see also LORD JUSTICE BRIGGS, FINAL REPORT, *supra* note 42.

154. See SUSSKIND, *supra* note 134.

155. See, e.g., Orna Rabinovich-Einy & Ethan Katsh, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 CARDOZO J. CONFLICT RESOL., 637, 653 (2017) (discussing, as one example of dispute system design, talks about the growing need to design digital dispute resolution systems by incorporating algorithms).

156. See SUSSKIND, *supra* note 134, at 71–72.

157. See, e.g., Christopher Nolland, *What the Heck is Settlement Counsel and Why Do You Care*, A.B.A. CORP. COUNS. CLE SEMINAR (Feb. 11–14, 2016), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016/2016-corporate-counsel/written_materials/1_Settlement_Counsel_ABA_CC_Final_2016.pdf [<https://perma.cc/E4E9-H2EQ>].

increasing primacy as a justice value. In an ODR-infused justice system, moreover, new roles or specialty areas for lawyers will evolve. These roles include case officers,¹⁵⁸ case managers, online mediators, agreement reviewers, legally trained ODR technologists employed by the court system and law firms, and ODR consultants guiding people through ODR processes.¹⁵⁹

Of course, ODR is unlikely to eliminate litigation altogether. As cases become more stratified and involve complex legal problems, some may not be suitable for ODR.¹⁶⁰ Such cases may certainly continue to require lawyers with traditional strategic skills to formulate an appropriate advocacy approach. Legal participation in court-driven ODR system-design processes could help the court consider the types of cases in which justice would be best strengthened by maintaining a more traditional approach to the adjudicative process, preventing the throwing out of the baby of procedural and substantive protections with the bathwater of inefficiency and lack of access to justice.

C. Reprioritization of Lawyering Skills

We suggest that six adaptive skills can serve lawyers a dual purpose. The very skills that will allow lawyers to remain vital in this evolving justice environment are those that will also provide them the mindset necessary to engage constructively in ODR design conversations with other stakeholders. These skills are: digital literacies; interdisciplinary facility; a forward-thinking, problem-solving outlook; emotional intelligence; a greater reliance on higher-level cognitive skills; and an entrepreneurial approach. We expect that an ODR-infused justice system will incentivize

158. This new role is already developing in the U.K.'s online court, although it is yet unclear which aspects of the role will be limited to those with legal training. The same question goes for any of the roles listed here.

159. For more on future lawyer roles in general, see R. Amani Smathers, *The T Shaped 21st Century Lawyer*, VIMEO (Apr. 13, 2014), <https://vimeo.com/91864405> [<https://perma.cc/7LMR-7J5E>].

160. Richard Susskind, *Online Disputes: Is it Time to End the "Day in Court"?*, TIMES (London), <https://www.thetimes.co.uk/article/online-disputes-is-it-time-to-end-the-day-in-court-6rpxjbt0x8>

(clarifying his recommendations for establishing an online court in the U.K.: "Nowhere, though, do we suggest that complex claims should be settled by the proposed online court. If complex claims were to come before online facilitators or judges, we would expect them to assign these to the traditional court system. Online dispute resolution is not suitable for all cases.").

lawyers to develop digital literacies.¹⁶¹ Problem-solving skills, interdisciplinary facility, emotional intelligence, reliance on higher level cognitive skills, and entrepreneurial ability are already traits of some of the lawyers of today and will only gain importance in the changing justice environment. All of these skills combined will help redefine what “thinking like a lawyer” will mean in an ODR-infused justice system. The mindset they cumulatively create will allow lawyers to engage with other stakeholders in considering how ODR systems can take advantage of this new “thinking like a lawyer” in order to strengthen the justice they deliver.

1. Digital Literacies

Lawyers will need to adapt by acquiring and demonstrating digital literacies.¹⁶² This involves the ability to analyze and utilize commonly encountered technologies, particularly legal technologies, in the course of a lawyer’s work. Digital literacies involve both technological fluency, or the ability to interface with an ever-widening range of technological platforms, and communicative fluency, or the ability to communicate effectively through online media. Of importance to the quality of justice outcomes, digital literacies also involve the ability to assess whether there is bias in an ODR process.

