

Where Have All the Lawyers Gone?

The Empty Chair at the ODR Justice Table

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Abstract

We are currently witnessing a revolution in access to justice and a parallel revolution in justice delivery, design and experience. As dispute resolution design scholars tell us, the implementation of any new dispute intervention plan in a system should involve all of its stakeholders from the beginning. In our justice system there are three primary stakeholders, who have been traditionally involved in processes of innovation and change: the courts, the parties and the lawyers. Courts and parties have been involved in the development of online dispute resolution (ODR). However, one significant justice stakeholder, the legal profession, has been relatively absent from the table thus far – whether by lack of awareness, by lack of will or innovative spirit or by lack of invitation: lawyers.

Keywords: legal profession ODR, system design, courts, legal practice.

1 Introduction

We are currently witnessing a revolution in access to justice and a parallel revolution in justice delivery, design and experience. As dispute resolution design scholars tell us, the implementation of any new dispute intervention plan in a system should involve all of its stakeholders from the beginning. In our justice system there are three primary stakeholders, who have been traditionally involved in processes of innovation and change:¹ the courts, the parties and the lawyers. Courts and parties have been involved in the development of online dispute resolution (ODR). However, one significant justice stakeholder has been relatively

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1 See S. Smith & J. Martinez, 'An Analytic Framework for Dispute Systems Design', *Harvard Negotiation Law Review*, Vol. 124, 2009, pp. 129-133; L. Blomgren Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', *Ohio State Journal on Dispute Resolution*, Vol. 24, 2008, pp. 46-47.

absent from the table thus far – whether by lack of awareness, by lack of will or innovative spirit or by lack of invitation: lawyers.²

We appreciate that, for many, this is a very difficult conversation and one that has been avoided. We encountered such avoidance both in the legal field and in the ODR field. Our own efforts to engage the legal community in discussion of this issue have elicited mixed reactions. Attempting engagement through the academic's default method of writing articles on ODR and its impact on the legal profession, we encountered recurrent rejection from leading law reviews. Colleagues in practice and academia with whom we discussed the issue largely responded with indifference, perhaps stemming from a fundamental disbelief that disruptive change could ever manifest in the courts. That is not to say that we never encountered displays of interest from our colleagues.³ Some future-oriented law teachers helped and encouraged us to pursue the issue further. In greater clusters, law students tended to grasp and more readily accept the impact of the court-ODR revolution on their future careers. To our relief, we also found that those engaged in the law and public policy sphere showed greater interest in this topic than any other legal field.⁴

Looking at this same issue from the perspective of the ODR field, we can say that so far as we know, the issues of lawyers' engagement in ODR design or their roles in ODR procedures, whether in the courts or in private proceedings, have never been significantly discussed by the ODR community. These have never been on the agenda at past meetings of the International Forum on ODR, explored in discussions at Cyberweek conferences, been the topic of articles in the *International Journal on Online Dispute Resolution* or raised in any other form in any other venues in which this community convenes, discusses or publishes. In conversations with academics and professionals involved in ODR we observed that they seemed generally interested by the sweeping absence of lawyers from the ODR planning arena but not particularly concerned by it. If lawyers wanted to miss out on a historic opportunity, their thinking seemed to go, that is their problem. While we understand the sentiment and its roots, we also think that in both the short term and over time, lawyers' absence from court-ODR would become ODR's problem, and the court's and the public's as well.

- 2 For a discussion of the responses of the three stakeholders to Court ODR, and a discussion of many of the topics raised at this session, see N. Ebner & E. Greenberg, 'Strengthening ODR Justice', *Washington University Journal of Law & Policy*, Vol. 63 (forthcoming 2020). Current draft available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3434058.
- 3 One topic that legal educators were anything but indifferent about was our suggestion that legal education needed to adapt significantly to prepare students to function professionally and thrive in the new justice system. For a discussion of these changes, see E. Greenberg & N. Ebner, 'What Lawyers Can Learn from Dinosaurs about Avoiding Extinction in the ODR Evolution'. *St. John's University School of Law Legal Studies Research Paper* No. 19-0004, 2019. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317567. While some colleagues objected strongly, we discovered others, equally passionate, advocating for change in legal education for other reasons, with recommendations similar to our own.
- 4 Indeed, our article *Strengthening ODR justice* will be published in the *Washington University Journal of Law & Policy's* upcoming volume on 'New Directions in Dispute Resolution' forthcoming in Spring 2020.

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Given the lack of discussion in the various fields surrounding court-ADR, and with court-ODR snowballing as it currently is, we considered that the time for this conversation had arrived.

