

## Using ODR Platforms to Level the Playing Field

### *Improving Pro Se Litigation through ODR Design*

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A sea change is under way in how we talk and think about court technology.<sup>1</sup> For decades, court officials – judges and staff – have relied on computers for word processing and internal scheduling, case management systems to store and organize digital records, the internet for research, and email to communicate. Like many organizations, courts have long conceived of technology exclusively as a way to improve their operational efficiency, reducing the time and effort it takes for them to do what they have always done:<sup>2</sup> provide neutral, real-time, face-to-face proceedings to resolve disputes, with a judge or a magistrate overseeing safe and purportedly transparent hearings in a physical, courthouse setting.<sup>3</sup>

This perspective is changing. The advent of online dispute resolution (ODR) platforms has reminded courts that providing in-person, real-time proceedings in a physical courtroom is just a means to an end; courts exist first and foremost to resolve disputes, at least in state courts handling everyday matters.<sup>4</sup> Presumably, there is no

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<sup>1</sup> See generally RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* 33–45 (2019); Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165 (2017).

<sup>2</sup> See ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 155–56 (2017).

<sup>3</sup> Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 925 (2020).

<sup>4</sup> See Warren E. Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A. J. 443, 445 (1976). In resolving disputes, courts also announce, reaffirm, and refine the law. Some consider this aspect of dispute resolution to be central to the function and purpose of courts. See, e.g., ERWIN CHERMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* 1–19 (2017).

single best way to resolve disputes,<sup>5</sup> and courts are beginning to recognize that ODR – with its potential to improve accessibility while maintaining the integrity and values of traditional judicial process – can improve on conventional face-to-face courtroom proceedings for a significant fraction of cases.<sup>6</sup> But precisely how far such technology can take courts remains an open question – one with huge implications for the future of formal adjudication in our society.

In this chapter, I argue that court-based ODR platforms can do far more to improve dispute resolution than simply puncture the barriers inherent to accessing physical courthouses, as important as this achievement is in its own right. In particular, I show that ODR systems also have the capacity to reduce the pro se representation gap in adjudication by incorporating tools that mimic many of the essential functions of legal counsel. In the years ahead, courts should grasp the opportunity to design and deploy technology with this goal in mind to advance their core function of successfully resolving disputes, even when the prospect of doing so may push them out of their comfort zone and blur or even redraw traditional boundaries regarding court neutrality and concerns over “helping” litigants.

The first step in this argument is recognizing that effective dispute resolution depends on robust access to justice. While the defining virtue of ODR technology to date is its capacity to improve the accessibility of courts for litigants, the phrase “access to justice” hinges on what it means to achieve justice,<sup>7</sup> and any useful access-to-justice criterion must ask whether laws and institutions resolve disputes appropriately – that is, accurately and fairly.

One important class of access-to-justice issues relates to the sheer difficulty of using courts to resolve disputes.<sup>8</sup> If individuals cannot make meritorious claims or defend themselves against improper allegations because doing so is too costly or difficult, the system implicitly “resolves” disputes inappropriately – for instance, through default, coerced settlement, uninformed verdicts, or other outcomes that are more a function of litigation and court-imposed costs than underlying substance.<sup>9</sup> For this reason, some

<sup>5</sup> See LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 111–31 (2020); Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute System Design*, 17 HARV. NEGOT. L. REV. 151, 155–64 (2012).

<sup>6</sup> Richard Susskind, *The Future of Courts*, THE PRACTICE, July–Aug. 2020, <https://thepractice.law.harvard.edu/article/the-future-of-courts>.

<sup>7</sup> *What Is Access to Justice?* NAT’L CTR. FOR ACCESS TO JUST., <https://ncaj.org/what-access-justice>; *Human Rights and Access to Justice*, A.B.A., [https://www.americanbar.org/advocacy/rule\\_of\\_law/what-we-do/human-rights-access-to-justice/](https://www.americanbar.org/advocacy/rule_of_law/what-we-do/human-rights-access-to-justice/).

<sup>8</sup> Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 217–31 (2016).