As stated in the previous part, the ABA has already begun to require digital literacy of lawyers, by incorporating technological awareness and understanding into lawyers’ ethical responsibilities.¹⁶³ While general skill with technology is a good start, far more is needed to substantively comply with the ABA ethical mandate that lawyers be technologically competent. In the era of digital justice, lawyers will have to understand how the new court-ODR systems function in order to evaluate whether the platforms and their processes are appropriate, fair, trustworthy, and secure. Lawyers will

161. See generally DIGITAL LITERACIES: CONCEPTS, POLICIES AND PRACTICES (Colin Lankshear & Michele Knobel eds., 2008).

162. This phrase expands on the concept of digital literacies expounded in Digital Literacies. See *id.* A respected colleague of mine at St. John’s, Professor Vincent M. DiLorenzo, remarked how he need to become digitally literate to interpret the research reviewed in his recent scholarship. Vincent DiLorenzo, *Fintech Lending: A Study of Expectations Versus Market Outcomes*, 38 REV. BANKING & FIN. L. 725 (2019).

163. See MODEL RULES OF PROF’L CONDUCT. r. 1.1 cmt. 8 (AM. BAR ASS’N 2012).

then need to be able to explain their assessment to their clients and counsel them about the best way to proceed.¹⁶⁴

Furthermore, such digital literacies will be foundational to prepare, represent, advocate, and coach clients in those online procedures. Whether lawyers are providing clients with direct representation in online mediation or online court proceedings, or coaching them behind the scenes in unrepresented online dispute resolution procedures, lawyers must be knowledgeable about how these platforms work.

2. *Interdisciplinary Knowledge*

Lawyers will need to develop the interdisciplinary knowledge¹⁶⁵ required to holistically address their clients' needs. Lawyers who adapt will understand that the client's legal rights must be put in a meaningful context that comports with what is important to the client. As cases become more stratified, there will still be a need for lawyers to handle the more complicated cases.¹⁶⁶ Here again, lawyers with interdisciplinary skills will have a competitive advantage over those who are only knowledgeable about the law. For example, lawyers involved in the contested dissolution of a family conglomerate would be at an advantage if besides their legal knowledge, they were knowledgeable about the business, tax, and psychological issues pertaining to family business breakups. Certainly, we can all point to many lawyers today who are knowledgeable beyond the law, with regards to substance and to psychological dynamics in their area of practice. In an ODR-infused justice system, however, possessing such knowledge will be *de rigueur*.

3. *Forward-Thinking Problem-Solving Skills*

To adapt to the needs of the ODR justice system, lawyers must become skilled problem-solvers and strategists. True, lawyers have always been

164. See Noam Ebner & John Zeleznikow, *Fairness, Trust and Security in Online Dispute Resolution*, 36 *HAMLIN J. PUB. L. & POL'Y*, no. 2, 2015, 143, 153.

165. See SUSSKIND, *supra* note 134, at 75–76.

166. As technology advances, ODR software will incrementally progress from having the capacity to deal with simple cases to possessing the sophistication required to handle cases of higher complexity. Attorneys' level of mastery must rise accordingly, to stay ahead of the machines and handle cases requiring human intervention.

known as problem-solvers.¹⁶⁷ Yet, when lawyers problem-solve today, they still interact by advocacy, as if an adjudicated determination is a likely outcome in the real world, their BATNA,¹⁶⁸ should these “problem-solving” negotiations fail.¹⁶⁹ In the changing justice reality, however, problem-solving skills will be reprioritized such that it will be harder for lawyers to pretend that litigation is a realistic BATNA and that legal precedent is the most meaningful benchmark.¹⁷⁰ Rather, problem-solving will require more interactional and transactional skills, requiring lawyers to stay at the table and work with each other rather than make their cases to a hypothetical judge. In order to provide greater value than machine-generated outcomes, problem-solving will likely require an integrative approach.¹⁷¹ Thus, adaptive lawyers will need to hone the more expansive and creative thought processes required both to strategically assess the appropriate dispute resolution options to resolve presenting conflicts and to proactively and realistically solve systemic problems.

