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Elayne E. Greenberg

St. John's University School of Law

Noam Ebner

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**What Dinosaurs Can Teach Lawyers About How to Avoid
Extinction in the ODR Evolution**

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Elayne E. Greenberg and Noam Ebner

E-mail Comments to:
greenbee@stjohns.edu
St. John's University School of Law
8000 Utopia Parkway
Queens, NY 11439

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What Dinosaurs Can Teach Lawyers About How to Avoid Extinction in the ODR Evolution
Noam Ebner and Elayne E. Greenberg¹

Change is the law of life. And those who look only to the past or present are certain to miss the future.

John F. Kennedy²

Abstract

This paper is a wake-up call for the legal profession: Heed the justice changes that are upon us or risk extinction. Online dispute resolution (hereinafter ODR) is currently being incorporated into U.S and international court systems, re-shaping and re-defining justice as we know it today. Courts and clients, two stakeholders in our justice system, are increasingly receptive to ODR as a viable option to help provide and access justice efficiently and affordably. The legal profession, the third stakeholder in our justice system, however, has been slower to react. As ODR plays an increasingly prominent role in the court system, it will eliminate some of the justice roles currently reserved for lawyers, diminish others, and create new areas of practice. We highlight ODR innovations already in the justice system and project the paths of ODR's likely expansion. This paper alerts the legal profession and legal education community to take heed of these developments and become active contributors in shaping these justice innovations.

Viewing ODR's entry into the court as an evolution of the justice system, we identify six adaptive skills that will redefine "thinking like a lawyer" and help the legal profession avoid extinction and remain relevant. Some of these are currently marginally addressed in the law school curriculum,

¹ Noam Ebner is a Professor of Negotiation and Conflict Resolution in the Dept. of Interdisciplinary Studies at Creighton University. Elayne E. Greenberg is 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 thank Madeline Mallo, St. John's '19 for her diligent research assistance. We thank our ADR colleagues for their insightful comments at 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 manuscript.** 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.

² Address in the Assembly Hall at the Paulskirche in Frankfurt, June 26, 1963.

others are entirely absent. Law schools, the primary disseminators of legal education, must re-align their curriculum with the skills that practice-competent lawyers require to succeed in the ODR-infused justice system.

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Introduction:

This paper alerts the legal profession to the juggernaut of changes the online dispute resolution (hereinafter ODR) evolution is descending upon the legal system and suggests the potential roles lawyers may have to play in it to survive and succeed. The ideas presented in this paper incorporate the writings of ODR scholars and goes beyond them to project the impact that ODR will have on the courts and on the roles of attorneys. We chart ODR's incorporation into the court systems to illustrate that this process is already in motion and accelerating. Over the course of this exploration, we note changes that the incorporation of ODR into the court system will continue to descend on the legal process, the court system, and the very concept of justice itself. With this in mind, let's begin our exploration.

You have joined us on a visit to the Museum of Natural History in New York, at some point in the imaginable future. Fixated by the reproductions in the dinosaur exhibit, you wonder: how could such vibrant, powerful creatures have ever become extinct? A plaque on the wall explains that scientists still disagree on the cause of these great creatures' disappearance. Reading the suggested reasons – asteroid impact, volcanic activity, dust clouds, and temperature drop - you wonder what dinosaurs might have done – as individuals, and as a group – to weather the storm.

Moving on to the Hall of Human Society, you notice, next to exhibits of a Greek gymnasium and Roman baths, an exhibit marked '20th Century Courthouse,' which piques your curiosity. A large screen displays the exterior of a two-story brick-faced building, and its detailed floor plans indicating such areas as 'filing windows,' 'clerk's office,' 'attorneys' preparation rooms,' and 'judges' chambers'. The commentary provided notes that there were 36 human-waste disposal rooms in the building, ten areas for purchasing 'coffee' and 18 spots designated as 'waiting areas'. The second-story floor plan shows half a dozen 'courtrooms' positioned around a large 'atrium'.

Moving past the screen, you enter a life-sized, automated, re-enactment of courtroom activity. The room's rear is lined with empty benches, but the scene at the front is livelier. Lifelike androids sit in four areas: A raised table at the front, barred off from the rest of the room; two tables directly in front of it; a single seat off to its right, and another barred-off box, seating twelve androids, off to one side. The figure sitting in the raised box is clearly in an exalted judicial role, yet it is hard to discern the activity of the other androids. At different points, one android sitting at the front table rises suddenly and, raising one hand, exclaims something towards the judge while the others sit passively. At other points, these same androids rise, walk about, and speak towards the judge, the android sitting in the sole chair adjacent to the judge, and the twelve androids in the box. Trying to interpret what is going on, you intuitively try to figure out the rules as if this were a sports match, but cannot find any patterns, to say nothing of any system of point-scoring. The screen outside had explained that through the courtroom process, disputes between members of that society were decided by a judge, who enforced rules of procedure and applied substantive laws in reaching a decision. It explains that the active and vociferous androids were lawyers – professionals representing disputing parties and speaking on their behalf. Looking at the scene in front of you, you can't help but reflect that *this* is one system whose extinction does not surprise you. Particularly, you find it odd that the system was so cumbersome or confusing that it required disputants to pay translators and intermediaries. Your own experiences with the justice process have shown it to be smooth, simple, speedy, and easily navigable to the layperson.

Let's return to our current day, where the contemporary courtroom still anchors our justice reality. Perhaps this vision of the extinction of the modern courthouse in favor of a yet undescribed alternative is one you yourself share. Conversely, perhaps you've instinctively raised an eyebrow at such an unrealistic projection into a fantastical future. However, we can all agree that the future of the legal system and the legal process includes change.³ Fast forward into the future, and you will probably agree that it is unlikely that court proceedings will forever remain *identical* to their current form. Likely, you've already witnessed significant changes throughout

³ Richard Suskind, *Foreword*, in *ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE* (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), <http://www.ombuds.org/odrbook/suskind.pdf>.

your career, as online filing, case management, e-discovery and video testimony have been incorporated into the legal process. More change is on the way. The primary vehicle for the next wave of change, we suggest, is the spread of ODR throughout the court system. Applying data and communications technology to resolving cases and to preventing disputes will have far-reaching effects on the legal system; beyond ODR's proclaimed goals of increasing system efficiency, and increasing access to justice, we anticipate that it will end up redefining justice itself.⁴

In any field infiltrated by technology and automation, the question arises: Will its workers become extinct? As ODR permeates the legal system, lawyers might ask themselves this question if, indeed, they recognize that we have reached that point. When they do, we suggest that the lessons we might learn from the dinosaurs' extinction and the cataclysmic events that cast their world into upheaval indicate that a more helpful frame for lawyers to consider is: How can I function well in this new world? How can I help clients, make money, and improve my surroundings as I did before? Wiser lawyers will go beyond that, asking: How can I raise my own bar, and do *better* in the new world than I was able to in the old? To function well, lawyers will need new skills, and new takes on old skills. Practicing attorneys will need to consider making that pivot – and soon. Moreover, legal education will need to prepare its students to take their place in this new legal world, rather than priming them for the practice of yesteryear.

Returning to the courtroom of the present encountered in the museum of the future: What replaced that courtroom? We believe that ODR catalyzed its descent into extinction and will forecast what the next version of society's justice-providing institutions might look like, focusing on lawyers' roles in these transformed institutions. We suggest that the courthouse of the future will largely be automated in terms of case management, and largely accessed online.

⁴ We expect that the next set of ODR reforms, or perhaps the one to follow it, will affect the legal system in far more comprehensive and revolutionary ways than anything we have seen thus far, including changes to long-practiced procedural, evidentiary, and even substantive law. In the future justice might be different than our current legal textbook definitions. These changes will cut much deeper than previous reforms, as they will not solely implement practices aiming to increase efficiency but also reflect societal changes with regards to procedural and substantive justice. However, our focus in this paper is on how ODR will change the role of lawyers.

Synchronous co-location of parties, attorneys, and judges for hearings will give way to parties participating asynchronously and from a distance. This future courthouse will be accessible and user-friendly, with the average case being navigable by the average self-represented party. Far from being litigation-centered, the court will be hyper-focused on settlement. It will engage in activities hitherto not part of its purview: party education and dispute prevention. The first acts of these changes are already upon us, and the speed of change itself is speeding up.⁵ Finally, as this paper details, we project that in the courthouse of the future lawyers' traditional roles will be significantly curtailed.

In this article, we explain why we identify ODR as the force that will finally disrupt the legal profession, despite its staunch resistance to deep change. In order to survive and thrive in the new ODR-infused justice landscape, lawyers will need to reprioritize their skills and redefine the meaning of "thinking like a lawyer". In this article we identify six such adaptive skills: First, lawyers will need to develop digital literacies to assess the appropriateness of ODR processes and implement the best advocacy approaches for succeeding in them. Second, they will need interdisciplinary facility to understand the full dimensions of their client's overall needs. Third, lawyers will require a forward-thinking approach to problem-solving, to address individual and system-wide problems. Fourth, lawyers will need to have the emotional intelligence necessary to effectively work with clients in providing bespoke counsel and strategies. Fifth, lawyers will need to hone their higher cognitive capacities. Sixth, lawyers will require an entrepreneurial mindset to navigate the changing roles of lawyers in this evolving justice system. These skills will combine to reformulate "thinking like a lawyer" to help lawyers adapt and remain relevant in this evolving justice system.

This discussion will be in four parts. Part One and its related subparts will provide an overview of ODR in the courts at the present time, and its logical progression into the future. Part Two shifts

⁵ See Noam Ebner, *Negotiation is Changing*, 2017 J. DISP. RESOL., 99, 107–110 (discussing acceleration in the pace of change); Ethan Katsh, *ODR: A Look at History: A Few Thoughts About the Present and Some About the Future*, in ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE 21, 33 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), <http://www.ombuds.org/odrbook/katsh.pdf> (discussing the increasing speed of change, and why ODR is particularly suited to be the dispute resolution approach of choice in such an environment).

the discussion's focus to the three justice stakeholders: the courts, clients and the legal profession. In this part, we will explain how each of these stakeholders are responding to this the ODR evolution. Continuing the discussion in Part Three, we identify the skills lawyers will need to adapt, and suggest how law schools might better prepare lawyers for this change in legal practice. Part Four concludes and leaves the reader with questions to consider.

I. How ODR Is Reshaping The Delivery of Justice

A. What is ODR?

When we discuss ODR in this paper, we do so through a court-centric perspective to refer to all uses of technology to manage and resolve disputes submitted to the courts, or to prevent such disputes from arising. This definition derives from the phenomenon we are exploring, which is ODR's entry into the courts – the very heart of the justice system - and its effects on lawyers.⁶

Much has been written about online dispute resolution over the past twenty years, mainly exploring the potential that exists in combining alternative dispute resolution (hereinafter - ADR) with technology. However, in the past few years, interest in ODR, in practice and in writing, has shifted from ADR's playing field and into the structure of the court system itself. This can't be stressed strongly enough, given both the natural tendency to conflate ODR with online or technology-enhanced ADR and the literature which does so expressly.⁷ When, in this paper, we discuss ODR entering the court system in a broad sense, our overall vision is not limited to, or even focused on, enhancing court-connected ADR programs with technology. At most, this is only

⁶ As an outcome of choosing this narrow focus, we intentionally avoid delving into elements of ODR's development that do not pertain to its entry into the court system. Similarly, we do not survey many aspects of the ever-widening body of literature on ODR, as these pertain to online dispute resolution in non-court -settings. This is a rich literature and ultimately worth of reading by anybody interested in ODR; however, including it here would have muddied the waters of our attempt to deal solely with court-centric ODR.

⁷ For a helpful distinction along these lines, see, e.g., Michael Legg, *The Future of Dispute Resolution: Online ADR and Online Courts*, AUSTRALASIAN DISP. RESOL. J. (distinguishing between ODR and OADR – Online Dispute Resolution and 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 (separating court connected ODR from dispute resolution schemes that are 'alternatives' to courts).

one part of what ODR involves; focusing on this provides a very limited view of what ODR’s potential is and of the revolution it heralds for the court system.

ODR offers a true paradigm shift to addressing conflict. In ODR’s embryonic stage, Ethan Katsh and Janet Rifkin described ODR’s core shift as introducing technology as a fourth party into the dispute resolution process, supporting the third party.⁸ This revolutionary view of technology assisting in dispute resolution largely focused, in ODR’s early stages, on using technology to enhance traditional ADR processes such as mediation or arbitration,⁹ to replicate ADR processes online,¹⁰ and to provide ADR systems for those contexts in which traditional legal systems could not provide recourse. The young Fourth Party, so to speak, did not groom itself for itself a career *in court*.¹¹ And yet, here we are. As we observe and anticipate 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.¹² We take this approach in compiling a partial list of roles the Fourth Party could play in courts (Fig. 1)

Administrative Functions	Communication- Related Functions	Substantive Functions
<ul style="list-style-type: none"> • <i>Intake Management</i> • <i>Case filing</i> • <i>Correcting mistakes</i> • <i>Monitoring participation and compliance</i> • <i>Scheduling deadlines, due dates, and hearings.</i> • <i>Generating due-date reminders</i> 	<ul style="list-style-type: none"> • <i>Providing communication channels with court administrators</i> • <i>Providing litigants affective support</i> • <i>Providing virtual meeting spaces for conducting online mediation</i> • <i>Providing inter-party communication channels for negotiation</i> 	<ul style="list-style-type: none"> • <i>Party Education</i> • <i>Assessing parties’ preferences and priorities</i> • <i>Suggesting options for solution</i> • <i>Evaluating options for solution</i>

⁸ ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 93–94 (2001).