Therefore, at the 2019 International Forum on ODR held in Williamsburg, VA (hereafter, 'the Forum'), we took the opportunity to raise these issues with the ODR experts, court leaders and representatives, attorneys and ADR professionals attending our session. The session was framed, and conducted, as a community conversation. We provided brief introductory comments based on our ongoing research into the topic and framed questions for exploration. We then turned these over to the community of participants for discussion. We aimed to have participants explore three questions:

- 1 What value can lawyers add to the planning and design process of court-ODR systems?
- 2 What value can lawyers contribute as participants in the court-ODR procedures themselves?
- 3 Going forward, how might we more effectively engage lawyers to participate constructively in the design, implementation and delivery of court-ODR programmes and procedures?

In what follows, we describe our remarks framing each topic and share some of the highlights of the conversation.

2 Question #1: What Value Can Lawyers Add to the Planning and Design Processes of Court-ODR Systems?

To set the stage for this part of the discussion, the authors role-played conversations between court administrator and bar leaders, court administrators and ODR designers, and bar leaders and lawyers to help explain lawyers' absence from the ODR playing field.⁵ These skits brought to life the dynamics of how courts may or may not reach out to lawyers or to bar associations to participate in court ODR planning conversations, how lawyers or bar leaders may or may not be receptive to such outreach, and how lawyers might respond once they realize that ODR is spreading throughout the court system.

There are many other possible scenarios, of course. Indeed, in practice, we have found that lawyers and the bar have been more, or less – but nearly always less – engaged in the design and implementation of the many ODR programmes and pilots rolling out across the US and around the world. As these initiatives were forming, invitations soliciting lawyers to participate in the process have been issued and ignored, issued and accepted or not issued at all. Lawyers' participation in ODR design has been at times constructive, and at times disruptive. One way or another, and with no intention to assign any blame, we can recognize that the legal profession is less than fully engaged in the design and start-up processes of court-ODR.

5 See these role-plays at <https://www.youtube.com/watch?v=1ffaba2nSR8>.

Before discussing the question of *how* to engage the legal profession more successfully, however, we should consider what the *why*, or what the *value*, of doing so might be. What value can lawyers add to the planning and design process of Court ODR systems?

We found the community's response to this fascinating, particularly in that *no* suggestions were made for any positive value that increased lawyer involvement might bring. We might characterize the comments participants made along several themes:

- *ODR is the Uberization of justice... deal with it:* Uber did not ask the cab drivers how they felt before launching their service. Smiles Club did not ask orthodontists how they felt about the notion of seeing a service launched that encroached on their previously protected territory. Why grant lawyers special or preferential treatment at all, regarding the decision to implement ODR or the design of the system?
- *Bring more lawyers on board?* We should be bringing *other* professionals on board – psychologists, social workers, educators and members of other 'helping' professions – finally giving them the voice they had traditionally been denied while this was disproportionately granted to lawyers.
- *Lawyers are involved:* Those usually involved in envisioning and designing court-ODR systems – court administrators, judges, clerks, ADR personnel, and ODR system-designers – include, in their ranks, many members of the legal profession, who work in the service of the courts. Surely, their legal insight is enough to design fair and just systems. What special need requires soliciting input from additional, external, legal professionals?

After this discussion, we made two suggestions of our own, regarding the value of engaging lawyers in the planning and design stages of ODR. The first relates to lawyers' positive contribution to strengthening the system's justice outcomes; the second relates to the opportunity to pre-empt the inevitable backlash and the resistance that lawyers will mount against ODR, bringing the legal field's response up to the front end of the process, where it might contribute constructive input.

Strengthening justice: Most court-ODR systems are designed to handle low-value cases. Still, no matter how small the case-value is, justice is equally as important. External legal professionals have a role to play in making sure justice is safeguarded in any court-ODR system design. We are certainly not suggesting that lawyers who are part of the court system do not value justice considerations! However, they have also other interests vying for their attention such as court budgets, high caseloads and the efficient disposition of judges. The wider legal profession can add an external review as well as the practical perspective of how system-designs are encountered and navigated, and sometimes manipulated, by disputants. Incorporating these perspectives into early planning and design can help everybody involved keep their eye on the justice ball. In this sense, involving lawyers in ODR system design will strengthen the justice that ODR ultimately provides. Therefore, as we have written, lawyers

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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....⁶

2.1 *Preempting the ODR Wars*

Additionally, court-ODR is currently being introduced to address limited types of low-value claims. Resolving these cases might be viewed by everyone, including legal professionals, as enhancing access to justice without affecting the economics of the legal services market. However, court-ODR is going to grow, both in variety of case types and in case value-cap, beyond the realm of such 'access-to-justice' cases. At some economic value-point, the legal profession will begin to feel itself and its income encroached upon by court systems guiding disputants towards self-representation and providing them the tools to do so.