4. Emotional Intelligence

We noted in the earlier section that as our justice system becomes more defined by ODR, clients will seek out those lawyers with good human skills who can bridge the ODR process with the client’s human experience of the legal conflict. Skills such as emotional intelligence and empathy will distinguish those lawyers who are merely knowledgeable about the law from those lawyers who can deliver this knowledge in bespoke legal counsel whilst supporting their clients.¹⁷²

167. Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999); Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811 (1999).

168. In negotiation, “BATNA” refers to a party’s best alternative to negotiated agreement—the thing the party will do or the path the party will turn to should the current negotiation go awry. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 99–108 (Bruce Patton ed., 2011).

169. See, e.g., Jacqueline Nolan-Haley, *Mediation: The “New Arbitration”*, 17 HARV. NEGOT. L. REV. 61 (2012).

170. Rather, lawyers will be more likely to formulate realistic BATNAs by applying their interdisciplinary knowledge as well as data collected from historic ODR processes.

171. See Melamed, *supra* note 13.

172. See, e.g., SUSSKIND, *supra* note 134, at 75–77. We note that the literature confuses the term “empathy” to mean “emotional intelligence.” As explained below, we use “emotional intelligence” as an umbrella term to denote both the awareness and skills to understand and respond to the range of

An elephant in the room, in this emerging discussion, is our deepest fear that we will all become extinct, as the essence of our humanity, our emotions, are increasingly supplanted by more objective and rational digital processes.¹⁷³ Whether or not lawyers in the ODR evolution will require both emotional intelligence and a psychological understanding of conflict and decision-making continues to be a hotly debated issue. After all, don't clients want foolproof information, *sans* the risks of human error and irrational thinking caused by emotion? Several scholars, and we agree, have opined that lawyers in the ODR evolution will need to be empathetic.¹⁷⁴ Others have bristled at the idea that in an increasingly technological world, clients will turn to lawyers for their emotional fix.¹⁷⁵ Yet, authentic human engagement remains a basic human need.¹⁷⁶ A resounding amount of research reinforces that, as our world becomes more digitalized, human need for human connection grows.¹⁷⁷ A natural corollary is that in the ODR

people's emotions. We use "empathy" as the cognitive, emotional and skill ability to understand and demonstrate this understanding to another's perspective.

173. We remember with humor and irony Woody Allen's 1973 movie *Sleeper* in which a man dies, is cryogenically frozen, and reawakens two hundred years later to a changed world in which humans' sexual needs are satisfied by a ten-second visit to an orgasmatron. *SLEEPER* (United Artists 1973). Social psychologists bombard us with research that shows how our emotions and biases distort our thinking. In fact, recent research would think Woody Allen might have been psychic. Indicators are that the next generation is turning more to technology than to each other for sexual gratification to disentangle from the complications of human emotions when they seek sexual gratification. See Katie Julian, *Why are Young People Having So Little Sex?*, ATLANTIC (2018), <https://www.theatlantic.com/magazine/archive/2018/12/the-sex-recession/573949/> [<https://perma.cc/6V54-8BNL>]; Belinda Luscombe, *Why Are We All Having So Little Sex*, TIME (Oct. 26, 2018), <http://time.com/5297145/is-sex-dead/> [<https://perma.cc/ZC4S-BAXV>] (suggesting that the digitalization process is part of the reason young people are having less sex). For some, this response is a corollary of the workings of social science research that demonstrate how our emotions can distort rationale thinking. See generally DANIEL KAHNEMAN, THINKING FAST AND SLOW (2013).

174. See SUSSKIND, *supra* note 134 at 76–77.

175. See, e.g., DEBORAH R. HENSLER, RECONSTRUCTING BIG LAW: THE BIG PICTURE, IN BIG LAW IN LATIN AMERICA AND SPAIN: GLOBALIZATION AND ADJUSTMENTS IN THE PROVISION OF HIGH-END LEGAL SERVICES (Manuel Gómez & Rogelio Pérez-Perdomo eds., 2018).

176. See Sherry Turkle, *Authenticity in the Age of Digital Companions*, 8:3 INTERACTION STUD. 501-17 (2007), <https://www.dhi.ac.uk/san/waysofbeing/data/communities-murphy-turkle-2007.pdf> [<https://perma.cc/86FV-ZKZQ>].