⁹ *See id.* at 117–134.

¹⁰ *See id.* at 135–162.

¹¹ “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.

¹² Noam Ebner, *Online Dispute Resolution: Applications for E-HRM*, in ENCYCLOPEDIA OF HUMAN RESOURCES INFORMATION SYSTEMS: CHALLENGES IN E-HRM (T. Torres-Coronas & M. Arias-Oliva eds., 2008). The chart is adapted from the same source.

<ul style="list-style-type: none"> • <i>Delivering court documents</i> • <i>Conducting e-service of process</i> • <i>Automating case-diversion to suitable processes</i> • <i>Storing Data</i> • <i>Managing court schedules and timetables (judges, administrative staff, courtrooms, etc.)</i> 	<ul style="list-style-type: none"> • <i>Providing virtual courthouse, convening judge, jury, parties, attorneys and public, as required.</i> • <i>Providing channels for submission of e-evidence</i> • <i>Displaying visualizations</i> • <i>Drafting and tracking documents</i> • <i>Providing security</i> 	<ul style="list-style-type: none"> • <i>Predicting likely settlement or judicial outcomes</i> • <i>Identifying relevant case law and statutes</i> • <i>Assessing evidence</i> • <i>Conducting automated decisionmaking</i>
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Fig. 1 Fourth Party Roles in the Court

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 court systems. In a previous generation of modernization, focusing on digitalization reforms and case management improvements, many court systems have already incorporated technology fulfilling a number of the administrative roles listed in the chart, without any mention of ODR. The Fourth Party has already made inroads into fulfilling communication and substantive roles as well, and this will increase as ODR permeates the underlying operating system of the courts.

When encountered in court, we find some of those Fourth Party functions **bundled** together into software programs that parties, attorneys and court administration interact with. These programs, the **building blocks** of the ODR-infused courts of the future, are already being introduced in the courts. In order to recognize them in action, we introduce a number of these building blocks. 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, behind the scenes, the process through which each case proceeds. Based on party-provided information, such a system could provide parties with legal or negotiation information, channel the case to online ADR processes, refer it to face-to-face ADR, or move it ahead towards a judicial decision at expedited or regular speed.

Initial party education:

Once a potential plaintiff reaches a court's website, an online educational process begins. The court can offer information on what constitutes a cause for action, how to file a claim, what information to include, etc. As the plaintiff uploads information into the system (e.g., by filing a small claims suit related to consumer issues), the system can reactively offer them information targeting this context more specifically. It can then offer the respondent helpful information.

3. Automated negotiation:

A process in which parties negotiate via a software platform by working 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-on questions and choice-sets.

4. 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, while providing them a dedicated communication platform.¹³

5. Online Replication of ADR processes:

These are mediation, arbitration, or any other type of ADR process, conducted wholly or primarily online. For example, the court could assign cases to a court mediator who facilitates interaction between parties via text-based interactions on a dedicated court-provided system, or to an external mediator conducting mediations via Skype.¹⁴

¹³ 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.

¹⁴ 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,

6. *Advanced party education / Direct negotiation decision-influencing:*

Such a system provides parties substantive information that is likely to influence their decision to litigate or settle, and affect their settlement considerations.¹⁵ For example, it could project an objective analysis of the likely costs involved in pursuing the case through to judicial decision. It can share a variety or average of settlement rates and settlement values for such cases. It could predict the likelihood of a judicial outcome to be more or less than a counterpart's offer, implementing data specific to that court or to settlements in general.¹⁶ It could provide advice to parties considering settlement, helping them to prioritize their preferences.¹⁷ It could go so far as to crunch the numbers and predict the precise outcome of adjudicating the case.¹⁸

7. *Online Replication of court processes:*

These are full or partial official court proceedings and hearings, which may largely mirror familiar court procedure, with the exception that any or all of the parties, their attorneys, the judge, the jury, evidence, etc. might not be co-located and instead interact via online communication channels. Such proceedings might also incorporate some degree of asynchronicity.

8. *Case decision via algorithm:*

Software making procedural or substantive court decisions by algorithmic processes, with or without close human oversight, applying a decision-making process to information that parties have entered to the system and providing an outcome.¹⁹

<https://www.virtualmediationlab.com/> (last visited Sept. 25, 2018) (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. OF 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).

¹⁵ 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

¹⁶ 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. OF EMPIRICAL LEGAL STUD. 551 (2008).

¹⁷ 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., 23, 271 (2005).

¹⁸ 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://www.huygens.es/ebooks/IDTSeries1_ODR.pdf.

¹⁹ Ayelet Sela dubs software involving proactive involvement of AI 'principal ODR', as opposed to platforms that facilitate communication between parties without AI intervention, which she calls 'instrumental ODR'. See Sela,

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

B. ODR in the Courts Today and Around the World

As we mentioned above, many of these ODR building blocks have already been implemented, in one form or another, in real-life projects and programs, around the world and in the US. These programs have largely been developed to address two needs: improving court efficiency and providing access to justice where this is lacking. It is striking, that none of these programs include any required or assumed role for lawyers; in fact, reviewing their websites and descriptions, they are clearly designed to be accessible and manageable to lay parties.

Ayelet, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO STATE J ON DISP. RESOL. 91, 100.

Current court ODR initiatives involve only instrumental ODR. However, principal ODR systems are currently active in out-of-court e-commerce 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 online dispute resolution process; software makes the vast majority of decisions). In court systems, we anticipate that principal ODR systems will first be implemented at the edges, 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*, THE CONVERSATION (Oct. 22, 2017), <https://theconversation.com/dont-fear-robo-justice-algorithms-could-help-more-people-access-legal-advice-85395> (citing the initiators of an ODR project in British Columbia (discussed in the following section) 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 judgement.”).

A similar quote is attributed to former Lord Justice Fulford. Paul Magrath, *Is the Online Court the Future of Litigation?* THE LAWYER (July 14, 2017), <https://www.thelawyer.com/online-court-litigation/> (discussing the UK’s Online courts (also discussed below): “Giving a speech at the Law Society last November, he dismissed fears about “Cyber judges” and “robot courts” and explained that, despite the increasing use of algorithms and machine learning techniques (for example in predicting risks or outcomes based on analyzing bulk data), every decision respecting a person’s substantive rights would still be made by a judge.”).

In this section we detail three current projects of demonstrating pathways for ODR entering the court system. The first is the Civil Resolution Tribunal in British Columbia, Canada; the second is the Online Court in the UK; the third is the Internet Court in Hangzhou, China.²⁰

1. Canada: The Civil Resolution Tribunal

In Canada, British Columbia's Civil Resolution Tribunal Act (hereinafter: the CRT) passed in 2012, and the tribunal commenced operation in 2016. The CRT is authorized to resolve small claims cases of a variety of legal categories, with a value of up to \$25,000. In its current pilot phase, however, it is handling claims up to \$5,000. It is also authorized to resolve a variety of types of cases related to strata (condominium) properties - such as non-payment of fees; voting and meetings disputes; enforcement of bylaws – with no value cap.

The CRT process, which demonstrates sequencing of ODR building blocks, involves four phases: *Assisted self-help*: Before officially filing a claim, a potential plaintiff 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, providing the user with legal information about such claims and resources for resolving the issue on their own (e.g., letter templates for contacting their counterpart directly, to request action or remedy).

Intake: Claimants fill out a request for dispute resolution. They must do so themselves, as representation by attorney's is largely precluded in CRT proceedings. This request is initiated by responding in text fields to a number of pre-set questions such as 'One sentence summary of the claim,' 'When did you become aware of the claim?' 'What have you done so far to resolve this?' 'Why is this claim important to you?' 'What do you want?' etc. They pay a fee, submit the claim, and are provided with a package of forms to provide to the other party.

²⁰ Surveys of projects connecting ODR to the justice field often discuss the Rechtwijzer platform designed to help divorcing couples resolve their issues amicably and constructively. See Michael Legg, *The Future of Dispute Resolution: Online ADR and Online Courts*, 27 AUSTRALASIAN DISP. RESOL. J. 277 (2016). We do not fully review it given our narrow focus on court-internal ODR programs only, a category in which Rechtwijzer is not included. For a summary of the program and the circumstances of its dissolution, see Dr. Maurits Barendrecht, *Rechtwijzer: Why Online Supported Dispute Resolution is Hard to Implement*, THE HILL (Jun. 21, 2017), <http://www.hiil.org/insight/rechtwijzer-why-online-supporte-dispute-resolution-is-hard-to-implement>;

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 inter-party communication. If unable to reach agreement through independent negotiation, parties are contacted by a CRT facilitator to help them resolve the 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 parties to prepare the case for adjudication.

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 via the online system.

2. The UK's Online Court

Two reports²¹ submitted as part of Lord Justice Briggs' Civil Courts Structure review recommended the initiation of a fully online court. This court would have initially have jurisdiction in civil claims ranging up to £ 25,000.²² A current pilot of the Online Court – or, as it is also being called, the Online Solutions Court - will continue into 2019.²³

Claims go through three phases:

Intake: This court is intended to be largely lawyer-free, although representation is not precluded. Accordingly, its intake process aims to allow the unrepresented citizen to craft an appropriately comprehensive claim document via a flow of drop-down menus and text fields; the claimant does not need to file a formal document in legalese. The claimant can submit evidence in different forms such as by uploading documents and photos. The defendant receives notification of the claim and is guided through submitting a defense through a similar flow of menus and fields.

²¹ See Lord Justice Briggs, *Judiciary of England and Wales Civil Courts Structure Review: Final Report*, JUDICIARY OF ENG. & WALES (July 2016), <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>; Lord Justice Briggs, *Judiciary of England and Wales Civil Courts Structure Review: Interim Report*, JUDICIARY OF ENG. & WALES (Dec. 2015),

²² Note, that this is far beyond the UK small claims court claim limit of £10,000.

²³ 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>.

Case Management: In the second stage, the case is reviewed by a case officer who recommends diversion to telephonic or face-to-face ADR processes, as suitable.

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

3. China: The Hangzhou Internet Court

In August 2017, China established an online court, based in the city of Hangzhou. This court aims to address disputes arising from online shopping and other online activity. This includes consumer disputes arising from online shopping, product liability claims related to products bought online, suits against internet service providers, and more.²⁴ The value of these claims are capped only to match those of a comparable offline court's jurisdiction, allowing the majority of civil and financial claims and those related to loans from large financial institutions to proceed up to a value exceeding \$7,200,000. There are lower caps only with regards to suits related to loans given by small loan providers (\$72,000) and to intellectual property suits (\$1,200,000). 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. Hangzhou is the domicile of many Chinese e-commerce giants including Alibaba; by locating the online court there, the court system offers a solution to parties seeking to bring suit against these companies who were previously frustrated by distance or case value.²⁵ In the intake stage, the claimant files a claim by filling in online forms. Within 15 days, they and the defendant are contacted by a mediator to conduct a text-based, telephonic, or videoconferencing mediation. Only if the mediation fails does the defendant respond, via the system, to the complaint. In this court, parties can identify themselves by using their AliPay (Alibaba's payment system, comparable to PayPal) ID, which can also be used to pay court fees and other costs. Pleas and evidence are all submitted online. Fitting its evidentiary rules to its forum and its fuses, the court has recently accepted blockchain-based

²⁴ See THE LITIG. PLATFORM OF HANGZHOU INTERNET COURT, <https://www.netcourt.gov.cn/portal/main/en/index.htm> (last visited Jan. 9, 2018).

²⁵ See Sara Xia, *China Establishes its First Cyber-Court in Hangzhou: Thank You Alibaba*, CHINA L. BLOG (August 16, 2017), <https://www.chinalawblog.com/2017/08/china-establishes-its-first-cyber-court-in-hangzhou-thank-you-alibaba.html>.

evidence.²⁶ Actual judicial hearings are held via videoconference, open to the public via a live videostream.²⁷ While the system has been designed to be navigated by laypeople, and the court provides guidance to disputants who need it, lawyers are not precluded from representing in the Chinese Internet Courts, and have indeed represented clients in cases of relative complexity. However, data on the rates of representation and self-representation is currently unavailable.

The courtroom of the future, envisioned - yet left undescribed - during the museum fieldtrip that opened up this paper, is brought to life in Prof. FANG Xuhui's description of the Hangzhou court. 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. The trial record is generated automatically by a speech recognition system. AI technology is used to draft judgements. In cases of online shopping disputes, digital evidence is transmitted from the online shopping web-sites such as Taobao.com to Hangzhou Internet Court database by just one click. The court clerks are not needed during an online court hearing. A speech recognition system turns spoken words into written documents at the end of the session, greatly improving the efficiency of the court. As of 30 April 2018, the Hangzhou Internet Court handled a total of 7,771 Internet-related disputes and closed 4,798 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."²⁸

²⁶ 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/>.

²⁷ See Kieren McCarthy, *China's Cyber Court Opens for Business; a Gavel-Free Zone?*, THE REGISTER (Aug. 21, 2017), https://www.theregister.co.uk/2017/08/21/chinas_cyber_court_opens_for_business/.

²⁸ See Fang Xuhui, *Recent ODR Developments in China*, 4 INT'L. J. OF ONLINE DISP. RESOL. 32, 34 (2017).