At that point, it is nigh-inevitable that the legal profession's current silence will be replaced with vocal opposition to court-ODR. Not seeking to be too cynical, we still suggest that much of this resistance, when ultimately voiced, will be framed in terms of justice, e.g. 'Justice online is justice denied', 'Computer-generated advice is no substitute for competent legal counsel', and 'The court employing robots for judges is a travesty of justice'. For good measure, we can expect accusations that court-ODR systems providing education, advice or guidance constitute unauthorized practice of law. This prediction is well grounded in past experience; many of these claims echo those raised in the resistance mounted by the legal profession to the development of Alternative Dispute Resolution, some 25-30 years ago. This time, as a cherry on top, the resistance will highlight one novel and deep human fear, the spectre of Skynet taking over our judicial system. Whether or not this will be a battle the legal profession will ultimately lose, the ODR wars will have a cost in terms of time, focus, resources and pace of spread of court-ODR. It will also result in tweaks to the technological platforms and the justice process – additions, eliminations and redundancies resulting from post-design and post-conflict compromises, rather than from justice concerns or collaborative system-design. The public will pay a price – in cost, in access to justice and in the quality of justice.⁷

Both of these suggestions seemed to resonate with participants, leading to enthusiastic participation in the discussion of how lawyers could be constructively engaged in early planning phases. Before moving on to that conversation (Question #3), we asked participants their thoughts on lawyers' potential roles supporting clients in actual ODR proceedings.

6 Ebner & Greenberg, forthcoming 2020, p. 35 of draft.

7 In the session, we also noted that court leaders and ODR designers – of which there were many present – would also pay a price in frustration, delay and stress before the ODR wars eventually settled down. *See Id.*, pp. 34-35 of draft.

3 Question #2: What Value Can Lawyers Contribute as Participants in the ODR Procedures Themselves?

Across court-ODR systems, one thing seems to hold constant: legal participation in the ODR proceedings themselves – the actual online negotiation, mediation, litigation or other proceedings that parties undergo in the court-ODR environment – is *extremely* limited. Most of the systems we are familiar with are primarily designed to be navigated by parties on their own. In fact, this is one of the most fundamental design instructions included in the systems' design specifications. To demonstrate this, we asked participants to consider the systems that had been introduced during the first days of the Forum, preceding our session: nearly all of them touted their design as tailored to allow, facilitate or encourage easy and intuitive lawyerless participation. In fact, of the many systems introduced at the Forum, we noted only one platform designed specifically *for* lawyer-represented cases, the Singapore Court Dispute Resolution platform for conducting case management and early evaluation of motor vehicle accident claims.⁸ We might add to this example the Chinese Internet Court, which explicitly allows for lawyer participation, although the system is designed to be navigated by unrepresented laypersons as well.⁹ However, it is an understatement to say that systems designed for represented cases are the exception rather than the norm. In the great majority of court-ODR platforms we have surveyed in our research, similar to the platforms introduced in previous Forum sessions, lawyer participation is either explicitly prohibited, allowed but simply designed out of the default (e.g. the default view has no place for a lawyer to sign in; the default automated negotiation system conveys messages between two parties only), or simply rendered unnecessary by the degree of system-provided guidance allowing laypersons to navigate the system on their own.

None of this is by chance; there are reasons that ODR system-design omits lawyers from the proceedings. The first is a growing recognition in the courts that their duty to the public outweighs considerations of tradition or of affinity towards the legal profession. Given the opportunity to help the public by revolutionizing the delivery of justice, the courts feel less bound to consider lawyers' dependence on the status quo to support the legal services market.¹⁰ Second, there is a clear intention among court leaders and court-ODR visionaries, spoken or unspoken, of *unhooking access to justice from access to lawyers*.¹¹

Inviting participants to consider this intent to 'delawyerize' justice proceedings critically, we asked, 'What value can lawyers bring to proceedings, from a jus-

8 See J. Yeo, 'From the Physical to the Virtual: Online Dispute Resolution for Motor Accident Claims', *Presentation at the 19th International Forum on ODR, Oct. 2019, Williamsburg VA*. Available at: <https://s3.amazonaws.com/dntstatic//f8b92f6d-70f9-4b57-68e7-5835de756454>, slides 31-54.