<sup>9</sup> J.J. Prescott & Alexander Sanchez, *Platform Procedure: Using Technology to Facilitate (Efficient) Civil Settlement*, in *SELECTION AND DECISION IN JUDICIAL PROCESS AROUND THE WORLD* 30, 30–34 (Yun-chien Chang ed., 2020); see also, e.g., PEW CHARITABLE TRS., *HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS* (2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts>.

access-to-justice advocates have criticized the justice system's reliance on physical courthouses that are few and far between, open only during business hours, difficult to navigate, and intimidating to use.<sup>10</sup> Especially in relatively low-stakes legal cases (a large majority of cases, in fact), like traffic or small claims matters, these hurdles leave large swaths of people out in the cold, unable to seek protection under the law.

First-generation court-connected ODR (or ODR 1.0)<sup>11</sup> has already shown technology's potential to overcome this particular class of access-to-justice barriers. First-gen ODR has opened up courts by leaving courthouses behind. In many states, and across a variety of dispute types,<sup>12</sup> ODR platforms allow people to interface with their cases using mobile phones from their homes at any hour of the day. Software design and “smart” forms simplify processes.<sup>13</sup> Notifications and error checks keep litigants in the know, allowing them to engage more quickly.<sup>14</sup> All in all, ODR platforms make accessing courts much easier.<sup>15</sup> Moreover, while today's ODR platforms are available for minor legal disputes, they also show potential for certain aspects of more significant litigation matters. The recent success of online voir dire proceedings, and even trials, intimates that the need for in-person hearings to resolve disputes with accuracy and fairness may be limited.

But existing court ODR systems do not go far enough. Even if these platforms were capable of allowing everyone to resolve their disputes from a place and at a time of their choosing, a meaningful access-to-justice gap would remain. In a society with significant socioeconomic disparities, the mere power to invoke the law, even at near-zero cost, hardly levels the playing field. Wielding the law *effectively* requires experience and expertise.<sup>16</sup> While some litigants can accrue experience and build expertise through repeated play, other parties to a legal dispute – usually, the “haves” – typically acquire these assets by hiring a lawyer.<sup>17</sup> Lawyers provide many services to their clients, but perhaps first among them is assessing likely outcomes in any matter. Lawyers also explain the nuts and bolts of the law and the range of

<sup>10</sup> See, e.g., Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1267, 1288–89 (2016).

<sup>11</sup> David Freeman Engstrom, *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2273–83 (2021).

<sup>12</sup> See, e.g., A.B.A. CTR. INNOV., *Online Dispute Resolution in the United States: Data Visualizations* (2020), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf> (documenting the spread of ODR tools in the United States).

<sup>13</sup> Maximilian A. Bulinski & J.J. Prescott, *Designing Legal Experiences: Online Communication and Resolution in Courts*, in LEGAL INFORMATICS 430, 433–36 (Daniel Martin Katz et al. eds., 2021).

<sup>14</sup> J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2030–34 (2017).

<sup>15</sup> Alex Sanchez & Paul Embley, *Access Empowers: How ODR Increased Participation and Positive Outcomes in Ohio*, in TRENDS IN STATE COURTS 14, 17 (Nat'l Ctr. St. Cts. ed. 2020).

<sup>16</sup> Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885 (2016).

<sup>17</sup> See Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 382–85 (1965).

options available to their clients, including the option to do nothing. Lawyers physically represent their clients in courtrooms as well, muting or obscuring demographic and/or educational differences between litigants when appearing before court (at least if we assume lawyers are likely to be more alike in background and training than any particular set of litigants).

Therefore, simply easing access to a courtroom through technology can only do so much to move us toward ideal dispute resolution. Indeed, access-to-justice advocates devote the lion's share of their attention to ensuring adequate legal representation in courtrooms, lambasting any system rife with pro se litigants as likely to get it wrong far too often.<sup>18</sup> For this reason, as first-gen ODR platforms proliferate, disparities in outcomes that are attributable to disparities in representation are unlikely to shrink and will probably increase. After all, as those long shut out of courthouses newly turn to ODR to pursue their legal interests, the significance of the representation chasm will become even more stark. A lot more “have-nots” will be seeking justice without a fair shot.<sup>19</sup>