Building on the Hangzhou court's success, China is rapidly establishing additional online courts.²⁹

5. In the US:

In the U.S., dozens of courts are beginning to pilot ODR programs on a state-by-state or courthouse-to-courthouse basis, without any central institutionalizing force focusing on court ODR specifically. This contrasts with the top-down decisionmaking we've observed in British Columbia and China, and with the country-wide, top-down approach we've observed in the UK. This developmental dynamic owes to the fragmented structure of the US legal system, requiring 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 US appears, at first glance, to lag behind some countries in ODR development.³⁰ However, we note that when one looks beneath the visible tip of active projects in U.S. courts, this perceived lag vanishes and a rapidly-forming iceberg of programs in formation is clearly visible. In a short while, we predict, the US will be a forerunner in court ODR. Advances in the formation of the bulk of the iceberg is rapidly forming along both axes of the US' unique circumstances. At the time of writing (late 2018), over 40 courthouses around the US reportedly have an operational ODR program.³¹ 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.³² The National Center for State Courts estimates that jurisdictions in

²⁹ Indeed, as this article was being finalized, a second Internet Court in Beijing has begun to hear cases, with a third, in Guangzhou, due to open in a matter of weeks. *China's 2nd Internet Court Opens in Beijing*, THE DAILY MAIL INT'L (Sept. 10, 2018), <https://dailymailnews.com/2018/09/10/chinas-2nd-internet-court-opens-in-beijing/>.

³⁰ 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>.

³¹ Based on the list of 'Courts Using ODR,' this data is shared with the caveat that many of the programs listed are probably self-reported, and there is no one fieldwide definition of what constitutes an ODR program. COURTS USING ODR, <http://odr.info/courts-using-odr/> (last visited Dec. 12, 2018).

³² A good example is the Online Traffic Pleading program in the 14A District Court of Michigan's Washtenaw county. The project's success catalyzed a second ODR initiative focusing on outstanding warrants. With the success of these programs, word rippled out and, as of late 2017, 30 Michigan counties are moving forward with similar ODR programs. See 14A DIST. COURT WASHTENAW CTY. MICH., <https://www.washtenaw.org/946/14A-District->

at least 40 US states are currently exploring possibilities for incorporating ODR in their court system. Moreover, it assesses that at the present time 35 states either already have operational ODR programs or have plans to implement them within the next six months.³³ Indeed, in the writing of 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 consumer debt cases in the New York State Unified Court System.³⁴

There are also a few instances of operational ODR programs related to typical online civil cases. One example is an ODR program initiated by the Franklin County Municipal Court in Columbus, Ohio.³⁵ The small claims division of the court launched an ODR program in late 2016. 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 ‘Negotiation Center’ – essentially, a system offering elements of automated negotiation alongside a text-based communication channel through which parties can interact with each other in an effort to resolve the case. If they cannot resolve the issue on their own, they may call a mediator who joins them on the platform – or by phone, or by Skype, as parties prefer. If the process does not produce agreement, the case goes to adjudication.³⁶

Court; *see also* S ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF Disputes, 162 (2017) (noting that 19 Michigan state courts have implemented such systems).

³³ Correspondence with Paul Embley, CIO and Technology Division director at the National Institute for State Courts (Dec 15th, 2018; on file with authors).

³⁴ Joint Technology Committee, *Case Studies in ODR for Courts: A View from the Front Lines*, JTC RESOURCE BULLETIN (Nov. 29, 2017),

<https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx>.

³⁵ *See* ONLINE DISPUTE RESOLUTION FRANKLIN COUNTY MUNICIPAL COURT, <https://sc.courtinnovations.com/OHFCMC>.

³⁶ *See* Joint Technology Committee, *supra* note 34; *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).

Another notable example, crossing the lines from ‘planned’ to ‘operational’ as this paper was being finalized, is Utah’s statewide small-claims court ODR program, planned to be the state’s *only* small claims option.³⁷ Currently piloted in a Salt Lake City courthouse, 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 judgement of the court. If they are unable to reach agreement within two weeks, the neutral summarizes their positions in a joint trial preparation document, which continues on, with the case file, as the case is scheduled for a traditional, face-to-face, hearing.³⁸

Besides these individual court initiatives, it is worth noting an initiative jointly conducted by the National Center for State Courts and the Pew Charitable Trust Civil Justice Initiative.³⁹ The scope of this collaboration is to conduct significant ODR initiatives in fifteen states or major jurisdictions.⁴⁰ In each, the partnership will provide technical support for setup, initiation and implementation of the court ODR project, along with in-depth evaluation. The initiative’s overall goal is identifying best practices for establishing and maintaining ODR systems in courts. In a sense, this initiative is attaching an industrial-sized icemaker to the ODR iceberg-in-formation. This is another sign that 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 clearly increasing.

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

³⁷ See Joint Technology Committee, *supra* note 36.

³⁸ See Bob Ambrogi, *Utah Courts Begin Unique ODR Pilot for Small Claims Cases Tomorrow*, LAW SITES (Sept. 4, 2018), <https://www.lawsitesblog.com/2018/09/utah-courts-begin-unique-odr-pilot-small-claims-cases-tomorrow.html>.

³⁹ See NCSC/Pew Charitable Trusts ODR Project Announcement, ODR.INFO (July 10, 2018), <http://odr.info/ncscpew-charitable-trusts-odr-project-announcement/>.

⁴⁰ Colin Rule-*The Godfather of Online Dispute Resolution Speaks to Kleros*, KLEROS: THE BLOCKCHAIN DISP. RESOL. LAYER (Oct. 22, 2018).

As ODR pilots take hold and ODR spreads, our legal system (as well as others) will evolve into ODR-infused justice systems. ODR enters the court system with a bold vision of redesigning the way courts handle cases and administer justice, start to finish (and beyond, as we explain below regarding conflict prevention). Thus, an ODR-infused court system cannot be described simply as “a digital version of the traditional courthouse.” Rather, an ODR-infused court provides a fundamentally different justice experience to judges, parties, and lawyers.

To generally describe this courthouse of the future, we suggest that most, if not all, of the legal process will be conducted online; 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; and parties will be constantly offered opportunities to resolve their issues through a variety of processes involving either direct or facilitated conversations or offering the wisdom of algorithms. In ODR’s grand vision, 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 or judicial decision remarkably, resulting in enhanced justice, both in terms of parties’ access, experience of procedural justice, and overall satisfaction. These opportunities will be so smoothly and pervasively built into the process that parties experience, that ODR will no longer entail the sense of being an artificial, alternative, extra-judicial, ‘diversion’ from the legal process from which ADR processes long suffered.

Throughout this evolution, we suggest that expectations, access, process, and substance of justice will change. ODR’s adoption into the courts will not only change parties’ individual justice experiences; 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 currently hold.⁴¹ Judges,

⁴¹ 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 (2004). As Michael Moffitt correctly points out, not all of the remaining cases are settled; “...Instead, some of the remaining cases are dismissed on motion or are abandoned, for example.” While reaffirming the centrality of settlement in the system, saying “Still, every credible study of which I am aware has concluded that

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.

As courts continue to assume an even greater settlement focus, courts, in lieu of lawyers, will also assume a more primary role in disseminating relevant information to clients about the dispute resolution processes available to help settle a client's case. This unmediated information flow between individuals and the court will help ensure that clients receive objective and unbiased information about dispute resolution options available, including ODR. Moreover, the information on court homepages and ODR intake pages will help dispel any myths that clients may have about adjudicated justice and replace it with more objective and realistic justice expectations. The expectation is that such settlement-focused information will neutralize a lawyers' 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. And, with time, as we see wider ripples of this trend, popular media will eliminate scenes of courtroom dramas and instead replace it with scenes of settlement.

An ODR-infused justice system will shape the volume and type of cases that are resolved by ODR. One anticipated effect of the new system is an increase of cases, given that access to recourse has been simplified.⁴² Initially, there is also expected to be a sharper stratification of legal cases in which those cases of lower dollar values that now often proceed without lawyers will be diverted to ODR processes that provide basic legal information and efficient resolutions.

settlement is at least the modal means by which most forms of civil litigation are resolved" he suggests that – despite a lack of consensus of the actual overall civil settlement rate in the US – those studies that have been conducted indicate that this is in the range of 65%-70%. Michael Moffitt, *Settlement Malpractice* (article in preparation for submission, raft on file with authors at footnote 2). 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.

⁴² Orna Rabinovitch-Einy & Ethan Katsh, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 CARDOZO J. OF CONFLICT RESOLUTION 637, 648 (2017) (positing that litigants previously opting to "lump it," avoiding the arduous process of getting justice, may now elect to proceed with claims, as ODR facilitates obtaining justice).

However – and here is something we cannot stress strongly enough – connecting the dots of court ODR initiatives (particularly, the widest and most successful of them) shows the following: Piloted with relatively low-value cases,⁴³ they were all designed simply and clearly, so that litigants could interface with the system on their own. Depending on the system, lawyer participation is precluded (CRT), rendered superfluous by design (UK), or unrequired and only utilized in complex cases (China Internet Courts). The systems provide parties with substantive information about their case (replacing the traditional lawyer-as-sage role) and interfaces with them directly (doing away with the traditional lawyer-as-intermediary role). And, finally, while all these design and role elements fit in well with their pilots’ anticipated audience, the programs were never intended to remain constrained to the audiences – and case values – of their pilots.⁴⁴

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. This will *not* automatically return lawyers into the system to fulfill their traditional role. Unless presented with pressing reasons to increase legal representation in the system, we anticipate that courts will continue to exclude them; expressly in some cases, or by means of continuing to utilize the systems they piloted – systems that render lawyers somewhat superfluous in many cases. This expansion, already under way in some venues,⁴⁵ will offer parties

⁴³ The Chinese Internet Courts are the exception to this; as noted, their jurisdiction is largely unrestricted by value. *See supra* pp. 14–15.

⁴⁴ This holds true not only from the perspective of court administrators, but also converges with the perspective of early ODR systems designers and formulators of ODR vision: ODR’s application to low-value cases was never the end-goal, only the foot in the door. Nicolas W. Vermeys & Karin Benyekhlef, *ODR and the Courts*, in *ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE* 381 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), http://www.ombuds.org/odrbook/vermeys_benyekhlef.pdf (“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.”).

⁴⁵ 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 case-value jurisdiction, we note that British Columbia’s CRT, discussed above, was originally given jurisdiction in strata disputes as well as small-claims cases valued up to \$25,000 (Canadian). As mentioned, its pilot program dealt with small-claims cases valued at under \$5,000. *See Civil Resolution Tribunal Act*, BRITISH COLUMBIA, (last visited Jan. 9, 2018), <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/civil-resolution-tribunal-act>. The program has resulted in expanding its jurisdiction 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, after only two years of operation. *See Shannon*

the option for autonomous dispute management in case and value realms that were previously reliable sources of income for lawyers. This is 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. This will limit their activity in these cases to specific roles such as providing advice or drawing up final agreements, without represent the whole case. Such limitation will essentially force an unbundling of legal services. This displacing will affect not only litigators, but their assistants and teams as well

We stress, this is but the first wave of displacement in ODR's disruption of the justice system; it is further compounded by the displacing of contact-related litigation by blockchain technology and smart contracts, discussed below. Alerting the legal profession and the field of legal education to the disruptive nature of court ODR is the central aim of this paper. We now continue to note further effects of ODR's entry into the courts, as understanding ODR's wider effects on the justice system not only provides context but also helps to understand the magnitude of the changes hovering over the horizon.

As ODR takes hold, and even more so as it sheds the "experimental" adjective, we anticipate gradual changes in procedural law. These will increase, as court systems recognize that ODR-based processes comprise the vast majority of their caseload, and that designing procedures to maximize their effectiveness makes more sense than cramming ODR caseflows into a set of procedural rules that were designed for traditional litigation. Amongst the changes we anticipate are shortened deadlines for submissions and responses,⁴⁶ gradual loosening of co-location requirements for judicial proceedings,⁴⁷ and new treatment of jurisdictional issues.⁴⁸

Salter, *Small Claims: Coming Soon to the CRT*, Civ. Resol. Tribunal (April 8, 2017), <https://civilresolutionbc.ca/small-claims-coming-soon-crt/>. We consider this a telling example of things to come.

⁴⁶ Currently, one aspect of ODR's appeal to courts is that it is designed to incorporate all settlement activity within a case's typical lifecycle, without extending any deadlines in order to accommodate it. See Colin Rule, *How to Successfully Deploy ODR in Your Court*, TYLERTech 16:03–17:43(April 17, 2017), https://empower.tylertech.com/Modria_0417_Webinar_Recording.html. As ODR becomes the fabric of the court process, it is most likely that deadlines will be realigned to match it best.

⁴⁷ See *infra*, note 6, noting this already occurs *de facto* by judicial consent (rather than by procedural rulechanging).

⁴⁸ Hangzhou's Internet court, as we have explained, is an example of an online accommodation to overcome traditional jurisdictional barriers. See *infra*, note 31.

We also anticipate that evidentiary rules will be reshaped to accommodate the types of evidence that can helpfully and easily be displayed and assessed online. Similarly, we may see rules allowing evidence assessment by a judicial body in one geographic locale, in order to support a case being heard by another body in a different locale. Additionally, we expect to see rules developed for allowing blockchain-based evidence.⁴⁹

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 a particular law or a particular formulation of it with an unwarranted conflict-generating effect. Second, as AI develops and we see first shifts towards automated decisionmaking, we expect to see certain laws redesigned to involve less judicial discretion so as to facilitate machine decisionmaking.⁵⁰

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, largely unreviewed, and out of the scope of researchers - back into the fold and under the microscope. ODR-gathered data will provide a welcomed resource for court improvement and conflict prevention. Moreover, as this information will likely be publicly accessible, it can be closely monitored for any biased treatment towards participants and any resulting resolutions.⁵¹ By creating a more transparent environment than the traditional legal

⁴⁹ China's Hangzhou-based Internet court has already created procedures for both these suggestions. Recent legislation in the state of Vermont has deemed blockchain evidence admissible in court. See Xander Landen, *Vermont Bullish on Blockchain as New Law Takes Effect*, VTDIGGER, (Aug. 28, 2018), <https://vtdigger.org/2018/08/28/vermont-bullish-blockchain-new-law-takes-effect/>.