9 See Ebner & Greenberg, forthcoming 2020, pp. 14-15 of draft.

10 *Id.*, pp. 33-34 of draft; explicit voices from court leaders on this topic can be found in n. 143 in the draft.

11 *Id.*, pp. 26 and 28 of draft.

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tice perspective?’ Participants’ responses to this question can be broken down into three themes:

Lawyerless=Good: Generally, participants voiced support for lawyerless proceedings, particularly given the types of cases currently directed to court-ODR: low-value, relatively simple, claims in which providing ODR is viewed as enhancing access to justice rather than limiting anybody’s options or encroaching on lawyers’ turf. Will this perception continue to hold later on, when higher-value caps and more complex dispute topics are added to ODR’s purview? Participants seemed comfortable to kick that can on down the road.

Justice can be lawyerless without any sacrifice: One response that clearly resonated with participants was the statement that justice is simply not dependent on lawyers and that it can be fully achieved in non-lawyered proceedings. In other words, the notion that lawyers bring something essential to court proceedings only holds water under the traditional legal paradigm, procedure and structure; that default no longer applies in an ODR-infused court system. Perhaps ODR-infused court systems can provide lawyerless justice, across the population, that is *better*, individually and overall, than the selectively-lawyered justice of the past.

Return of the Lawyers: Participants noted that ODR platforms could accommodate lawyer participation, or have (or can have) the necessary features built into the programme, even if these are ‘turned off’ for the current caseload. ODR will not remain completely lawyerless forever.

4 Question #3: Going Forward, How Might We More Effectively Engage Lawyers to Participate Constructively in the Design, Implementation and Delivery of Court-ODR Programmes and Procedures?

Here we asked participants to take into account not only the skits we had put on at the beginning of the session and the scant existing accounts of ODR programme development¹² but also their own experience as court leaders and representatives in engaging the legal profession. The first round of responses tended towards acknowledging that our description of lawyers’ absence from ODR planning was largely apt. Some participants spoke to the legal profession’s lack of interest or initiative. Representative comments were:

- ‘Well, we sent out four invitations to the Bar and never heard back from them’
- ‘We invited them, but they never showed up’

And, more generally,

- ‘Lawyers are burying their heads in the sand’

There were also those who stated that in the course of their initial discussion of ODR, they did not solicit lawyer participation, whether because they did not feel it was necessary (‘All the court staff involved in this are lawyers’) or because they

12 See, e.g., D. Larson, ‘Designing and Implementing a State Court ODR System: From Disappointment to Celebration’, *Journal of Dispute Resolution*, Vol. 2, 2019, pp. 77-102.

thought it would not contribute to a constructive process ('Where I am, that would have been a whole barrel of mess!'). Still others candidly shared that although lawyers had been invited to partake in the planning discussions, they did not feel bad when those said lawyers failed to show up at the meetings.

We next asked participants to shift focus and jointly generate a list of positive steps that could be taken to engage the legal profession. What actions have been successful in practice? What others are likely to help in future efforts? Assuming that, after this session, you consider lawyer participation to have some value, we asked, what might be best practices for engaging them constructively?

Several participants mentioned the value of 'early on' – bringing lawyers in at the very first stages of the court-ODR consideration process. A representative from the New Jersey courts noted they had engaged the main bar as well as multiple speciality bars right from the start, placing them on committees as these were set up.

This example also speaks to the suggestion that several participants raised of utilizing existing relationships to engage the bar. In courts in which a close working relationship with the bar exists, this can be utilized; if not, perhaps a particular judge or court official might have a special relationship or a respected platform with the bar, and the court's ODR programme manager can utilize it to build an ODR-focused bridge to the bar.

A non-lawyer ODR systems-designer described their approach, which involves using employees who are lawyers as ambassadors whenever engaging with groups of lawyers or the bar. It is no secret, we think, that lawyers often prefer to speak with other lawyers, and this group affiliation opens doors that might be closed to the un-barred. Court-ODR project managers who are not themselves attorneys, might consider using such ambassadors.

In the discussion's first part, bar associations and their leadership were recurrently identified as obstacles to engagement. When the conversation shifted to identifying proactive steps that court-ODR programme leaders could take to engage the legal profession, several suggestions were offered sharing the theme of going *around* these organizations and their leaders. Individual lawyers, participants noted, were often far more receptive to ODR than bar association leaders. One participant noted that while the bar associations might still have the nuisance power to trigger the ODR wars, they do not have the clout that they used to, in the sense that their membership does not necessarily listen to them or follow their lead. Rather than working with the main bar leadership, participants advised (a) looking for alternative groups with more clout, and (b) appealing over or below the leadership's heads to those lawyers likely to listen. The examples they offered included the young lawyer, technology and the ADR sections as well as the legal aid community.