177. Steven van Belleghem, *When Digital Becomes Human*, 17 J. DIRECT DATA DIG. MKTG. PRACS. 2, 2-4 (2015), <https://link.springer.com/article/10.1057%2Fdddmp.2015.36> [<https://perma.cc/W5R7-6FAX>]; Zach St. Louis, *Thomas Friedman on Human Interaction in the Digital Age*, ASPEN INST. (Jan. 10, 2017), <https://www.aspeninstitute.org/blog-posts/thomas-friedman-human-interaction-digital-age/> [<https://perma.cc/TK5G-8CC7>] (stressing the sustained need for human connection and relatedness in the digital age); THOMAS FRIEDMAN, THANK YOU FOR BEING LATE: AN

evolution clients will want lawyers skilled in providing a human dimension to their conflict resolution experience.

We intentionally use the term “emotional intelligence” rather than “empathy,” to denote the broader range of affective skills lawyers will need to be competent in the ODR evolution. “Emotional intelligence” is an umbrella term capturing our awareness and understanding of the emotional dynamics within ourselves and between others.¹⁷⁸ Empathy is just one aspect of emotional intelligence.¹⁷⁹ In suggesting that clients might come to require empathy and emotional intelligence from their lawyers, we are suggesting that tapping our core humanity will become a vital adaptive skill in the ODR evolution. Emotionally intelligent attorneys will also find that this capacity will allow them to engage constructively with the range of interdisciplinary consultants that may be involved in a given case. Finally, it will allow them to engage more effectively with stakeholder counterparts in ODR-design conversations.

5. *Reliance on Higher Cognitive Processes*

The legal profession has always relied on higher cognitive thought processes. The distinction between these and lesser-required cognitive domains, however, is likely to become even sharper in the evolving justice system. Benjamin Bloom, a renowned educational psychologist, created a hierarchical taxonomy of cognitive objectives¹⁸⁰ in 1956,¹⁸¹ revised in 2001,¹⁸² that provides a useful framework to help us distinguish those cognitive processes that lawyers will need to master in an ODR-infused justice system. Starting with the simplest, the cognitive skills identified

OPTIMIST’S GUIDE TO THRIVING IN THE AGE OF ACCELERATIONS 450 (2016) (identifying “isolation” as humanity’s fastest growing disease).

178. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (2005); Noam Ebner & Andrea Schneider, *Social Intuition*, in *THE NEGOTIATOR’S DESK REFERENCE*, 127–42 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017).

179. See *id.*; see also Elayne E. Greenberg, *The Power of Empathy*, 9 N.Y. DISP. RESOL. L. 8, 8–10 (2016).

180. Genevieve Marie Johnson, *Functional Internet Literacy: Required Cognitive Skills with Implications for Instructions*, in *DIGITAL LITERACIES: CONCEPTS, POLICIES & PRACTICES* 38 (Colin Lankshear & Michele Knobel eds., 2008).

181. *Id.*

182. See Patricia Armstrong, *Bloom’s Taxonomy*, VAND. U. CTR. FOR TEACHING (2019), <https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy/> [<https://perma.cc/487J-HRY3>].

include knowledge, comprehension, application, analysis, evaluation, and synthesis.¹⁸³ Lawyers will have less of a need to master those lower-ordered cognitive skills such as basic knowledge, memory, and recollection because these skills will increasingly be more efficiently and more cost-effectively provided by digitalization and artificial intelligence.¹⁸⁴ Importantly, lawyers can develop and master the higher-level cognitive skills through self-improvement¹⁸⁵ and through the readjustment of law school curriculum.