⁵⁰ 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>.

⁵¹ 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> [ASK NANCY if she has another source for it]

system, ODR's entry into the courts 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 – and preemptively engage in conflict prevention.⁵² Such prevention might be carried out through recommending changes in procedural or substantive law, or in other systems for implementing social policy such as education, welfare, and law enforcement. This 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 theory⁵³ and has been tested successfully in the private sector.⁵⁴ We expect to see the first shoots of this next phase of evolution emerge from current ODR programs, very soon. Early signs to look out for are policy discussions of “data captured from tens of thousands of litigants.”

Continuing with this evolution, ODR's next evolutionary phase will offer a new paradigm in which contracts are automatically linked to their performance. Contract performance, as well as any breach, will automatically self-create evidence of performance and breach, triggering automated consequences for both. This is discussed in the ODR literature under the caption of utilizing self-enforcing smart contracts, based on blockchain technology, for transactions and their

⁵² See, ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF Disputes, 165–67 (2017).

⁵³ See *id.* at 148–69.

⁵⁴ 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 one of the most common sticking points in resolving eBay-related disputes was not the item itself, but the question of who would cover the return shipping costs in the event of a faulty or poorly described item being returned; the buyer, or the seller? This enabled eBay to improve the information sellers provide about their return policies before the sale is completed, and reduce the volume of this type of secondary conflict. See AMY SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION 45–46 (2017).

enforcement.⁵⁵ The outcome is that court's role in enforcing contracts will diminish.⁵⁶ This will converge with, and compound, court ODR's effect in reducing the market for legal services, particularly in the realm of litigation.

In the next section, we will explain the justice stakeholders' varying degrees of receptivity and responsiveness to the ODR evolution.

II: How ODR is Changing Stakeholder's Justice Expectations and what the Legal Profession Can Do to Adapt:

A. Justice Stakeholders' Changing Interests

In the previous section, we detailed how ODR is re-shaping 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

⁵⁵ "...smart contracts are programmable contractual tools, they are contracts embedded in software code. Thus, a smart contract can include the contractual arrangement itself, governance of the preconditions necessary for the contractual obligations to take place and the actual execution of the contract." Riikka Koulu, *Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement*, 13 SCRIPTED 40, 53 (2016), <https://script-ed.org/wp-content/uploads/2016/05/koulu.pdf>. While full discussion of this topic is beyond the scope of this paper, we urge readers to familiarize themselves with it as we foresee it as an evolutionary stage in the process discussed in this paper. For gateways to the topic, see generally Tsui Ng, *Blockchains and Beyond: Smart Contracts*, A.B.A. (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2017/09/09_ng.html; Riikka Koulu, *Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement*, 13 SCRIPTED (2016) <https://script-ed.org/wp-content/uploads/2016/05/koulu.pdf>; Petro Ortolani, *Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin*, 36 OXFORD J. OF LEGAL STUDIES (2016).

⁵⁶ This form of ODR occurs largely out-of-court and might therefore seem adjunct to the paper's focus. However, it pertains directly to court evolution, by significantly diminishing both the court's role in contract enforcement, a primary function of the court, and its case volume with regards to consumer and commercial contracts. As Riikka Koulu notes, "One of the most interesting aspects of smart contracts is the possibility of self-enforcement: self-execution adopts the role of conflict prevention, as it limits the scope of potential disputes arising from the transaction." Koulu, *supra* note 55. This alternative form of contract and enforcement will prevent many of the contract-based claims currently filed in court from ever reaching the docket. Beyond smart contracts, other mechanisms for preventing disputes from occurring or from reaching the courts will emerge through ODR system design. In those rare cases where judicial examination of an issue is required, its transfer can be automated. And, of course, once in court, such cases will be managed through the ODR-infused court design discussed in this article.

welcoming or receptive to ODR as a justice innovation that, in many cases, can better respond to 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 complacency to adapt in the evolving ODR-infused justice system.

1. Courts: the First Justice Stakeholder:

As courts struggle to meet their access to justice responsibilities, they are particularly receptive to the justice possibilities ODR offers. ODR has piqued the interests of court systems nationally and globally as a justice option to help courts as they grapple overflowing court dockets, increasing numbers of unrepresented litigants and shrinking court budgets.⁵⁷ Whether ODR is viewed to be the default justice provider of the future or as an adjunct to the existing justice system,⁵⁸ courts are beginning to see ODR as a viable mechanism to provide litigants justice.

As has been explained more fully in the earlier section, increasing numbers of courts are now experimenting with ODR. Indeed, we have discussed how different jurisdictions have expressed varying degrees of commitment to, and enthusiasm for, ODR. While the UK courts have committed a billion pounds towards setting up their online court system,⁵⁹ courts within the U.S. have taken a more cautious approach, experimenting with ODR for defined types of cases in select jurisdictions. However, as we have discussed, we expect the adoption of ODR in U.S. to

⁵⁷ See Ethan Katsh & Orna Rabinovich-Einy, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 149–165 (2017); Joint Technology Committee, *Case Studies in ODR for Courts: A View from the Front Lines*, JTC RESOURCE BULLETIN 14 (Nov. 29, 2017),

<https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx>.

⁵⁸ See Joint Technology Committee, *Case Studies in ODR for Courts: A View from the Front Lines*, JTC RESOURCE BULLETIN, 9–10 (Nov. 29, 2017),

<https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx> (contrasting different models of ODR adoption into courts, ranging from standalone implementation of certain building blocks, to partial integration in the court system's work to full implementation - in which ODR is the essential design of the court process).

⁵⁹ See Fiona Rutherford, *HMCTS Improving the Justice System*, GOV.UK: INSIDE HMCTS (Mar. 31, 2017), <https://insidehmcts.blog.gov.uk/2017/03/31/hmcts-improving-the-justice-system/>.

accelerate. Success stories from one jurisdiction will likely trigger interest from the next. Additionally, ODR service providers, policy organizations and research foundations are increasingly proactive in persuading courts to adopt new technology by demonstrating ODR's capacity to reduce dockets by delivering justice more quickly and more efficiently.⁶⁰

In part, courts are receptive to ODR, because ADR never quite became the default recourse process courts had hoped it would be.⁶¹ ADR programs have provided the court with some case management relief, but have largely not lifted the burden of courts' ongoing access to justice challenges. Parties continue to file suit, rather than privately arranging for mediation.⁶² Litigants often refuse court-referred mediation.⁶³ When they agree to such mediation, there are far too many cases in which lawyers misuse mediation and arbitration as litigation substitutes.⁶⁴ 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.⁶⁵ Thus, many parties remain unaware and ill-informed about the value of ADR for their particular case, and too many court-connected programs remain underused.⁶⁶ 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

⁶⁰ See NCSC/Pew Charitable Trusts ODR Project Announcement, ODR.INFO (July 10, 2018), <http://odr.info/ncscpew-charitable-trusts-odr-project-announcement/> (in 2018, the National Center for State Courts and the Pew Charitable Trust partnered to help courts develop ODR processes).

⁶¹ See, ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF Disputes*, 43 (2017).

⁶² 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); 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).

⁶³ See *id.*

⁶⁴ See, e.g., Jacqueline Nolan-Haley, *Mediation: the 'New Arbitration'*, HARVARD NEGOTIATION L. REV. (2012); Tom Stipanowich, *Arbitration: The 'New Litigation'*, 2010 UNIV. OF ILL. L. REV. (2009).

⁶⁵ Elayne Greenberg, ... *Because 'Yes' Actually Means 'No': A personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution*, 102 MARQ. L. REV. (forthcoming Fall 2018); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2950020.

⁶⁶ See, e.g., 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).

the more collaborative advocacy approach it requires.⁶⁷ For all these and perhaps other reasons, the promise of settling cases that courts had hoped for in ADR never achieved full fruition.⁶⁸

In this struggling justice environment, courts are willing to pilot the promise of ODR. The design of many ODR procedures offer justice without lawyers, addressing the problem of the unrepresented. ODR justice promises to be efficient and cost-effective, addressing the problem of shrinking budgets and case overflow. And, as we will explain in the following section, ODR delivers to litigants a form of justice they are already experiencing as consumers.

2. Clients: the Second Justice Stakeholder:

Increasingly, clients are seeking a more efficient and affordable dispute resolution procedure that 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.⁶⁹ Second, a growing number of disenfranchised clients cannot afford a lawyer and are

⁶⁷ See Global Data Trends and Regional Differences, GLOBAL POUND CONFERENCE SERIES 16 (2017), <https://webcache.googleusercontent.com/search?q=cache:dYdLBZxU12sJ:https://www.imimmediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf+&cd=1&hl=en&ct=clnk&gl=us>.

⁶⁸ 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 doesn't give 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 a paper on ADR, it is interesting to note - from an ODR 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. 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 UK 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. In that sense, there is little new, in the UK 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 system's capacity to meet specific program needs. They also demonstrate how online ADR is but one set of building blocks in a far wider range of options for ODR system design. See *supra*, Part I: ODR in the Courts Today and accompanying footnotes.

⁶⁹ Like anyone else, legal clients are likely to have gone through online dispute resolution processes as consumers at eBay, Amazon, or other online marketplaces. eBay was the earliest site to incorporate online dispute resolution

denied access to justice.⁷⁰ Third, clients have had a longstanding dissatisfaction with the quality and escalating costs of legal services and have taken affirmative steps to seek alternatives.⁷¹ These three experiences have reshaped clients' dispute resolution expectations, enhancing their receptivity to ODR justice.⁷²

The first social phenomenon involves clients 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 make purchases, and resolve any disputes arising out of those purchases online. Ebay and PayPal collaborated to pioneer an ODR system to resolve its 60 million disputes per year,⁷³ 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 such remedies as credit card chargebacks⁷⁴ and posting negative reviews about

system for buyers and sellers participating in its marketplace, and its system handles over 60 million disputes each year. See Arthur B. Pearlstein, Bryan J. Hanson and Noam Ebner, *ODR in North America*, in ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE 445, fn 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); See generally Lee Rainie and Janna Anderson, *The Internet of Things Connectivity Binge: What are the Implications?* PEW RESEARCH CENTER (June 6, 2017), <http://www.pewinternet.org/2017/06/06/the-internet-of-things-connectivity-binge-what-are-the-implications/>.

⁷⁰ See Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, REPRESENTING YOURSELF CAN., 39 (May 2013), <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>

⁷¹ See, e.g., Michael Zuckerman, *Is there Such A Thing As An Affordable Lawyer*, THE ATLANTIC (March 20, 2014) at <https://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/>; Clark D. Cunningham, *What Do Clients Want From Their Lawyers*, 2013 J. OF DISP. RESOL., 143 (2013); 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).

⁷² In this, we agree with the National Center for State Courts assessment that "The public will likely be the most enthusiastic stakeholder group" with regards to ODR. Our discussion below lays out the converging causes for this enthusiasm. Joint Technology Committee, *Case Studies in ODR for Courts: A View from the Front Lines*, JTC RESOURCE BULLETIN, 21 (Nov. 29, 2017), <https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx>.

⁷³ See *id* at 34.

⁷⁴ See *id* at 15.

their experience with a provider, all from the comfort of home.⁷⁵ 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 online dispute resolution.⁷⁶ Why would they not expect the same efficiency and accessibility from their court-based justice system?⁷⁷ We anticipate that consumer experience with online dispute resolution in their private transactions and dispute activity will render them receptive to ODR justice when they encounter it as clients in court.⁷⁸ Beyond this, millennials, the next generation of clients, will have even greater comfort with technology⁷⁹ and with ODR.

The second social phenomenon is that clients in poverty do not have access to justice; the primary reason that people don't have lawyers is money.⁸⁰ The Justice Index indicates that as many as 2/3 of litigants in the US are self-represented.⁸¹ Nationwide, for every 10,000 people living in poverty, there are approximately .64 legal-aid lawyers available to represent them.⁸² We expect many of these clients to welcome ODR as one way to access the justice that had previously eluded

⁷⁵ Colin Rule and Harpreet Singh, *ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress*, in *ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE* 175–196 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), http://www.ombuds.org/odrbook/rule_singh.pdf (discussing posting on reputation sites such as Yelp and TripAdvisor, and the relationship between these sites and ODR).

⁷⁶ See *id.* Consumers familiarity with online dispute resolution contrasts noticeably with parties lack of awareness of court-connected ADR.

⁷⁷ See *id.*; ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES*, 153 (2017).

⁷⁸ See, e.g., AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* (2017).

⁷⁹ See Shawna Benston & Brian Farkas, *Mediation and Millennials: A Dispute Resolution Mechanism to Match a New Generation*, 2 *J. OF EXPERIENTIAL LEARNING* 157 (2018). Particularly, perhaps, this generation might be inclined towards to a collaborative problem-solving in the online setting, offered by ODR systems. Farkas and Benston suggest that millennials are more inclined than previous generations to collaboration and risk aversion.

