

Despite recent implementation(s) of technological innovations in the practice of law, prior to and concurrently with the COVID19 pandemic¹, ODR, or online-dispute-resolution, has not yet reached its full potential. ODR, a practice which expands on mere eFiling or eNotifications², provides for litigation³ to proceed, from inception to disposition, with all its panoply of possible routes to resolution, entirely online. ODR offers the hope for all of the aforementioned goals, while simultaneously carrying the full support, authority, legitimacy, and power of the Courts to the outcome⁴.

Even without the existential pressures of the COVID19 pandemic, the expansion of ODR in the US⁵ has been dramatic, with statistics from The American Bar Association's Center for Innovation, indicating a 50% increase⁶ in such Court supported systems in each of the last five consecutive years⁷. Supporters of ODR, an off-shoot of the 1970s practice commonly known as

¹ Notably the widespread use of Zoom, Microsoft Teams, or Cisco WebEx video-conference platforms due to social distancing requirements.

² Via Email or Text.

³ Only Civil and Administrative causes of action are addressed herein. Criminal trials before a jury are not addressed.

⁴ National Center for State Courts; Online Dispute Resolution, "What is ODR?", <https://www.ncsc.org/odr/guidance-and-tools>

⁵ "Court ODR was pioneered outside of the United States in places such as Singapore, the Netherlands, and Canada", PEW Trust, "Online Dispute Resolution Moves From E-Commerce to the Court", June 4th, 2019. <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts>

⁶ The American Bar Association; Center for Innovation, "Online Dispute Resolution in the United States", September 2020, Page 3. <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf>

⁷ Prior to 2020.

"ADR" or Alternative-Dispute-Resolution⁸, hope to bring better access to justice and the legal system to the citizenry by encouraging Courts to increase ODRs widespread use and acceptance. An hopefully allegory would follow in that as much as ADR led to the widespread and now roundly supported use of mandatory mediation in most civil disputes, ODR would lead to an obvious evolution in the operations and procedures of the daily practice of law.

Currently, ODR seems to be expanding most significantly in the State of Michigan⁹, while nationwide trends appear to show that Traffic Court(s), resolutions¹⁰ of bench warrants for FTAs "Failures to Appear", and other simple high-volume civil matters are the most often currently handled¹¹ by ODR systems in the US. Some other early adopters show progress in ODR-implemented dispositions in Property, Tax, and Family Law matters¹². Nonetheless, and somewhat belying such astounding successes prior to COVID19, the best practices now indicate that an Opt-

⁸ PEW Trust, "Online Dispute Resolution Moves From E-Commerce to the Court", June 4th, 2019. <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts>

⁹ The American Bar Association; Center for Innovation, "Online Dispute Resolution in the United States", September 2020, Page 5. <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf>

¹⁰ As well as preventing FTA Capias by increasing access to Court via ODR.

¹¹ The American Bar Association; Center for Innovation, "Online Dispute Resolution in the United States", September 2020, Page 6. <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf>

¹² Self-Representative Litigants Network, Joint Technology Committee, "JTC Resource Bulletin; ODR for Courts", November 2017, Page 11, https://www.srln.org/system/files/attachments/ODR%20for%20courts_0.pdf

In/Opt-Out of an ODR is system is still necessary. First, because many citizens do not yet know how to use computer technology sufficiently, do not have access to robust enough technology to participate, and many still do not trust anything without a formal paper trial. Yet COVID19 has shown, admittedly supported by only anecdotal evidence so far, that when push comes to shove, even these best practices are merely “sauce for the goose” and should be rebuked by our leaders as such thoughts would have held humanity back when transitioning from the stone age to the bronze age.

Yet continued growth into fully implemented ODR requires the entire industry of law to accept that the current human practitioners, the current rules, the current procedures, the current ethics, and the current policies which govern this industry are not currently constructed to expand ODR without significant changes. ODR is not just a website, database, or an eFiling Portal. For its success, it may even take burdensome changes, for instance, requiring all Clerks of Court from different jurisdictions to use the same nomenclature, software, and even hardware¹³. ODR proponents would indicate that the goal of ODR is to have an entirely new way for citizens to access the law, not for the current practitioners and support staff to

¹³ Thereby limiting independence & budget control coveted by locally elected officials such as Clerk’s of Court.

adapt the legal procedures of 1985, 1995, or even 2005 to work with the technology of 2025. In other words, ODR proposes that the practice of law must change to fit the technology, not that technology should be used to support the current practice of law.