Another suggestion was to seek opportunities to introduce ODR in processes in which the legal profession is already involved. For example, the ODR programme of the Ontario Condominium Association Tribunal, an official state tribunal, developed out of a wider process of comprehensive review of condominium-related legislation in which the local bar and lawyers took part.

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Participants agreed that one possible way to engage the legal community would be to have the topic of court-ODR featured as a keynote at ABA conferences.¹³

While engaging lawyers on the topic of court-ODR, participants noted that framing was important: shift the focus away from the threat court-ODR might pose lawyers by reframing the conversation towards the opportunities, such as in business and jobs for lawyers, that it offers them.¹⁴

5 Our Analysis and Takeaways from the Session

In reviewing participants' comments and contributions throughout the session, we identified, and now try to make meaning of, several themes.

The first of these, is recognizing the degree to which session participants struggled to identify any value *at all* that lawyers could bring to strengthening ODR justice. Relatedly, we could not help but notice the session participants' negative perception of the organized bar. Joining these two together, we note that they are one more expression of the fundamental dissatisfaction people have with the organized bar and legal practice. This dissatisfaction has been echoed in discussions of access to justice and is evident in the growing number of pro se litigants who are voluntarily opting not to use lawyers even when they can afford them.¹⁵ Perhaps such dissatisfaction is now playing out in ODR development.

The second is that participants initially seemed to think that lawyers' participation in court-ODR development processes was, at best, their own business. If they do not show up, they reasoned, they cannot complain later. As the conversation deepened, it seemed that this view shifted. Perhaps 'lawyers are burying their heads in the sand...', as one participant put it, but the same might be said for those who assume that when they eventually extract it, all will be well and they will accept ODR initiatives of the court post facto. In reality, if the bar wishes to object later on, it will not be silenced by suggestions that it should have woken up, and spoken up, earlier.

Third, there also seemed to be different views about whether court personnel and ODR designers involved in the process, many who are also lawyers, are in fact representing the full perspective of legal stakeholders. Many participants held the view that the fact that there are many court-internal lawyers involved in ODR

13 We added that this was particularly important for conferences of sections other than those of the Section on Dispute Resolution. Over the past few years, this section has been a strong promoter of ODR and an ally of the forces leading it into the mainstream of dispute resolution and the court systems. The Section's Executive Director, Linda Seely, participated in the Forum, actively demonstrating the constructive roles the Bar could play in partnering in ODR's entry to the courts.

14 Borrowing terms introduced in Greenberg & Ebner (2019), which employed metaphors of dinosaurs and meteorites to describe the potential impact of ODR on the legal profession, we would frame this as 'Focus on the evolution, not on the impending extinction'. We note that we have found this focus on opportunities particularly effective when talking with law students, who can eagerly view their field as a dynamic playing field on which nimble players will gain advantage.

15 See Ebner & Greenberg, forthcoming 2020, p. 28 of draft.

planning negates or relieves the necessity of engaging external legal professionals. Particularly so when you combine this with the fact that participants were hard-pressed to articulate any specific justice value that lawyers could contribute to the process even if invited. The inevitability of the ODR wars, and the desire to pre-empt some of its consequences, seemed to resonate with participants as reason for engaging with the legal profession up front more than any potential justice contributions of such engagement. However, we suggest that no matter what the motivation for engaging the legal profession, bringing them to the table offers them the opportunity to use their particular perspective and expertise to strengthen ODR justice. We hope they will utilize opportunities they are given.

6 Conclusion

This is one of those difficult conversations that make courts, ODR designers and lawyers uncomfortable. We believe, however, that it is a conversation that is long overdue and one that *must* take place. If we are committed to integrating ODR into the court's justice system, courts must look beyond their efficiency attraction to ODR and consider its qualitative justice outcomes. We believe that a more deliberative process that includes lawyers in the design, development and implementation of court-connected ODR services will help strengthen ODR justice outcomes. This session exposed some of the reasons for convening this inclusive process as well as some of the obstacles to doing so successfully. Participants offered a community-generated menu of suggestions for constructive court-ODR engagement with the legal profession. Going forward, what affirmative steps will the court-ODR community and lawyers themselves take to engage lawyers in helping to strengthen ODR justice outcomes?