⁸⁰ See, e.g., Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, REPRESENTING YOURSELF CANADA, 39 (May 2013), <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>; see also Natalie Anna Knowlton, Logan Cornett, Corina D. Gerety & Janet L. Drobinske, *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, INS. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 12–14 (2016), http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf; *Support for Self-Represented Litigants*, THE JUSTICE INST., <https://justiceindex.org/2016-findings/self-represented-litigants/#site-navigation> (last visited Jan. 11, 2018).

⁸¹ See *Support for Self-Represented Litigants*, *supra* note 82. However, see the “About the Index” tab of this website, which states ‘In our states, as many as two-thirds of the litigants appear without lawyers.’

⁸² *Attorney Access Index*, THE JUSTICE INST., <https://justiceindex.org/2016-findings/attorney-access/#site-navigation>. (last visited Sept. 20, 2018); see also Knowlton et al, *supra* note 82 at 14.

them. Moreover, as the digital divide is narrowing, and the gap between those who cannot afford to pay for Internet access and those who have access has become marginal, ODR is becoming a more viable justice option for clients in poverty.⁸³

The third social phenomenon that has been occurring over the past 30 years is that paying clients have had a growing dissatisfaction with the accessibility,⁸⁴ quality and affordability of legal services. Legal consumers have demanded changes, increasingly have demanding from attorneys more cost-efficient resolutions.⁸⁵ Others have opted to forego attorneys and represent themselves.⁸⁶ 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.

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 client's choice of justice resolutions.⁸⁷ In fact, efficiency is such a priority for clients, they are willing to forego traditional notions of justice and participate in ODR processes to benefit from their efficiency.⁸⁸ Second, clients want

⁸³ See Liz Sultan, *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/>.

⁸⁴ 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/. (last visited Jan. 6, 2019).

⁸⁵ Leigh McMullan Abramson, *Is the Billable Hour Obsolete?* THE ATLANTIC (Oct. 15, 2015), <https://www.theatlantic.com/business/archive/2015/10/billable-hours/410611/>.

⁸⁶ See, e.g., Alan Feuer, *Lawyering by Laymen; More Litigants Are Taking A Do-It-Yourself Tack*, THE 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>; Frederic Lederer, *Improving Access to Justice Via Technology*, ABA NEWSLETTER (May 17, 2018), http://www.abajournal.com/news/article/improving_access_to_justice_via_technology (citing as contributing reasons litigants don't have access to justice is the cost of lawyers and slowness of justice).

⁸⁷ The preference for efficiency is evidenced in multiple ways. One example is people's willingness to continue to purchase on eBay despite knowing that they will likely not find remedy through traditional judicial systems. They prefer the efficiency of the eBay resolution system over the slow and inaccessible court process. Another example are those surveyed in the Pound Conference who rated efficiency as a number 1 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/ (noting how Pound Conference client's said that efficiency is a priority).

⁸⁸ See *The Pew Charitable Trusts*, PEW (2019), <https://www.pewtrusts.org/en>. In fact, 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.

to avoid litigation.⁸⁹ Third, clients desire prophylactic measures to avoid conflicts.⁹⁰ 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.⁹¹ Finally, in this digital age, clients still have a need for human contact as they resolve their disputes;⁹² we expect this need to persist – even to grow - in this ongoing justice evolution. These changing justice interests will help facilitate the acceptance of ODR.

In fact, the 2018 Global Pound Conference Series report confirmed these changing client justice interests. This report assessed individual and corporate civil and commercial dispute resolution stakeholders to better understand their prioritized considerations when opting for a dispute resolution process. It is worth noting that unlike many consumer disputes, lawyers play an active role in the resolution of civil disputes. The report concluded that when clients are selecting a dispute resolution process, their primary consideration is to select a process that will help resolve their dispute efficiently.⁹³ A second client consideration is their preference for their attorneys to listen to them and collaborate with them more about dispute resolution processes.⁹⁴ A third interest clients expressed is for their in-house counsel to focus on conflict prevention.⁹⁵ A fourth consideration is clients' preference that when conflicts do arise, lawyers should use dispute resolution efforts that are actually devoted to the use of pre-dispute protocols and less-costly mixed adjudicative and non-adjudicative processes to help resolve them.⁹⁶ Clients voiced their

⁸⁹ See *Global Pound Conference Series*, *supra* note 89.

⁹⁰ See *id.*

⁹¹ See Nancy Welsh, *ODR: A Time for Celebration and the Embrace of Procedural Safeguards*, ADRHUB, (July 4, 2016), <http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr>.

⁹² See, e.g., Kai-Fu Lee, *The Human Promise of the AI Revolution*, THE 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/>.

⁹³ See *Global Pound Conference Series*, *supra* note 92 at 1, 8 The 2016-2017 meeting surveyed more than 4,000 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.

⁹⁴ See *id.* at 11 (discussing lawyer's view of their roles as advocates, not collaborators).

⁹⁵ See *id.* at 16.

⁹⁶ See *id.* at 14.

desire that adjudicative processes only be used when all else has failed.⁹⁷ 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.⁹⁸

Client's reprioritization of efficiency in their dispute resolution preferences calls into question whether clients' expectations of procedural justice, whether in court, ADR or ODR, are similarly in flux.⁹⁹ Nancy Welsh suggests that these have not fundamentally changed. She cautions ODR designers and lawyers suggesting ODR to their clients, that even though ODR provides a different dispute resolution context, clients still want to be assured that any ODR process also satisfies their procedural justice concerns.¹⁰⁰ Professor 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 decision-maker listen and understand what the party said? Was the process impartial and free from bias? Was the party treated in a dignified way?¹⁰¹ Thus, clients have an ongoing interest in achieving procedural justice, whichever dispute resolution process they use.

Without arguing the premise of procedural justice's ongoing centrality, we do suggest that the prioritization and characterization of its four 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 the real security risks associated with its use.¹⁰² This same transformation might lead to people abandoning or reprioritizing other safeguards they valued in the pre-internet world. For example, in the ODR evolution, clients may be satisfied they have been "treated in a dignified manner" so long as the ODR platform clarified each process and

⁹⁷ See *id.*

⁹⁸ See, ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF Disputes, 149–69 (2017).

⁹⁹ 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. (2011).

¹⁰⁰ 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>.

¹⁰¹ See *id.*

¹⁰² See Lee Rainie and Janna Anderson, *The Internet of Things Connectivity Binge: What are the Implications?* PEW RESEARCH CENTER (June 6, 2017), <http://www.pewinternet.org/2017/06/06/the-internet-of-things-connectivity-binge-what-are-the-implications/>.

resolved their conflict in a timely manner. They might experience “having an opportunity to express themselves” 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. Having the decision maker listen and understand in the ODR context might be satisfied by the sense that the platform’s artificial intelligence (hereinafter AI) was able to process their perspective. Thus, in the ODR-infused courthouse, clients may forego components of procedural justice, or lower the bar required for their satisfaction, in return for the convenience of the process.¹⁰³

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. This shifting interest characterizes not only legal clients, but human beings in general. Immersion in technology leaves people feeling disconnected, and seeking interpersonal connection.¹⁰⁴ An ironic by-product of our increased connectivity to and through the internet is that people feel more lonely and have a greater need for human contact.¹⁰⁵ That need is only likely to increase in the next generation.¹⁰⁶ Internet-based communication and social networking applications are adjuncts to human relationships,¹⁰⁷ but they are not substitutes.

¹⁰³ In this, we agree with Ethan Katsh and Orna Rabinovich Einy, who succinctly summed up all we can currently say for certain with regards to this issue by 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.”

¹⁰⁴ As Professor Sherry Turkle of MIT, who studies the impact of internet on society and human relationship with technology, 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 a mere sociological observation. When asked to name the biggest disease in America today, US Surgeon General Vivek Murthy, answered “Isolation.” See THOMAS FRIEDMAN, *THANK YOU FOR BEING LATE: AN OPTIMIST’S GUIDE TO SURVIVING IN AN AGE OF ACCELERATIONS* 26, 450 (2016); see also Kai-Fu Lee, *The Human Promise of the AI Revolution*, WALL STREET JOURNAL (Sept. 14, 2018), <https://www.wsj.com/articles/the-human-promise-of-the-ai-revolution-1536935115>.

¹⁰⁵ See Clay Routledge, *The Curse of Modern Loneliness*, NATIONAL REVIEW (Jan. 16, 2018), <https://www.nationalreview.com/2018/01/digital-age-loneliness-public-health-political-problem/>.

¹⁰⁶ See Jean W. Twenge, *Has Smartphone Destroyed A Generation?* THE ATLANTIC DAILY (Sept. 2017, 2018), <https://www.theatlantic.com/magazine/archive/2017/09/has-the-smartphone-destroyed-a-generation/534198/>.

¹⁰⁷ See Anna M. Lomanowska & Matthieu J. Guittou, *Online Intimacy and Well-Being in the Digital Age*, 4 INTERNET INTERVENTIONS 138 (2016), <https://www.sciencedirect.com/science/article/pii/S2214782916300021>.

Thus, now more than ever, clients may prefer lawyers who are also skilled in relating to the client, rather than those who only have substantive expertise in the law.¹⁰⁸ Situations in which parties navigate their disputes largely on their own, via technology, may create a new type of need for human legal guidance. That this lawyer-client relationship differs greatly from the current typical relationship is clear. This is only one example of how lawyers' roles might shift as a result of clients' changing justice needs.

3. The Legal Profession: The Third Justice Stakeholder

In stark contrast to courts' and clients' curiosity about and receptivity to ODR, the legal profession as a whole has ignored the signs and has yet to take coordinated steps to avoid possible extinction in an ODR-infused justice system. Rather, some lawyers find the concept of lawyer extinction ludicrous; an unrealistic projection into a fantastical future. After all, lawyers have survived the ADR evolution, despite predictions to the contrary. Why wouldn't lawyers survive the ODR evolution, too? Still other lawyers are paralyzed to inaction by the ongoing justice changes you are observing and are lamenting, "Why can't lawyers just stay the way they were?"¹⁰⁹ However, the reality of today's legal practice is about change.¹¹⁰

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 of the 21st century legal practice, others have been more resistant.¹¹¹ Depending on the size of the firm and the comfort of the firm's decisionmaking lawyers, law firms are embracing technology to improve their

¹⁰⁸ See RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 76 (2nd ed. 2017).

¹⁰⁹ See generally, ELISABETH KUBLER ROSS, *ON DEATH AND DYING* (1969). For some, change represents a loss of what was and involves a grieving about the loss, before the change is accepted. In many ways, this grieving about change mirrors the grieving process articulated by Kubler-Ross: denial, anger, bargaining, depression and acceptance. In the writing of this article, the authors, too, experience both an excitement about the ongoing changes precipitated by the digital justice evolution and a sadness about what is becoming extinct.

¹¹⁰ Richard Suskind, *Foreword*, in *ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE* (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), <http://www.ombuds.org/odrbook/suskind.pdf>.

¹¹¹ See Steve Lohr, *A.I. is Doing Legal Work. But It Won't Replace Lawyers, Yet*, *THE N. Y. TIMES* (March 19, 2017), <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html>.

practice of law.¹¹² Few lawyers appreciate, however, how the cumulative import of these technological changes are helping to advance our legal system into an ODR -infused justice system.¹¹³ In response to these technological advancements, some law firms are beginning to appreciate that with increased technological connectivity, there is less need for traditional office space. Thus, many law firms are beginning to rethink the value of maintaining a costly brick and mortar footprint in this digital age.¹¹⁴ Please note that those technological innovations or adaptations that has been done in individual firm, primarily addresses in-house communications, case management, and legal research.

The American Bar Association 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.¹¹⁵ Over half of US states have adopted corresponding rules¹¹⁶ Explicitly, Rule 1.1 Comment 8 Maintaining Competence provides:

[8] 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.¹¹⁷

However, the rule's wording is broad and subject to interpretation and has failed to spark widespread interest in advancing lawyers' technological competence.¹¹⁸

¹¹² *Id.*

¹¹³ Katsh and Rabinovich-Einy categorize these early innovations as examples of 'using technology for case management', the first of three phases of the incorporation of technology into the court system, a process that ultimately results in an ODR-infused system. See, ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF Disputes, 154–58. (2017).

¹¹⁴ See, e.g., Andrew McIntyre, *NYC Brick and Mortar: Less Space Per Lawyer*, LAW360 (Sept. 4, 2018), https://www.law360.com/legalethics/articles/1064787/nyc-brick-mortar-less-space-per-lawyer?nl_pk=2bfa25dd-c8a6-4c4d-8d28-01f969b2d612&utm_source=newsletter&utm_medium=email&utm_campaign=legalethics.

¹¹⁵ ABA MODEL RULES OF PROF'L CONDUCT. 1.1 cmt. 8 ("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 ...").

¹¹⁶ 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/>.

¹¹⁷ *Supra*, note 117.

¹¹⁸ See, e.g., Elayne Greenberg & Noam Ebner, *Ethics Meets the "O" in DR*, 11 N.Y. DISP. RESOL. LAWYER (2018).

A select group of lawyers, however, are heeding the signs and are 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 analytics¹¹⁹. In another illustration, entertainment lawyers who are negotiating contracts for Netflix stars with Netflix executives decision-makers must now balance data-driven analysis about viewer preferences with the star's preferences.¹²⁰ 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.¹²¹

We observe that the legal profession's uneven adoption of technology in their 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. Rather, lawyers have largely ignored the intent to delayerize¹²² the design of the ODR systems currently operating. Sometimes, the system's designers and administrators overtly acknowledge such delayerization, other times they acknowledge such delayerization through the design itself, delivering the message verbally in more placating tones to reduce attorney resistance.¹²³

¹¹⁹ 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/>.