In his book *Tomorrow's Lawyers*, Professor Richard Susskind confirms that lawyers will need higher cognitive skills of analyzing, synthesizing, and evaluating to remain relevant in a justice system that is penetrated and disrupted by technology.¹⁸⁶ They help lawyers maintain relevance, Professor Susskind explains, by enhancing their efficacy as the negotiators, strategists, and advocates that will be needed in this new era.¹⁸⁷ Susskind further forecasts that that this reprioritization of strategic, advocacy, and negotiation skills will reshape the role of lawyers, law firms, and in-house counsel in the technological era and make them more focused on problem-prevention and problem-resolution.¹⁸⁸

6. Entrepreneurial Ability

In the transitioning legal environment, lawyers must develop the entrepreneurial flexibility to reshape and effectively market the legal skills they offer to clients.¹⁸⁹ Within this skillset, we include the willingness to unbundle the legal services lawyers offer¹⁹⁰ and the inventive knack for

183. *See id.*

184. *See, e.g.*, SUSSKIND, *supra* note 134, at 51–53.

185. *See generally* CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2007) (explaining that self-improvement helps individuals better understand their environment).

186. *See* SUSSKIND, *supra* note 134, at 75–77 (arguing that “law firms do not take sufficient time to immerse themselves in their clients’ environments,” and that such an intense analysis is necessary).

187. *See id.* at 34.

188. *See id.* at 72–73. We note that Susskind’s analysis was not focused on ODR in particular, but rather on the economics and structure of the legal market after this will be significantly altered by technology.

189. *See, e.g.*, Cari Sommer, *How Entrepreneurship is Reshaping the Legal Industry*, *FORBES* (July 24, 2013), <https://www.forbes.com/sites/carisommer/2013/07/24/how-entrepreneurship-is-reshaping-the-legal-industry/#63594ab2efea> [<https://perma.cc/Y6VV-Z3XZ>].

190. For more on the topic of unbundling the package of legal services lawyers and firms often offer clients (e.g., representation in a case, start to finish) and tailoring bespoke services to suit client’s specific needs, see FORREST S. MOSTEN, *A GUIDE TO DELIVERING LEGAL SERVICES A-LA-CARTE* (2000); Stephanie L. Kimbro, *Law A La Carte: The Case for Unbundling Legal Service*, A.B.A. (Sep.

tailoring and re-bundling them to suit clients' needs. Lawyers already have many of the negotiation and analytic skills that are needed to be good entrepreneurs.¹⁹¹ To successfully adapt, lawyers will also have to overcome their tendencies to be risk-averse and to "over-lawyer," toxins that dampen the entrepreneurial efforts needed to go forward in the digital age.¹⁹² Ultimately, lawyers' success will depend on being able to align their added value with clients' changing justice needs. An entrepreneurial mindset, directed towards strengthening justice, is likely to mesh well with the mindsets of the courts and ODR service providers in conversations on ODR system design.

D. Thinking Like a Lawyer in the ODR Evolution

The reprioritization of the skills we have identified above will transform the meaning of "thinking like a lawyer." In the ODR-infused justice system, "thinking like a lawyer" will have a different meaning than it does today¹⁹³ in three significant ways. First, the higher-ordered cognitive skills such as analyzing, synthesizing, and evaluating that distinguish the top lawyers of today will have even greater relevance in the ODR-infused justice system. Second, as identified above in our discussion of interdisciplinary skills, "thinking like a lawyer" in an ODR-infused system will require lawyers to have a cognitive understanding about a broader range of subjects than just laws and statutes, and an interdisciplinary knowledge of how these subjects intersect in the real world.¹⁹⁴ In the digital justice age, lawyers will also have to be familiar with such topics as economics and psychology so that the lawyer can fully appreciate the client's presenting conflict and

26, 2018), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/september_october/law-a-la-carte-case-unbundling-legal-services/ [<https://perma.cc/V35A-YZGR>]; see also SUSSKIND, *supra* note 134, at 29–38 (using the term "decompose" rather than "unbundle," with the same intent).

191. See, e.g., Tiyani Majoko, *5 Reasons Why Lawyers Are Great Entrepreneurs*, HUFFPOST (June 2, 2018), https://www.huffingtonpost.co.za/tyani-majoko/5-reasons-why-lawyers-are-great-entrepreneurs_a_23333093/ [<https://perma.cc/4YQU-PHRR>].

192. See, e.g., Jonathan Marciano, *10 Lawyers Turned Entrepreneurs Creating a Revolution in Law*, ENTREPRENEUR (June 14, 2017), <https://www.entrepreneur.com/article/295194> [<https://perma.cc/F9ZE-EHEL>].