Looking forward, a key goal for second-generation ODR platforms must be using data science techniques, design opportunities, and the treasure trove of data ODR platforms and court systems collect every day to bridge the legal representation gap.<sup>20</sup> Court-connected ODR platforms, if designed appropriately, can offer – for free – many of the same “services” that lawyers currently deliver to those fortunate enough to have a lawyer. The idea is not for courts to provide all litigants with a robot lawyer.<sup>21</sup> Instead, the idea is to recognize that much of what lawyers do to help their clients involves providing them with information (e.g., options, predictions) about how their case “stacks up” and helping them to put their best foot forward (e.g., presentation, representation). If courts enhance ODR platforms so that they may offer some of these same functions in the right way, the future of dispute resolution will not only be low cost and easy to access but will also disadvantage pro se litigants much less than traditional court processes.

<sup>18</sup> See Kathryn M. Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*, 26 PSYCHOL. PUB. POL'Y & L. 198, 210–11 (2020).

<sup>19</sup> KATSH & RABINOVICH-EINY, *DIGITAL JUSTICE*, at 156–58.

<sup>20</sup> Courts have always collected case and litigant data, and making this information public in a way that is consistent with current court practices is a good starting point. Engstrom, *Digital Civil Procedure*, at 2273–83 (describing a future in which ODR designers leverage these tools and data).

<sup>21</sup> The notion of a robot lawyer connotes technology making decisions for people. By contrast, appropriately designed ODR would function as “decision support.” This is not to say that decision support cannot nudge people toward certain choices – all environmental features do this, including how courts, procedures, and law are currently architected. See Ayelet Sela, *e-Nudging Justice: The Role of Digital Choice Architecture in Online Courts*, 2019 J. DISP. RESOL. 127, 137; Mentovich et al., *Are Litigation Outcome Disparities Inevitable?* at 924–27.

## 12.1 THE CURRENT STATE OF THE ART: FIRST-GENERATION, COURT-CONNECTED ODR

As a concept, ODR emerged from the commercial consumer sector, as companies like eBay sought a means of resolving disputes (usually involving small-dollar values) that arose online between physically separated individuals. Many state court cases resemble small-stakes commercial disputes, and while litigants are often geographically proximate to each other, going to court to resolve a small-stakes case (say, under \$500) still makes little sense to many. Even proceeding *pro se* routinely requires missing work, finding transportation, navigating the courthouse, and facing an intimidating judge. Add to this the fact that court is always a gamble – the prospect of improving one’s chances, from 0 percent (default) to even a modest 50 percent, is uncertain, but a litigant pays the cost of accessing the law at a courthouse with certainty – and it is unsurprising that many individuals in small-stakes disputes simply default, wrongly admit fault, or decline to file a meritorious case.

### 12.1.1 *Where the Story Begins: Courts, ODR, and Access to Justice*

Less than ten years ago, state courts began implementing ODR platforms for high-volume, small-stakes cases, like alleged traffic violations and other cases where physical resolution of the matter could be very costly to one of the litigants (e.g., outstanding failure-to-pay warrants), making remote resolution particularly attractive. One of the very first ODR platforms, if not the first, to be widely adopted in US courts was Matterhorn, which Michigan adopted starting in 2014.<sup>22</sup>

The earliest Matterhorn ODR implementations sought to resolve disputes between individuals and the government: traffic, civil infractions, warrants, and a couple of misdemeanors. These ODR platforms were in many ways designed to “mimic” traditional proceedings, with a few key differences: ODR was made available at any time of day, information was exchanged asynchronously by text, and litigants could access the platform with any online remote device. But in most respects, litigants could expect to experience a process similar to going to court on their own. These systems inform the litigant of the charge or issue, “ask” the litigant whether they would like the court to review their case, and then ask the litigant to answer questions, including an open-ended invitation to “let the court know” anything else they felt was potentially relevant. These implementations are easy to use and make the process much easier to follow than what a litigant walking into a