¹²⁰ See Shalini Ramachandran & Joe Flint, *At Netflix, Who Wins When It's Hollywood vs. The Algorithm*, THE WALL STREET J. (Nov. 9, 2018), <https://www.wsj.com/articles/at-netflix-who-wins-when-its-hollywood-vs-the-algorithm-1541826015?mod=searchresults&page=1&pos=2>.

¹²¹ See Spencer Williams, *Predictive Contracting*, 2019 COLUM. BUS. L. REV. (forthcoming 2019).

¹²² Richard Susskind introduced this term to connote handing a traditional lawyer-task over to non-lawyers to discharge. See RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 33 (2nd ed. 2017). 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.

¹²³ For example, consider the words of Lord Justice Briggs, essentially the architect of the UK's (largely lawyerless) Online Court: "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

Why else haven't lawyers taken up arms against ODR's lawyerless design? In the early period of ODR's court debut, lawyers have been largely absent in the planning stages, unconsulted on implementation decisions, and sidelined in the basic design.¹²⁴ One reason for lawyers' lack of involvement in the development of ODR systems is that 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.

Such passivity, however, comes at a steep price for the legal profession. ODR, with its lawyerless design, will continue to be introduced into courts – the number, types and value of cases that courts manage through ODR systems, however, is likely to increase dramatically in the near future. 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 platforms to cases of higher value. This will be done incrementally and repeatedly until ODR caps rise into the economic zone that includes those cases that have traditionally been profitable for attorneys,¹²⁵ facing a sharp loss of revenue and employment in an already contracting market, lawyers will instinctively respond in a sharp, protectionist manner. This, we anticipate, is when the ODR Wars will begin to flare up, with lawyers and bar associations vigorously rallying to block or limit ODR's adoption by the courts.

In anticipation of these developments in the rapidly approaching future, we suggest that lawyers, as justice stakeholders, are at a choice point: either heed the changing justice needs of the two other justice stakeholders, courts and clients, or risk extinction. If lawyers are going to survive

thinking of using the Online Court." [Lord Justice Briggs, *Civil Justice: My Vision for the Online Court*, THE 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://www.lawgazette.co.uk/practice-points/civil-justice-my-vision-for-the-online-court/5055277.article>.

¹²⁴ However, the launching of a NY ODR pilot for consumer cases was stopped when lawyers protested that the harms to consumers from the lawyer-less design would outweigh any benefits of the program.

¹²⁵ This might occur concurrently with the litigation market contracting owing to another ODR-related factor: the expanding use of smart contracts and blockchain evidence.

the ODR evolution and continue to play a central role in the delivery of justice, they must be individually, at the bar association level, and as a profession, a constructive part of the process of incorporating ODR into the court. Rather than obstructing ODR's advancement, they must participate in conversations and workgroups in which they plan and evaluate ODR by providing their unique expertise in looking out for the justice interests of parties.¹²⁶ 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, and innovate new roles for lawyers. Even if lawyers do not become constructive stakeholders in the ODR evolution and are disenfranchised from certain domains which they previously dominated, the legal profession might still thrive if it adapts. The next section identifies the specific skills that will be required to adapt, survive and even thrive.

B. Survival of the Fittest: Skills That Will Help Lawyers Thrive in the ODR Evolution

How can the legal profession avoid being relegated to the room in the Museum of Natural History adjacent to the courtroom exhibit? The answer to this question, as with any evolutionary challenge, is adaptation. Initial research affirms that lawyers who adapt to their changing roles will be valued.¹²⁷ We suggest re-prioritization of legal competencies as an adaptive response to the changing justice expectations of courts and clients. This section discusses, in detail, skills that

¹²⁶ Remarks by David Larson at AALS Section of the Dispute Resolution Program, ADR & Technology held on January 5, 2019 in New Orleans, opined that in part, the inability to launch a ODR program for creditors and debtors was because all the lawyers involved did not vocalize their concerns until the program was about to be launched. Alternative Dispute Resolution, Co-Sponsored by Litigation and Technology, Law and Legal Education, THE ASSOC. OF AM. L. SCHOOLS (Jan 5. 2019).

https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=7bac5278-9eb5-4a85-bdbe-6b99a2810038.

¹²⁷ See, e.g., Dana Remus & Frank S. Lee, *Can Robots Be Lawyers? Computers, Lawyers and the Practice of Law* (Nov. 27, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092; *AI Vs. Lawyers*, LAW GEEX, <https://www.lawgeex.com/AlvsLawyer/> (last visited Jan. 2, 2018) (lawyers and AI compete at timed issue spotting to see who completed the task more accurately); James Manyika, Michael Chui, Medhi Miremadi, Jacques Bughin, Katy George, Paul Wilmott & Martin Dewhurst, *Harnessing Information for a Future That Works*, MCKINSEY & Co. (Jan. 2017), <https://www.mckinsey.com/featured-insights/digital-disruption/harnessing-automation-for-a-future-that-works>.

will enable lawyers to survive and thrive in the coming justice evolution, and the concomitant recalibration law schools must make if they expect to graduate practice-competent lawyers.¹²⁸

We begin with a discussion of which types of legal roles will diminish in an ODR-infused justice system, which will remain relevant and persist, and which will thrive or come into existence.

In the new justice system, there will certainly still be a need for lawyers who provide efficient and affordable bespoke legal counsel.¹²⁹ For example, lawyers will play a role in providing a standalone diagnostic session, in which they counsel the client as to whether they have a claim in the first place, the likely area of settlement/judgement, and the most advantageous types of evidence to procure, without representing them in the actual process. Lawyers will be needed to counsel about whether or not participating in an ODR settlement-oriented process such as online mediation, rather than insisting on judicial proceedings (which may be held online themselves!), is advantageous. A third might be providing behind-the-scenes negotiation advice or tactical participation advice in throughout the ODR process.¹³⁰

As cases become more stratified, cases that are not initially directed to an ODR caseflow (e.g., cases that automated intake systems could not easily categorize), or cases that are not considered by these systems as unsuitable for diversion to online alternative dispute resolution processes, or those that initial categorization led to unsuccessful diversion and resolution efforts, may be cases involving complex legal problems.¹³¹ Such cases may certainly continue to require lawyers equipped traditional strategic skills for resolution of the immediate case.

¹²⁸ See, Remus & Lee, *supra* note 129; Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet*, THE N.Y. TIMES (March 19, 2017), <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html> (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).

¹²⁹ See RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 141 (2d ed. 2017). See also Lord Justice Briggs, *Judiciary of England and Wales Civil Courts Structure Review: Final Report*, JUDICIARY OF ENG. & WALES (2016), <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>.

¹³⁰ *Id.*

¹³¹ Richard Suskind, *Foreword*, in *ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE* 6 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011), <http://www.ombuds.org/odrbook/susskind.pdf> (clarifying his recommendations for establishing an online court in the UK that, stated that “nowhere did we suggest that complex claims should be

As the court continues to evolve into 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,¹³² with skills to solve and prophylactically minimize the reoccurrence of organizational and interorganizational legal problems¹³³ – particularly, those which court ODR does not address sufficiently well. The second type is settlement counsel,¹³⁴ given settlement's increasing primacy as a justice value.

It is also safe to assume that new roles or specialty areas for lawyers will evolve: case managers,¹³⁵ online mediators, agreement reviewers, legally-trained ODR technologists for the court system and for firms, and ODR consultants guiding people through ODR processes. However, these roles will compensate for only a fraction of the jobs/roles that are eliminated.

With the legal field being redefined, in terms of roles and overall work volume, what's a lawyer to do, to survive as the fittest? We suggest that six adaptive skills are foundational for lawyers to thrive in this evolving justice environment: digital literacies; interdisciplinary facility; a forward-thinking, problem-solving outlook; emotional intelligence; an entrepreneurial approach; and a greater reliance on higher level cognitive skills. The skills combined will help redefine what "thinking like a lawyer" will mean in an ODR-infused justice system.

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").

¹³² See, e.g. Orna Rabinovich-Einy & Ethan Katsh, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 *CARDOZO J. OF CONFLICT RESOL.*, 637, 653 (2017) (as one example of dispute system design, talks about the growing need to design digital dispute resolution systems by incorporating algorithms).

¹³³ See SUSSKIND, *supra* note 131 at 71.

¹³⁴ See, e.g., Christopher Nolland, *What the Heck is Settlement Counsel and Why Do You Care*, A.B.A. Corp. Counsel CLE Seminar (Feb. 11-14, 2016), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016ccc/written_materials/1_Settlement%20Counsel%20ABA%20CC%20Final%202016.pdf.

¹³⁵ This role is already developing in the UK'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. R. Amani Smathers, *The T Shaped 21st Century Lawyer*, VIMEO (2013), <https://vimeo.com/91864405>.

To put these six skills into their evolutionary context, bridging yesterday and tomorrow. The ODR evolution, like any evolution, builds on and strengthens those existing skills that will have greater relevance in the developing future. Problem-solving skills, interdisciplinary facility, emotional intelligence, entrepreneurial ability and reliance on higher level cognitive skills are already traits of some of the lawyers of today. These skills gain survival enhancing importance in the new justice environment. Evolutions also incentivize the development of *new* skills. In the ODR evolution we anticipate, digital literacies skills fall under this category.¹³⁶

1. Digital Literacies

Lawyers will need to adapt by acquiring and demonstrating Digital Literacies.¹³⁷ Generally speaking, this involves the ability to analyze and utilize commonly encountered technologies,

¹³⁶Our 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. However, we were gratified to become aware other voices in the legal profession and in the field of legal education, each identifying one or more of these skills and arguing their necessity from perspectives other than our own focus on the ODR evolution. 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 – converging with our call for enhancing digital literacies. See *The 21st-Century T-Shaped Lawyer*, A.B.A. (Aug. 2014), https://www.americanbar.org/publications/law_practice_magazine/2014/july-august/the-21st-century-t-shaped-lawyer/. 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/mark-cohen/2018/05/21/innovation-is-laws-new-game-but-wicked-problems-remain/#28d04a303890>. 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 LegalRnDn Workshop*, THOMSON REUTERS (June 14, 2018), <http://www.legalexecutiveinstitute.com/delta-lawyer-competency-model/>. This delta-shaped model categorizes lawyer competencies into three domains: Personal effectiveness skills; process, data and technology skills; and legal knowledge and skills. Like the T-shaped lawyer model, this model converges with many of our own suggestions. Additionally, the past decade or so has seen many calls to recognize emotional intelligence as a legal competence and include its study in the law school curriculum. See, e.g., Dan Defoe, *Beyond the "Blue Book" – Emotional Intelligence Training, the Pace of Legal Education and Suggested Remedies*, PSYCHOLAWLOGY (Apr. 14, 2017), <https://www.psycholawlogy.com/2017/04/14/beyond-the-blue-book-emotional-intelligence-training-the-pace-of-legal-education-and-suggested-remedies/>; Christine C. Kelton, 63 CLEV. STATE L. REV. 459 (2015); JULIE MCFARLANE, *THE NEW LAWYER: HOW CLIENTS ARE TRANSFORMING THE PRACTICE OF LAW*, 150–59 (2d ed., 2017) (describing "Affective Lawyering"). These are just several examples, out of many calls for change in legal competencies and legal education, deriving from different perspectives and driving forces - yet leading in the same direction.

¹³⁷ This phrase expands on the concept of digital literacies expounded in Digital Literacies. See COLIN LANKSHEAR, & MICHELE KNOBEL, *DIGITAL LITERACIES: CONCEPTS, POLICIES AND PRACTICES* (2008). 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

particularly legal technologies, in the course of a lawyer's work. Digital literacy involves both technological fluency – the ability to interface with an ever-widening range of technological platforms, and communicative fluency – skill at communicating effectively through online media.

As stated in the previous section, the ABA has already embarked on the road to requiring digital literacy of lawyers, by incorporating technological awareness and understanding as a part of a lawyer's ethical responsibility”¹³⁸ While general skill with technology is a good start, more is needed to substantively comply with the ABA ethical mandate for lawyers to be technologically competent. In the era of digital justice, lawyers will have to understand how the new court ODR systems functions in order to evaluate the appropriateness, fairness, trustworthiness, and security of the platform and the processes it offers, and to explain their assessment to their clients and counsel them.¹³⁹ Furthermore, such digital literacies will be foundational to develop the skills to represent and advocate for their clients in those online procedures that involve direct representation – whether in online mediation or online court proceedings - as well as provide coaching to better prepare clients to participate in unrepresented online dispute resolution procedures.

2. Interdisciplinary knowledge

Lawyers will need to develop the interdisciplinary knowledge¹⁴⁰ 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.¹⁴¹ Here again, lawyers with interdisciplinary skills will have a competitive advantage over those who

reviewed in his recent scholarship. Vincent DiLorenzo, *Fintech Lending : A Study of Expectations Versus Market Outcomes*, 38 REV. BANKING & FIN. L. (forthcoming 2019); <https://ssrn.com/abstract=3247112>.

¹³⁸ ABA MODEL RULES OF PROF'L CONDUCT. 1.1 cmt. 8.

¹³⁹ See Noam Ebner & John Zeleznikow, *Fairness, Trust and Security on Online Dispute Resolution*, 36 HAMLIN J. OF PUBLIC L. AND POL'Y, 5 (2015).

¹⁴⁰ See RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 75–76 (2nd ed. 2017).