193. See, e.g., Larry O. Natt Gantt II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2017).

194. See, e.g., SUSSKIND *supra* note 134, at 75.

recommend a settlement approach that is best for that client and the presenting conflict.¹⁹⁵ Third, as discussed above, “thinking like a lawyer” involves lawyers possessing greater emotional intelligence, in order to provide clients with the human insights and connection that are necessary in an increasingly digitalized justice age.¹⁹⁶ Thus, lawyers will need to be proficient in multiple domains¹⁹⁷ if they are to “think like a lawyer” in the evolving justice system.

In today’s practice of law, as we noted above, settlement counsel and dispute system designers are two categories of lawyers who regularly rely on higher cognitive skills. In the ODR evolution, lawyers skilled in settlement and dispute system design will gain even greater relevance as problem-prevention and problem-resolution become of even greater importance. In addition to legal knowledge, lawyers and law firms will be expected to have business knowledge about the client’s industry and to possess interpersonal skills including the ability to empathize.¹⁹⁸ Such interdisciplinary richness will help lawyers deliver the more bespoke legal counseling that customers will need and value.¹⁹⁹ In-house counsel will be valued for applying their knowledge of the business and their risk-management acumen.²⁰⁰

195. See Deborah Hensler, *Leuphana Honorary Doctorate 2014*, YOUTUBE (Jan. 7, 2015), https://www.youtube.com/watch?v=UKLIE0R_Sew [<https://perma.cc/H3GF-BWA5>]; SUSSKIND, *supra* note 134, at 137; Elayne Greenberg, ... *Because “Yes” Actually Means “No:” A Personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution*, 102 MARQ. L. REV. 197 (2018) (claiming that lawyers need to first understand the client’s personal values and preferences before recommending a settlement approach); Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants’ Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOL. QUARTERLY 69 (2018) (stressing the need for lawyers to first understand clients’ values before prescribing a course of action).

196. See, e.g., SUSSKIND, *supra* note 134, at 75; Zach St. Louis, *Thomas Friedman on Human Interaction in the Modern Age*, ASPEN INST. (Jan. 10, 2017), <https://www.aspeninstitute.org/blog-posts/thomas-friedman-human-interaction-digital-age/> [<https://perma.cc/TK5G-8CC7>] (discussing the sustained need for human connection and relatedness in the digital age).

197. Bloom’s taxonomy, discussed above, is actually only a part of Bloom’s overall work focusing on the cognitive domain. He envisioned similar taxonomies for the affective domain (which would include our discussion of emotional and social intelligence and elements of problem solving), and the psychomotor domain. For a discussion of Bloom’s work and its implications for legal education, see Sue Liemer, *Embodied Legal Education: Incorporating Another Part of Bloom’s Taxonomy*, 96 U. DET. MERCY L. REV. 69 (2017) (stressing the need for enhancing legal education with objectives from the psychomotor domain).

198. See SUSSKIND, *supra* note 134, at 137.

199. See *id.* at 75–76.

200. See *id.* at 89.

“Thinking like a lawyer” in an ODR-infused justice system also calls into question whether the more linear thought process that has traditionally been lawyers’ hallmark is relevant, or whether a more complementary understanding of how humans respond to conflicts and make decisions is needed.²⁰¹ A predominant number of today’s lawyers who have taken the Myers-Briggs test²⁰² are found to be “thinkers” rather than “feelers.”²⁰³ Similarly, applying the Kolb Learning Style Indicator has shown that lawyers are more intrigued with abstract theory and ideas than with people.²⁰⁴ Expectedly, lawyers are drawn to logical rather than practical resolutions.²⁰⁵

As problem-solving and emotional intelligence become the reprioritized skills needed to excel in this changing ODR-infused environment, we notice that these are the same skills in which women are known to excel. Therefore, we can’t help but optimistically hope that one result of the need to combine higher cognitive thinking with emotional intelligence and problem-solving is that the legal environment of the future will become more receptive and less hostile to women.²⁰⁶ Empirical research has repeatedly demonstrated that women have greater problem-solving skills and emotional intelligence than their male counterparts.²⁰⁷ As these skills gain greater value in the practice of law, we expect that women,

201. See Gantt, *supra* note 193, at 443, (explaining that a linear thought process is part of the traditional ideals related to “thinking like a lawyer”); Armstrong, *supra* note 182.