<sup>22</sup> See A.B.A. CTR. INNOV., *Online Dispute Resolution in the United States: Data Visualizations* (2020), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odr-visualizationreport.pdf> (indicating Matterhorn as the first ODR system adopted by a state court); Lyle Moran, *Online Dispute Resolution Promises to Increase Access to Justice but Challenges Remain*, A.B.A. J. (Oct. 1, 2021), <https://www.abajournal.com/magazine/article/online-dispute-resolution-promises-to-increase-access-to-justice-but-challenges-remain>.

courthouse should expect to face, but at their core, they are an online version of a pro se courthouse experience.<sup>23</sup> The individual locates their case, makes a request for relief, and answers questions from the court.<sup>24</sup>

Matterhorn ODR soon grew to address disputes between private individuals. Early examples include ongoing family court cases, where parties negotiate in the online presence of a case manager without the need for in-person hearings,<sup>25</sup> and small claims disputes, where parties use an online text-based negotiating (chat) space (and perhaps online mediators) to engage in informal discovery or settle their case outright. These ODR implementations sought to reduce default by making it easier for everyone to come together outside of court in an informal way before being compelled to come together in court. Parties usually negotiate a resolution, and by making online negotiation and mediation free, easy to use, and court-sanctioned, courts were soon playing an important role via ODR in a significant fraction of cases. What's more, some tentative evidence hints that early engagement with court-connected ODR promotes traditional courtroom engagement later, which might have social benefits,<sup>26</sup> even if a case ultimately ends in face-to-face litigation.

Regardless, first-gen ODR works by moving courtroom or court hallway activity to a more amenable online venue that can be streamlined/individualized for the type of case. A pro se litigant may find it easier to negotiate with a counterparty or contest a civil infraction through an ODR platform, but such litigants are just as “pro se” during an online interaction as they would have been during an in-person tête-à-tête.<sup>27</sup> Whether first-gen ODR moves into asynchronous text-based exchanges or real-time video-based hearings (or any number of other ways parties can communicate, make offers and demands, share/present information, and work through outcome-determinative decisions), existing ODR platforms can make dispute resolution easier, faster, cheaper, and therefore more accessible, but the value of legal advice is likely to matter just as much as it does in traditional settings. True, more “have-nots” will be

<sup>23</sup> See *Family Court – Child Support Compliance*, MATTERHORN, <https://getmatterhorn.com/odr-solutions/family-online-dispute-resolution/family-court/>; Press Release, 20th Circuit Court Ottawa County, Michigan, Friend of the Court 20th Circuit Court Ottawa County Now Offering Online Dispute Resolution for Parenting Time Issues (Aug. 28, 2020), <http://www.miottawa.org/courts/foc/pdf/MatterhornPressRelease.pdf>.

<sup>24</sup> It is true that ODR-based interaction between judges and parties might not be as rich as it could be. For example, opportunities for back-and-forth exchanges are usually limited, at the request of the court. However, in traditional processes, judges also limit back-and-forth exchanges, *but judges do so at their arbitrary discretion*, and, in any event, such a limitation is simply an adjustable design feature – it is not inherent to ODR as an idea.

<sup>25</sup> See, e.g., Amy J. Schmitz & Leah Wing, *Beneficial and Ethical ODR for Family Issues*, 59 FAM. CT. REV. 250, 258–60 (2021).

<sup>26</sup> Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1275 (2020); ALLAN GREENBERG, *ARCHITECTURE OF DEMOCRACY* 82 (2006).

<sup>27</sup> See Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67 BUFF. L. REV. 89, 104–25 (2019); see generally Bulinski & Prescott, *Online Case Resolution Systems*.

able to use courts and access the law. But the “haves” (with their lawyers, experience, and mastery of the rules of the game) will remain just as privileged (if not more so, given digital divide concerns) relative to their “have-not” counterparts as before.

Empirical evidence on ODR outcomes is consistent with this story. This expanding literature speaks to the improvements enjoyed by pro se litigants (as opposed to represented parties): Cases proceed more quickly, default rates plummet, and communication between parties, court staff, and judges increases.<sup>28</sup> This accessibility leads to more accurate outcomes (primarily by reducing default), giving more muscle to substantive law and reducing the role litigation costs play in determining legal outcomes.<sup>29</sup> In the case of Matterhorn, at least, litigants also report that they find ODR proceedings fair, the online process easy to understand, and the software straightforward to use.<sup>30</sup> On the whole, ODR-based improvements in pro se litigant outcomes (both quantitative and qualitative) appear significant, although these advances are relative to a pro se baseline where the relevant control groups of litigants are also unrepresented.