To avoid irrelevance¹⁴ while maintaining legitimacy¹⁵ in this customer-centric anytime/anywhere¹⁶ modern age, Courts and all facets of the practice of law, must recognize that "ODR-Law", when supported and sponsored by the citizenry, by and through the Courts, via taxes or fees, becomes a powerful tool of justice, but maybe not of profits. Many in the current industry of law will suffer financially when ODR becomes the codified, neutral, reliable, uniform, & comprehensive, standard for citizens to seek civil justice in global society. Yet many leaders already lament that citizens suffer through a legal system that takes too long and costs too much¹⁷. Painfully ODR may remove the need for Attorneys to draft all but the most unique of documents and pleadings. This auto population of documents and pleadings would make the Courts useful to the

¹⁴ Ebay Citation.

¹⁵ International Council on Online Dispute Resolution's Standards for maintaining legitimacy with the Implementation of ODR: <https://icodr.org/standards/>. "Accessible, Accountable, Competent, Confidential, Equal, Fair/Impartial/Neutral, Legal, Transparent"

¹⁶ "For example, nearly 33% of Franklin County, Ohio's ODR system use is after hours." Self-Representative Litigants Network, Joint Technology Committee, "JTC Resource Bulletin; ODR for Courts", November 2017, Page 5, https://www.srln.org/system/files/attachments/ODR%20for%20courts_0.pdf

¹⁷ Self-Representative Litigants Network, Joint Technology Committee, "JTC Resource Bulletin; ODR for Courts", November 2017, Page 1, https://www.srln.org/system/files/attachments/ODR%20for%20courts_0.pdf

average citizen without the often massive inefficiencies¹⁸ and massive expense of hiring an Attorney. Yet these pecuniary losses in the industry of law will not be uniform in nature, rather some support services, like court reporters, may have a boon from the volume and speed at which cases could be handled without travel time and expenses.

Indeed, society itself will benefit through the reduced environmental impact from significantly smaller Courthouses, Jails, and less travel related energy use from Judge to Janitor. Capitalism requires us to agree that if ODR when implemented, would massively reduce the budgets of Courts, reducing fees and taxes. Entire Courthouses could be eliminated along with the costs of maintenance, electricity, and physical plant employees. ODR would reduce the travel time and expenses of Judges, Attorneys, and citizens. ODR would assist in bringing justice to rural communities which may find themselves hours from the nearest Courthouse. Additional access to those with poor health, limited mobility, disabilities, childrearing duties, on military deployment, and those fearful of violence are obviously budgetarily beneficial to a capitalistic society without addressing the effects of ODR on the practitioners of law.

¹⁸ Self-Representative Litigants Network, Joint Technology Committee, "JTC Resource Bulletin; ODR for Courts", November 2017, Pages 8 and 31,
https://www.srln.org/system/files/attachments/ODR%20for%20courts_0.pdf

This is not a left-leaning or right-leaning political statement, rather a direct explanation of reality. The practice of law has changed before, it is changing now, and ODR will be the future. Let us all accept the future and embrace it instead of holding on to archaic ideas like local rules, procedural quirks in differing jurisdictions, Judge specific procedures, massive budgets for Clerk's staff(s), and the blight of unregulated and unnecessary Judicial Assistants/Paralegals upon the landscape of the law. Or we can limit ODR's widespread implementation and continue allow the law to appear to be a drag on society when no longer necessary if an open reimagination of the practice of law is pushed into reality. History will look at this moment and pass Judgement harshly, the practice of law has in ODR a chance to make itself look good in the public eye. Please do not let this opportunity pass without action.