202. A personality test evaluating takers along four dichotomies: favorite world, information, decisions, and structure. *MBTI Basics*, MYERS & BRIGGS FOUND., <https://www.myersbriggs.org/my-mbti-personality-type/mbti-basics/> [<https://perma.cc/7MTJ-H3QB>].

203. See, e.g., Stacey Romberg, *The Quirky Lawyer: Understanding the Genius of Personality Types Part 2*, STACEY L. ROMBERG ATT’Y AT L. (Mar. 21, 2016), <https://staceyromberg.com/2016/03/the-quirky-lawyer-understanding-the-genius-of-personality-type-part-2/> [<https://perma.cc/5REL-PJ4U>]; Jennifer Alvey, *The Other Key Lawyer Personality Trait: Think, Don’t Feel*, LEAVING L. (Dec. 10, 2018), <https://leavinglaw.wordpress.com/2010/12/08/the-other-key-lawyer-personality-trait-think-dont-feel/> [<https://perma.cc/UB6R-KR3U>].

204. Gantt, *supra* note 193, at 424. The Kolb Learning Style Inventory is a system “developed by [psychologist] David A. Kolb . . . designed to help individuals identify the way they learn from experience.” See generally ALICE Y. KOLB & DAVID A. KOLB, *THE KOLB LEARNING STYLE INVENTORY 4.0 2* (Experience Based Learning Systems 2013).

205. See Gantt, *supra* note 193, at 424.

206. See Christina Violante & Jacqueline Bell, *Law360 Glass Ceiling Report, By the Numbers*, LAW360 (May 28, 2018), <https://www.law360.com/corporate/articles/1047285> [<https://perma.cc/3EFK-D9AK>].

207. See Travis Bradberry, *Why Women are Smarter Than Men*, FORBES (June 21, 2016), <https://www.forbes.com/sites/travisbradberry/2016/06/21/why-women-are-smarter-than-men/#3dd15fa317e6> [<https://perma.cc/3PBS-J33K>].

too, will be valued more. Optimistically, this will help shatter the ever-present “glass ceiling.”

To summarize, the new era will pose new requirements of lawyers. To “think like a lawyer,” many lawyers will need to adapt their modes of thinking, to be keenly analytical but also practical; grounded in logic yet attuned to emotion; and experts in law with interdisciplinary facility. The good news is that many lawyers already have these competencies and will only need to reorient their mindset. Others may require new knowledge or training. However, we suggest that none of the skills we’ve identified is beyond the reach of those currently practicing law.

And the next generation of lawyers? Certainly, our description of the changing justice environment, our forecasts for future developments, and our identification of the new skills required to support our clients and justice more generally, all have implications for legal education. Lawyers need to be educated so that they contribute to strengthening the justice system of tomorrow. This article is not the place to elaborate on these educational implications, beyond saying that many voices actively calling for changes in legal education have raised ideas that converge with them.²⁰⁸

208. Our identification and compilation of these six skills were initially based on our analysis of the needs of courts and particularly of clients, in the previous section. As we articulate in Elayne E. Greenberg & Noam Ebner, *What Dinosaurs Can Teach Lawyers About How to Avoid Extinction in the ODR Evolution* (St. John’s Legal Research Paper No. 19-0004, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317567, we recognized their reflections in many of the voices calling for change in the legal profession and in the field of legal education. Each identified one or more of these skills and argued their necessity from perspectives other than our own focus on strengthening justice in and through ODR. For example, Amani Smathers has advanced the notion of a T-shaped legal professional, a lawyer with roots (the vertical line of the T) strongly embedded in the law, with wide knowledge across multiple disciplines (the horizontal line). Beyond supporting our call for interdisciplinary facility, there is a connection between T-shaped professionals and innovation, converging with our notion of entrepreneurial ability. One universally helpful ‘top of the T’ is enhanced capacity with technology, which reflects our own call for enhancing digital literacies. See *The 21st-Century T-Shaped Lawyer*, A.B.A. (July 11, 2014), https://www.americanbar.org/publications/law_practice_magazine/2014/july-august/the-21st-century-t-shaped-lawyer/ [<https://perma.cc/95BQ-TQMC>]. Several law schools have begun moving towards implicating this model. See Mark A. Cohen, *Innovation is Law’s New Game, But Wicked Problems Remain*, FORBES (May 21, 2018), <https://www.forbes.com/sites/markcohen1/2018/05/21/innovation-is-laws-new-game-but-wicked-problems-remain/#34e7e0733890> [<https://perma.cc/42HE-4WZP>]. This model has been expanded and contextualized to define a 21st century competency model for attorneys by a group of law professors and professionals. See Natalie Runyon, *The “Delta” Lawyer Competency Model Discovered through LegalRnD Workshop*, THOMSON REUTERS (June 14, 2018), <http://www.legalexecutiveinstitute.com/delta-lawyer-competency-model/> [<https://perma.cc/RM85-EH3P>]. This delta-shaped model categorizes lawyer competencies into three domains: personal