### 12.1.2 *From Courtrooms to ODR: Responding to Critics*

Moving from courtrooms to ODR is no panacea, of course. Critics raise a number of concerns, including the importance of the courtroom and human interaction in how litigants experience justice, the ability of efficiency-oriented designers to reduce choice and induce compliance, the lack of transparency in ODR hearings, the rigidity and inflexibility of procedures, and many others.<sup>31</sup> Most of these complaints, however, focus less on ODR’s basic principles and more on the weaknesses critics observe in specific first-gen systems.<sup>32</sup> Like traditional procedures, ODR will only be

<sup>28</sup> See Meghan M. O’Neil & J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability to Pay*, 82 LAW & CONTEMP. PROBS. 199, 221 (2019); Prescott & Sanchez, *Platform Procedure*, at 65; see also Darren Gingras & Joshua Morrison, *Artificial Intelligence and Family ODR*, 59 FAM. CT. REV. 227, 228 (2021).

<sup>29</sup> Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. MARSHALL J. COMPUT. & INFO. L. 81, 85 (2009); Prescott & Sanchez, *Platform Procedure*, at 70.

<sup>30</sup> Amy J. Schmitz, *Measuring “Access to Justice” in the Rush to Digitize*, 88 FORDHAM L. REV. 2381, 2383–84 (2020) (noting 92 percent of Michigan ODR users would recommend the system and 82 percent found it fair); Youyang Hou et al., *Factors in Fairness and Emotion in Online Case Resolution Systems*, 2017 PROC. CHI CONF. ON HUM. FACTORS COMP. SYS. 2511, 2518–19.

<sup>31</sup> See, e.g., Norman W. Spaulding, *Online Dispute Resolution and the End of Adversarial Justice?* (Chapter 11 in this volume); Jean R. Sternlight, *Pouring a Little Psychological Cold Water on Online Dispute Resolution*, 2020 J. DISP. RESOL., 1, 2–4; Schmitz, *Measuring “Access to Justice” in the Rush to Digitize*, at 2384; Nancy A. Welsh, *Dispute Resolution Neutrals’ Ethical Obligation to Support Measured Transparency*, 71 OKLA. L. REV. 823, 862–63 (2019); see also RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 118–21 (2013).

<sup>32</sup> See Chapter 11 in this volume; Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 733–55 (2017).

as good as its design. Yet ODR's inherent flexibility gives courts the means to resolve many worries raised about existing systems, if they have the will: for example, all ODR-related policies, choices, and outcomes can be made public, and the workflow can be designed to maximize litigant voice, even if current instances of ODR score poorly on these measures. Furthermore, ODR is almost always an option, not a requirement, so those who object to ODR must defend disallowing low-cost access alternatives for litigants who retain more expensive "Cadillac" access to justice and yet prefer ODR when given a choice.<sup>33</sup>

More importantly, most criticisms fail to reckon with the very real problems of traditional adjudication, especially in low-stakes cases. Detractors compare ODR processes to a stylized and idealized version of traditional adjudication.<sup>34</sup> But this perspective ignores the existing brick-and-mortar system's huge access-to-justice issues – including regressive costs, biases, disparities, confusion, and intimidation – as well as the paper-thin procedures that many if not most litigants experience in courtrooms. These critics compare the best of courts to the worst of ODR.

Some criticisms rightly focus on ODR being peddled by the private sector and the implications of long-term profit motives.<sup>35</sup> But there is nothing inherent in ODR as a concept that requires deferring to a private vendor; courts can and do build their own ODR systems (albeit, often via work-for-hire, which is par for the course when it comes to government software adoption). There are potentially negative, more indirect consequences to making courts and the law easier to access, too. Once lawsuits are extremely easy to file, answer, and navigate, more disagreements will become lawsuits. While ODR can be designed to balance access costs for plaintiffs and defendants, for instance, it may actually increase litigation rates. But the argument that making courts more efficient and accessible in a party-neutral way might be socially problematic simply proves too much; a corollary would be that courts ought to move back to pen-and-paper orders and file cabinets.