The global spread of the COVID19 pandemic created in the United States a crisis surrounding a criminal Defendant's constitutional rights vis-à-vis the Sixth Amendment. These Sixth Amendment rights compel the Courts to provide any Defendant a public trial, a speedy trial, the right to confront witnesses/evidence against them, the right to counsel at each stage of the process, and unfettered access to the Courts¹. Even though the majority of Attorney(s) in the US believe that the Sixth Amendment rights are absolute, they are not. The Sixth Amendment is not absolute in that nothing prevents Courts from directing how trials and other stages of the legal process are conducted by the Courts. If they were absolute, would criminal trials still be held by candlelight, without air conditioning, and without other modern accruements of the practice of law?

In 2020, as the COVID19 pandemic unfolded, the Federal Courts, thousands of municipal courts, dozens of State Courts, and even the United States Supreme Court allowed virtual hearings of various types² in criminal cases, but generally only with the Defendant's permission³. Although these hearings were

¹ University of Chicago, Virtual Criminal Court.

By: Deniz Ariturk, William E. Crozier, & Brandon L. Garrett.

<https://lawreviewblog.uchicago.edu/2020/11/16/covid-aritürk/>

² University of Chicago, Virtual Criminal Court.

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³ In some cases it appears that the State's position on virtual hearings was not considered by the Court.

widely considered successful without fully robust ODR-Law options implemented, these virtual hearings were not without problems. The primary of which is the false perception that fact-finder(s) lack the ability assess veracity via the virtual link⁴, the ineffective or lack of confidential communication between the Defendant and Attorney⁵ via a virtual link, & issues concerning the preservation of error for appeal when a confrontation clause⁶ violation is caused by a technical glitch. Finally, the lack of access for lower-income citizens to robust technology plagues the patchwork of virtual options until a unified ODR-Law roll-out is mandated by law.

The first virtual standard issued in Maryland v. Craig, 497 U.S. 836, 857 (1990)⁷ in Federal Courts attempts to resolve the issue on when virtual testimony should be considered, but seems quaint and antiquated when considering what new technological

⁴ Since it is an oft belief that a majority human communication is non-verbal.

⁵ Although virtual bail hearings in were done faster (See: University of Chicago, Virtual Criminal Court. By: Deniz Ariturk, William E. Crozier, & Brandon L. Garrett. <https://lawreviewblog.uchicago.edu/2020/11/16/covid-ariturk/>) many virtual bail hearings resulted in higher bail amounts (See: Brookings Institute, "The Legal and Technical Danger of Moving Criminal Courts Online"; <https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online/>).

⁶ Law360/LexisNexis. "Defending The Right To Confrontation In Virtual Criminal Trials". By: Michelle Bradford and David Frazee. <https://www.law360.com/articles/1315557/defending-the-right-to-confrontation-in-virtual-criminal-trials>

⁷ "Following this opinion, the Craig test emerged as the applicable standard used when addressing whether a witness may testify virtually at a criminal trial. In general, the Craig test requires a court to: (1) hold an evidentiary hearing; and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured." (See: Law360/LexisNexis. "Defending The Right To Confrontation In Virtual Criminal Trials". By: Michelle Bradford and David Frazee. <https://www.law360.com/articles/1315557/defending-the-right-to-confrontation-in-virtual-criminal-trials>)

options are now available to the Courts. Therefore, the United State Supreme Court's ruling in Crawford v. Washington, 541 U.S. 36 (2004), indicated broadly that any witnesses must be in need of "protection" before the Confrontation Clause obligation could be satisfied via a virtual testimony when there is also opportunity for cross-examination.

Thus "protection" of the witness becomes the dispositive issue. Therefore, weather related shutdowns of Criminal Courts would also benefit from these virtual systems despite the perceived problems. For example, even today, with more powerful and more regular Hurricanes facing the State of Florida, there are multiple jurisdictions which have no existing standing court order concerning Hurricane shut down policies in criminal cases. Speedy Trial rights have been denied, errors of the Court obfuscated, and illegitimacy can be documented due to a lack of acknowledgement of the "protection" standard allowing for virtual satisfaction of, in this case, the Sixth Amendment Right(s) to a Speedy Trial. Florida essentially requires Attorney(s) working in multiple jurisdictions to endanger themselves with travel during Hurricanes, while simultaneously endangering the rights of their clients, all while ignoring Crawford's direction to use virtual means when protection of witnesses is possible.