¹⁴¹ As technology advances, ODR software will incrementally progress from capacity to deal with simple cases to that required to handle cases of higher complexity. Attorneys' level of complexity must rise accordingly, to stay ahead of the machines and handle cases requiring human intervention. See RICHARD SUSSKIND, *Introduction to ODR*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 13 (suggesting that lawyers will continue to be required for complex cases in the age of ODR).

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 the 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 psychological dynamics in their area of practice. In the ODR evolution, 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 known as problem-solvers.¹⁴² 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 BATNA¹⁴³ should these ‘problem solving’ negotiations fail.¹⁴⁴ 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.¹⁴⁵ Rather, problem-solving will require more interactional and transactional skills, requiring lawyers to stay at the table and work with each other rather than making their cases to an hypothetical judge. In order to demonstrate benefits over machine-generated outcomes, problem-solving will likely require an integrative approach.¹⁴⁶ Thus, adaptive lawyers will need to hone the more expansive and creative thought processes required to proactively and realistically solve systemic problems and to strategically assess the appropriate dispute resolution options to resolve presenting conflicts.

¹⁴² Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-party Neutral: Creativity and Non-Partisanship in Lawyering: The Phyllis W. Beck Chair in Law Symposium: New Roles, No Rules – Redefining Lawyers Work-New Roles Problem Solving*, 72 TEMP. L. REV. (1999); Paul Brest and Linda Hamilton, *Lawyers as Problem Solvers*, 72 TEMPLE L. REV 811 (1999).

¹⁴³ In negotiation, your BATNA is your Best Alternative to Negotiated Agreement – the thing you will do or the path you will turn to, should the current negotiation go awry. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* 99–108 (Bruce Patton ed., 2011).

¹⁴⁴ See, e.g., Jacqueline M. Nolan-Haley, *Mediation: The “New Arbitration,”* 17 Harv. Negot. L. Rev. 61 (2012).

¹⁴⁵ Rather, lawyers will be more likely to formulate realistic BATNA’s by applying their interdisciplinary knowledge as well as data collected from historic ODR processes.

¹⁴⁶ See James C. Melamed, *Online Dispute Resolution*, *MEDIATE: EVERYTHING MEDIATION* 3 (suggesting that a category of cases requiring lawyers in ODR is the integrative category) <https://www.mediate.com/pdf/ODRforLawyers.pdf>.

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 and those lawyers who can deliver this knowledge in bespoke legal counsel whilst supporting their clients.¹⁴⁷

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.¹⁴⁸ 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* risk of the 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.¹⁴⁹ Others have bristled at the idea that in an increasingly technological world, clients will turn to lawyers for their emotional fix.¹⁵⁰ Yet, authentic human engagement remains a basic human need.¹⁵¹ A resounding amount of research reinforces that as our world becomes more digitalized, human

¹⁴⁷ See, e.g., RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 67–68 (2nd ed. 2017). We note that the literature confuses the term “empathy” to mean “emotional intelligence.” As explained in our text, we use “emotional intelligence” as an umbrella term to denote both the awareness and skills to understand and respond to the range of people's emotions. We use “empathy” as the cognitive, emotional and skill ability to understand and demonstrate this understanding to another's perspective.

¹⁴⁸ We remember with humor and irony Woody Allen's 1973 movie *Sleeper* in which a man dies, is cryogenically frozen and reawakens 200 years later to a changed world in which human's sexual needs are satisfied by a ten second visit to an orgasmitron. Our 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 that 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?* *THE ATLANTIC* (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/the-sex-recession/573949/>; Belinda Luscombe, *Why are we all Having So Little Sex*, *TIME* (Oct. 26, 2018), <http://time.com/5297145/is-sex-dead/>. 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);

¹⁴⁹ See SUSSKIND, *supra* note 149 at 76–77.

¹⁵⁰ See, e.g., list serve comments by Roselle Wissler and Deborah Hensler.

¹⁵¹ See Sherry Turkle, *Authenticity in the Age of Digital Companions*, (2007), <https://www.dhi.ac.uk/san/waysofbeing/data/communities-murphy-turkle-2007.pdf>

need for human connection grows.¹⁵² A natural corollary is that in the ODR 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.¹⁵³ Empathy is just one aspect of emotional intelligence.¹⁵⁴ An even broader term that has been introduced, “social intuition”¹⁵⁵ captures a wider range of human facilities: emotions, empathy, nonverbal communication, humor, metaphor and more to explain all of the skills humans have developed for understanding themselves, reading the other, and intentionally connecting with the other. In suggesting that clients might come to require empathy, emotional intelligence and social intuition from their lawyers, we are suggesting that our core humanity, the very essence that some prophesize will lead to our extinction, may instead 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.

5. Reliance on higher cognitive processes:

From an evolutionary standpoint, adaptation involves not only developing brand-new traits, but reinforcing those most successful of the previous traits. The legal profession has always relied on on higher cognitive thought processes; the distinction between these and lesser-required cognitive domains is likely to become even sharper in the evolving justice system.

¹⁵² Steven van Belleghem, *When Digital Becomes Human*, 17 J. OF DIRECT DATA DIGITAL MARKETING PRAC. (2015), <https://link.springer.com/article/10.1057%2Fddmp.2015.36>; Zach St. Louis, *Thomas Friedman on Human Interaction in the Digital Age*, THE ASPEN INST. (Jan. 10, 2017), <https://www.aspeninstitute.org/blog-posts/thomas-friedman-human-interaction-digital-age/> (stressing the sustained need for human connection and relatedness in the digital age); THOMAS FRIEDMAN, *THANK YOU FOR BEING LATE: AN OPTIMIST’S GUIDE TO THRIVING IN THE AGE OF ACCELERATIONS* 450 (2016) (identifying ‘isolation’ as humanity’s fastest growing disease).

¹⁵³ 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, 127–142 (Christopher Honeyman & Andrea Kupfer Schneider, eds., 2017).

¹⁵⁴ See *id.*; Elayne E. Greenberg, *The Power of Empathy*, 9 N. Y. Disp. Resol. Law. (2016).

¹⁵⁵ See Ebner & Schneider, *supra* note 155 at 129.

Cognitive thought processes are not all alike and differ in their level of complexity. In 1956¹⁵⁶ (and revised in 2001¹⁵⁷) Benjamin Bloom, a renowned educational psychologist, created a taxonomy of cognitive objectives.¹⁵⁸ In Bloom’s revised hierarchical continuum, the cognitive skills, starting with the simplest, include knowledge, comprehension, application, analysis, evaluation, and synthesis.¹⁵⁹

This taxonomy provides a useful framework to help us distinguish those particular thinking processes that lawyers will be required to master in the online digital evolution. Mastering these cognitive skills – through self-improvement, and through law school curriculum readjustment - will trump the need for mastery of the lower-ordered cognitive skills such as basic knowledge, memory, and recollection, as these will increasingly be more efficiently and more cost effectively provided by computerization and artificial intelligence.¹⁶⁰ The good news for lawyers seeking to adapt is that these skills are not fixed and - with motivation - can be developed.¹⁶¹

Indeed, in his book, “Tomorrow’s Lawyers,” Professor Richard Susskind identifies the higher cognitive skills of analyzing, synthesizing, and evaluating as the very skills that lawyers will need to survive in a market penetrated and disrupted by technology.¹⁶² Moreover, Professor Susskind explains that these are the very skills that lawyers will need to be the more effective as the negotiators, strategists, and advocates that will be needed in this new era.¹⁶³ To tie this in with the other adaptive skills we’ve listed, we note that Susskind predicted that this re-prioritization of strategic, advocacy, and negotiation skills will reshape the role of lawyers, law firms and

¹⁵⁶ Inspired by Genevieve Marie Johnson, “Functional Internet Literacy: Required Cognitive Skills with Implications for Instructions.” COLIN LANKSHEAR & MICHELE KNOBEL, *DIGITAL LITERACIES: CONCEPTS, POLICIES & PRACTICES* 38 (2008).

¹⁵⁷ See Patricia Armstrong, *Bloom’s Taxonomy*, VAND. UNIV. CTR. FOR TEACHING (2019), <https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy/>.

¹⁵⁸ Inspired by Genevieve Marie Johnson, “Functional Internet Literacy: Required Cognitive Skills with Implications for Instructions.” LANKSHEAR & KNOBEL, *supra* note 158.

¹⁵⁹ See [Armstrong, *supra* note 159](#).

¹⁶⁰ See, e.g., RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 51–53 (2nd ed. 2017).

¹⁶¹ See CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2007).

¹⁶² See SUSSKIND, *supra* note 162 at 75–77.

¹⁶³ See *id.* at 34.

inhouse counsel in the technological era and make them more focused on problem-prevention and problem-resolution.¹⁶⁴

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.¹⁶⁵ Under this skillset, we include the willingness to unbundle the legal services lawyers offer¹⁶⁶ – and the inventive knack for tailoring and rebundling them to suit clients’ needs. Lawyers already have many of the negotiation and analytic skills that are needed to be good entrepreneurs.¹⁶⁷ To successfully adapt, lawyers will also have to overcome their tendencies to be risk adverse and overlawyer, toxins that dampen the entrepreneurial efforts needed to go forward in the digital age.¹⁶⁸ Ultimately, lawyers’ success will depend on being able to align their added-value with clients’ changing justice needs.

C. *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 digital justice evolution, “thinking like a lawyer” will have a different

¹⁶⁴ 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. This converges with our own view of the impact of technology on the legal profession, which takes the perspective of changes in the court system due to adoption of ODR.

¹⁶⁵ 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>.

¹⁶⁶ 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. (Sept. 26, 2018), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/september_october/law_a_la_carte_case_unbundling_legal_services/; see also SUSSKIND, *supra* note 162 at 29–38 (using the term ‘decompose’ rather than ‘unbundle,’ with the same intent).

¹⁶⁷ 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/

¹⁶⁸ See, e.g., Jonathan Marciano, *10 Lawyers Turned Entrepreneurs Creating a Revolution in Law*, Entrepreneur (June 14, 2017), <https://www.entrepreneur.com/article/295194>.

meaning than it does today in three significant ways.¹⁶⁹ 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 digital justice evolution. Second, as identified above in our discussion of interdisciplinary skills, “thinking like a lawyer” in the digital justice evolution will require lawyers to have a cognitive understanding about a broader range of subjects than just laws and statute and an interdisciplinary knowledge of how these subjects intersect in the real world.¹⁷⁰ 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 recommend a settlement approach that is best for that client and the presenting conflict.¹⁷¹ 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 clients will need in an increasing digitalized justice age.¹⁷² Thus, lawyers will need to be proficient in multiple domains¹⁷³ if they are to “think like a lawyer” in the evolving justice system.

In today’s practice of law, we note that settlement counsel and dispute system designers are two categories of lawyers who regularly rely on higher cognitive skills. In the ODR evolution, lawyers

¹⁶⁹ See, e.g., Larry O. Natt Gant II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2017).

¹⁷⁰ See, e.g., SUSSKIND *supra* note 168 at 75.

¹⁷¹ See Deborah Hensler, Leuphana Honorary Doctorate 2014, YouTube (Jan. 7, 2015), https://www.youtube.com/watch?v=UkLIEOR_Sew&feature=youtu.be; SUSSKIND, *supra* note 168 at 137; Elayne Greenberg, ... *Because ‘Yes’ Actually Means ‘No’: A personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution*, 102 MARQ. L. REV. (forthcoming Fall 2018); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2950020 (lawyer’s 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), <https://onlinelibrary.wiley.com/doi/full/10.1002/crq.21228> (Stressing the need for lawyer’s to first understand client’s values before prescribing a course of action).

¹⁷² See, e.g., SUSSKIND, *supra* note 173 at 75; Zach St. Louis, *Thomas Friedman on Human Interaction in the Modern Age*, THE ASPEN INST. (Jan. 10, 2017), <https://www.aspeninstitute.org/blog-posts/thomas-friedman-human-interaction-digital-age/> (talking about the sustained need for human connection and relatedness in the digital age; isolation is our fastest growing disease).

¹⁷³ 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).

skilled in settlement and dispute system design will gain even greater relevance as problem-prevention and problem-resolution become of even greater importance. Lawyers, specifically, and law firms, generally, in addition to legal knowledge, will be expected to have business knowledge about the client's industry and interpersonal skills such as the ability to empathize (75-6). Such interdisciplinary richness will help lawyers deliver the more bespoke legal counseling that customers will need and value.¹⁷⁴ Inhouse counsel will be valued for applying their knowledge of the business and risk management acumen.¹⁷⁵

"Thinking like a lawyer" in the ODR evolution also calls into question whether the more linear thought process that has been the hallmark of today's lawyer might actually make lawyers more vulnerable to extinction unless they develop a complementary understanding of how humans respond to conflicts and make decisions.¹⁷⁶ A predominant number of today's lawyers who have taken the Meyers-Briggs test are found to be "thinkers" rather than "feelers."¹⁷⁷ Similarly, applying the Kolb Learning Style Indicator has shown that lawyers are more intrigued with abstract theory and ideas than people.¹⁷⁸ Expectedly, lawyers are drawn to logical rather than practical resolutions.¹⁷⁹

In yesterday's environment, of all these skills and domains, it was the higher cognitive skills that were currently stressed in law school and valued in practitioners. What might change in their regards, other than their value increasing? We suggest these invaluable skills, like all our skills, must be adapted to the new world. The linear thought process that has been the hallmark of today's lawyer – even in applying the highest-level cognitive thought processes - might still

¹⁷⁴ See Susskind, *supra* note 174 at 137.