CONCLUSION

Within the United States, courts are piloting ODR programs to help resolve the backlog of high-volume, low-dollar cases that lawyers have traditionally shunned. These programs are largely designed to be navigated by self-representing parties. As ODR is gaining a foothold in our justice system, it is touted as a discrete, efficient process that doesn't require litigants to use lawyers. This article explains how, in the long term, the explanation for the lawyerless design of ODR is simplistic, obscures the potential of ODR-infused justice, and weakens the broader justice mandates of the court. We posit that as ODR-infused justice programs take hold, ODR will expand its footprint in our justice system and will be used for a greater breadth of cases than originally piloted. This expansion of ODR, we forecast, will be a disruptive force that radically changes justice delivery and outcomes as we know them today. Therefore, the small-scale pilots of today have significant implications for the entire justice system of tomorrow.

Justice will be strengthened by involving the legal profession in the design, development, and implementation of ODR. As our court system has always done when it has considered alternatives to litigation, courts must include lawyers, one of the justice stakeholders, in the design and development of ODR, in order to be mindful of practical, discrete, and broader justice considerations. Lawyers, too, must come forth, and become actively involved in shaping ODR justice. This involvement serves all three justice stakeholders: the courts, litigants, and lawyers themselves.

Lawyers offer different justice perspectives and concerns that, when considered, could strengthen the justice outcomes of ODR. Moreover, their participation in these design processes would take into account the new roles lawyers could play in an ODR-infused justice system. As full litigative representation continues to be an exception to the norm, lawyers could counsel, coach and advocate for litigants in ODR processes. Furthermore, lawyers could provide clients with an objective assessment of the fairness and integrity of individual ODR systems. In complex cases, lawyers could

effectiveness skills; process, data and technology skills; and legal knowledge and skills. *Id.* Like the T-shaped lawyer model, this model converges with many of our own suggestions.

strategize about whether to use ODR, other alternatives to litigation, or traditional litigation to resolve the presenting matter.

As our justice system continues to evolve, the court could take heed of these new lawyer roles and design the new system such that justice can be strengthened by lawyers' participation, without delivery of justice to parties being dependent on their representation. While lawyers' input will not persuade courts to protect lawyers' traditional domains of occupational activity, it will doubtlessly remind courts to mindfully consider each case type or legal area under consideration for ODR as to its suitability from a justice perspective. This will help courts to identify those discrete areas in which designing a lawyerless process will weaken, rather than strengthen, justice.

ODR, as any justice innovation, provides an opportunity for lawyers to reimagine their roles, reprioritize existing skills and develop new ones. It is an opportunity for lawyers to hone higher cognitive skills, develop digital literacies, and "think like a lawyer" in a more interdisciplinary framework. Furthermore, it is an opportunity for law schools to synchronize their curriculums to teach these new skills and their advantageous use in the new justice system. Combined, all these activities will strengthen not only ODR justice, but the wider justice system that ODR supports. Inclusion of the legal profession in the process, as well as the profession's evolution to support clients in the new system, will reinforce and re-invigorate the court's broader capacity to provide access to justice, and just outcomes, for all.