¹⁷⁵ See *id.* at 87.

¹⁷⁶ See, e.g., Larry O. Natt Gant II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 443, 457 (2007); Patricia Armstrong, *Bloom's Taxonomy*, VAND. UNIV. CTR. FOR TEACHING (2019), <https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy/>.

¹⁷⁷ See, e.g., Stacey Romberg, *The Quirky Lawyer: Understanding the Genius of Personality Types Part 2*, STACEY ROMBERG (Mar. 21, 2016), <https://staceyromberg.com/2016/03/the-quirky-lawyer-understanding-the-genius-of-personality-type-part-2/>; Jennifer Alvey, *The Other Key Lawyer Personality Trait: Think, Don't Feel*, *Leaving the Law* (Dec. 10, 2018), <https://leavinglaw.wordpress.com/2010/12/08/the-other-key-lawyer-personality-trait-think-dont-feel/>.

¹⁷⁸ Gant, *supra* note 178 at 424.

¹⁷⁹ See *id.*

render lawyers vulnerable to extinction, if they do not also develop a psychological understanding of human responses to conflict and decision making.¹⁸⁰ Many lawyers will need to retrain 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.

We can't help but optimistically hope that one unexpected result of this demand for higher thinking and emotional intelligence is that the legal environment will become more receptive and less hostile to women.¹⁸¹ Empirical research has repeatedly demonstrated that women have greater problem-solving and emotional intelligence than their male counterparts.¹⁸² As these skills gain greater value in the practice of law, we expect that women, too, will be valued more. Optimistically, this will help shatter the ever-present glass ceiling.

D. Recommendations for Law Schools to Adapt

Law schools will be able to preserve their role as the gatekeepers of legal education if they adapt. Law schools will first need to recalibrate their admissions criteria, revise doctrinal and clinical curriculum, and encourage bar exams to better align with the skills aspiring attorneys will need to be practice-competent in the ODR evolution. To survive and thrive, attorneys will need to be competent in six skillsets we've identified above. Although today's law schools already introduce some of these skills, these skills are not fully integrated in doctrinal and skills courses. Moreover, as adjudication to decision continues to be of diminished relevance, law schools cannot continue to rely on the case book method of education. Rather, in this changing legal world, clients will likely rely more on their own community values, industry norms, objective data and personal preferences to resolve disputes. Therefore, if law schools are going to prepare aspiring lawyers to become practice-competent in this changing justice context, law schools must redesign their educational practices.

¹⁸⁰ See *id.* at 443.

¹⁸¹ See Christina Violante & Jacqueline Bell, *Law360 Glass Ceiling Report, By the Numbers*, L. 360 (May 28, 2018), <https://www.law360.com/corporate/articles/1047285>.

¹⁸² 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>.

The interdisciplinary legal education that is needed will provide law schools new opportunities to encourage teaching collaborations, for example, doctrinal and skills professors could partner to develop new pedagogical strategies to provide students with interdisciplinary *knowledge* required to survive.¹⁸³ Those law schools who are part of universities, could partner across campus to create dual-degree programs. Some professors may welcome this interdisciplinary approach while others may be apprehensive, concerned that this type of pedagogical approach is beyond their expertise. In time, these collaborations could become the norm, however, giving rise to a new generation of cross-disciplinary lawyers.

In that spirit, the teaching of doctrine could be expanded from a law-related problem-solving exercise to an interdisciplinary problem-solving learning opportunity. As an illustration of what a Contracts course problem could look like: Distributor Y is suing Manufacturer X for breaching the contract when X shipped Y non-conforming goods. In traditional pedagogy, professors would question students about legal doctrine regarding breach of contract. In order to expand the discussion to an interdisciplinary one, the professor could also question the students about how the receipt of non-conforming goods could be analyzed in the business culture of the goods, the future of the business, the overall economics of the industry, an understanding of who Manufacturer X and Distributor Y are as people, and the psychological relationship between X and Y.

The professor can then guide the student to consider what might be some responsive ODR and other dispute resolution processes resolutions to help resolve the problem at hand, given who Manufacturer X and Distributor Y are and the businesses they operate. The professor can help students discern between past-focused approaches, aimed at establishing fault and liability, and future-focused processes, examining what needs to be done now and onwards to allow both businesses to conduct their operations fruitfully. Assessing the multiple ODR options available to

address presenting issues, the professor might encourage students to assess the appropriateness of each to resolve the issue at hand. From these different interdisciplinary frames, students would be educated about contract law as well as the interdisciplinary issues in contractual business practices that will be relevant in our changing justice system.

ODR evolution has not happened in a day. Rather, its roots can be found in early efforts at court digitalization. Similarly, we find early efforts to teach teaching digital literacies in law schools. For example, a decade ago, negotiation teachers prepared their students solely for face-to-face interactions;¹⁸⁴ today, many negotiation courses include online simulations, and many textbooks include sections on online negotiation.¹⁸⁵ Still, these digital literacy elements, far from being taught as part of lawyers' core skillset, are appendixes to elective courses on ADR or Negotiation. We suggest that schools cannot omit a required course on Digital Literacies for Lawyers from their curriculum, any more than they could omit a course on Legal Writing and Reasoning.

In considering ways to reinforce digital literacies throughout students' educational experience, law school clinics could reimagine their case management. Students assigned to each case could be assigned either the role of litigation counsel or settlement counsel. Working in parallel, they would appreciate the different advocacy roles that each type of attorney offers. All clinic students would become adept at incorporating emerging technologies as part of their case management and comfortable with evaluating the appropriateness of ODR programs for their clients.

¹⁸⁴ See Noam Ebner, Noam Ebner, Anita D. Bhappu, Jennifer Gerarda Brown, Kimberlee K. Kovach & Andrea Kupfer Schneider, *You've Got Agreement: Negoti@ting Via E-mail*, MARQ. L. SCHOOL LEGAL STUD. PAPER (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392474 (identifying this educational gap and suggesting methods for closing it).

¹⁸⁵ See, e.g., ROY J. LEWICKI, DAVID M. SAUNDERS & BRUCE BARRY, SAUNDERS' NEGOTIATION: READINGS, EXERCISES AND CASES 188–208 (7th ed.); JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 153–178 (3d. ed. 2016). A rare few even include wider sections on online dispute resolution, albeit largely in its general, non- court-focused sense. See, e.g., JULIE MACFARLANE & JOHN KEELFELD, DISPUTE RESOLUTION: READINGS AND CASE STUDIES (4th. ed. 2015).

Clinics can provide opportunities to learn how to unbundle legal services. Clinic students can provide bespoke counsel to clients deliberating between dispute resolution options that don't require attorney participation but do require understanding on the part of the client and some guidance – supported by an emotionally intelligent student counsel – in assessing their own priorities. Clinic students also might coach clients engaging in an ODR process. Such unbundling experiences provide real-life training for practicing in the ODR evolution.

Education about technological and ODR advancements can be further integrated into students' clinical education. As courts continue to experiment with ODR, clinic students, guided by their professors, could become invaluable advocates to the courts, ensuring that the procedural and substantive justice issues raised by a considered or piloted ODR program are adequately addressed upon its implementation. In this hands-on way, students learn the fundamentals of dispute system design, an increasingly prioritized skill in the ODR evolution, in a real-life setting.

Of the six adaptive skills we identified, reliance on higher cognitive skills may be problematic for those law schools who continue to admit those students with lower qualifying scores as a strategy to maintain class enrollment. Those schools then require vulnerable students to take a series of supportive courses in which they are drilled on fundamental skills that will help them pass the bar. Yet, higher cognitive skills are more than memorizing and applying skills to routine tasks. Moreover, while each human being offers unique contribution, not everyone will have the cognitive ability to become a lawyer in the ODR evolution. Law schools will have to rethink their business models to attract and educate those students who will have the capacity to develop the requisite cognitive skills needed in the ODR-infused justice system.

Of course, law schools will need to adopt admission measures that identify and attract those students with an aptitude for the skills needed in this evolving profession. While LSATs and GRE's are good predictors of law school success as law schools stand today, these test measures fail to capture the emotional intelligence and interdisciplinary skills that law students will require. Law schools should consider, therefore, adding new components to their admission criteria. Moving

to the other end of the training process, when students complete their legal education, the Bar should include questions that assess graduates' competency to practice in the ODR evolution.

Law schools, as institutions, have been notoriously resistant to change.¹⁸⁶ The case book method introduced in the 1870's is still the predominant mode of teaching doctrinal courses.¹⁸⁷ Over the course of time, law schools have been required to include more clinics and skills course.¹⁸⁸ Many law schools have responded to these requirements in a way that maintains the doctrinal primacy in legal education without taking a holistic look at the legal curriculum being offered. For example, the clinical and skills professors hired to teach these courses are assigned a lower status in the faculty caste system, as evidenced by inferior contract terms and lower salaries. In another example, law schools have responded to the ADR evolution by offering ADR clinics or courses, sometimes cabined in ADR centers, while still perpetuating the myth that litigation is the dominant dispute resolution process. With regards to technology-related changes, law schools seem particularly resistant to change. For example, they have thus far resisted preparing students for technological advances in legal practice such as e-discovery or visual aids for advocacy, even though these advances are *already* a regular part of legal practice.¹⁸⁹

¹⁸⁶ See, e.g., Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WISCONSIN INT'L L. J. (July 26, 20016); Sarah O. Schrup & Susan E. Provenzano, *The Conscious Curriculum: From Novice Towards Master in Written Legal Analysis and Advocacy*, 108 Nw. U. L. REV. COLLOQUY 80 (2013).

¹⁸⁷ See *id.*

¹⁸⁸ See e.g., Robert MacCrate et al., *Legal Education and Professional Development – An Educational Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. (July 1992), [https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report\).authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf). See also Mary Lu Bilek, Diane Camper, Roger J. Dennis, Robert D. Dinerstein, Bryant G. Garth, Laura N. Gasaway, Phoebe A. Haddon, Randy Hertz, Rebecca S. Thiem, *Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary*, A.B.A. (Mar. 20, 2013), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf (reviewing the MacCrate report from 20 years earlier); See William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING (2007), http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf.; *Best Practices in Legal Pedagogy*, CLINICAL LEGAL EDUC. ASS'N., <http://www.cleaweb.org/best-practices> (2011).

¹⁸⁹ See Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory and Teaching of Law*, 12 B.U.J. SCI & TECH. L. 227 (2006).

It seems, then, that when change is forced upon the legal academy, it withstands it for as long as it can, and then incorporates it without displacing doctrinal topics' privileged position. When changes in legal education demanded by the ODR evolution rattle the doors of legal education, this dynamic may play out once again, widening the increasing gap between legal education and legal practice.¹⁹⁰ We believe schools supporting this path will be making a fatal mistake, withholding from their students the knowledge they need to practice in the 21st century.

In a more positive light, we hope our call for change will be met with receptivity. The ODR evolution will usher in deep changes to the justice system that law schools must recognize and address. They are incentivized to do so to remain viable in reality and in ranking. In the past, law schools have pivoted, making changes to safeguard their U.S. News & World Report law school ranking, such as in 2012 when employment of legal graduates plummeted and adversely impacted law school enrollment.¹⁹¹ As the ODR evolution changes the skillset of truly practice-competent lawyers, their scores on two of the twelve factors that inform the ranking, law schools' *reputational* levels as determined by lawyers and judges and their graduate employment levels,¹⁹² -will decrease, unless they adapt their curriculum to the new justice needs. Change is on the way, and no individual, institution, or tradition is exempt from reexamination.

Conclusion:

ODR is re-shaping our justice system and re-defining the meaning of justice. This paper is a wake-up call for our legal profession: adapt, or become extinct. Just as the lawyers of yesterday and today, the lawyers of tomorrow can and should continue to play a role in helping deliver justice. However, as explained in this paper, the lawyers' role will be somewhat different in an ODR-

¹⁹⁰ When preparing this section on law school intransigence to change, we reflect that the spirit of our recommended pedagogical changes related to the ODR context echo the spirit of changes recommended in the 2007 Carnegie Report. See Sullivan et al, *supra* note 191. As time goes by with no meaningful change, the gap between legal education and legal practice continues to expand.

infused justice system. The goal of this article is to name and call attention to recent and current phenomena that are taking place just beneath the surface of the legal system. These phenomena herald significant and potentially devastating effects for the legal profession if the profession fails to adapt. We call on the legal field to recognize this oncoming juggernaut of change and get constructively involved in its direction. We then prescribe how legal professionals can reprioritize and supplement their existing skills in order to adapt and contribute to our changing justice system in the future.

We appreciate that in this important discussion, we implicitly raise other questions about ODR and technology that require attention, yet exceed the scope of this paper. Will the rule of law be able to retain its primacy in a justice system whose focus is increasingly dominated by settlement? Will AI's thinking powers ever match or surpass the great human legal minds? What is the essence of our humanity in a world in which machines perform day-to-day tasks currently done by humans? Of course, these questions are dizzying, and fundamental to understanding how lawyers may remain relevant, but they are in many ways beyond our profession's control.

Our immediate focus in this paper, however, remains on affirmative actions that are within the control of the legal profession. If taken, these will allow our profession to adapt and remain a valuable contributor to our justice system. We recognize that the ideas we've raised for legal practice and for legal education, are challenging. By initiating this difficult conversation, we hope to energize members of our profession, in practice and in academia, to engage in internal conversation and in the external justice-shaping process. By doing so, they will ensure the legal field remains a relevant and constructive collaborator in the formation of the justice system of tomorrow.