### 12.1.3 *Auguries: First-Gen ODR and the Representation Gap*

With respect to pro se litigants and the "representation gap," at least some evidence suggests that ODR systems, even first-generation ones, can level the playing field just as retaining legal representation does. For instance, ODR proceedings in the traffic

<sup>33</sup> Such arguments fall into two camps. The first presumes that litigants don't know what is good for them or make systematic mistakes and so must be forced to engage in traditional litigation for their own good. The second relates to negative externalities or third-party effects. The fact that ODR may be better for any particular litigant does not mean that it is best for society, which may suffer from less transparent ODR processes, for instance, or the stunted development of law. SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE*, at 107–109.

<sup>34</sup> See, e.g., Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1305 (2016) ("We should reject both a romanticized view of the virtues of unaided human justice and a fetishistic or statist view of the virtues of mechanical justice.").

<sup>35</sup> See Chapter 11 in this volume.

context are associated with fewer race- and age-based disparities, either because switching to online proceedings (for example, text-based, asynchronous communication or at-home, video-based hearings) differentially benefits some groups over others or because ODR platforms reduce implicit bias by limiting decision-maker exposure to legally irrelevant identity traits.<sup>36</sup> The precise mechanism here is unclear, but this reversal is important and ties into questions about the benefits of corporeal representation in court. Lawyers “represent” their clients and so may disrupt implicit biases or other cognitive/behavioral distortions that attach to litigants who appear in person on their own. ODR may do this, too. At the same time, by offering litigants an alternative to a single, one-size-fits-all track, any single limitation a litigant might have in, say, communication (e.g., difficulty speaking in open court) is less likely to matter. In this sense, the addition of ODR makes our legal system more robust in its ability to accommodate pro se litigants.

Existing ODR platforms also implicitly provide guidance on the law and litigation process to litigants. For instance, ODR hearings are configured for the litigant and legal issue in question. All content is targeted and laid out in a single dashboard, and material that speaks to irrelevant contingencies can be omitted. Now consider a litigant’s experience walking into a state courthouse, which is, by design or happenstance, an all-purpose space we use to resolve many types of legal matters. A courtroom is not hung with customized signs. The litigant must digest, sort, and navigate. This is costly and often confusing and scary. By contrast, ODR is akin to being met at the door by an usher who helps you to where you need to be, reminds you of your to-dos, and tsk-tsks when you cut a corner or appear distracted. ODR makes the experience less stressful and reduces error. Lawyers also play this role. Thus, even first-gen ODR mitigates the effect of pro se status, but ODR today is better analogized to an usher than to a counselor. A lawyer can help you decide whether going to your seat is a good idea; an usher can just tell you how to get there.

## 12.2 A NEW FRONTIER: NEXT-GENERATION COURT-CONNECTED ODR

In this section, I contend that legal representation – what lawyers *do* for clients – can be disaggregated into distinct functions and that many of these can be approximated, achieved, and perhaps even exceeded within a pro se architecture of next-gen ODR. The confluence of online technology, data collection and storage, and computational power in effect blurs the distinction between “mere” access to a forum like a courthouse and actively supplying pro se litigants with many of the benefits of legal representation. When designing and implementing ODR systems, courts that care about access to justice and successfully resolving society’s disputes ought to set aside any historical reticence to offering robust litigant support – even when that support

<sup>36</sup> Mentovich et al., *Are Litigation Outcome Disparities Inevitable?* at 975.

overlaps with what lawyers do, such as providing objective information, even-handed guidance, and physical representation in court.

Thinking about next-gen ODR begins with a clear-eyed discussion of what (human) lawyers do and what they bring to the table – as well the drawbacks of legal representation (e.g., agency costs, limited communication). Lawyers serve many functions in a litigation context. Lawyers offer predictions,<sup>37</sup> counseling, representation, influence, and access,<sup>38</sup> and the option to litigate in ways that raise rivals' costs. Not surprisingly, represented parties often experience better litigation outcomes than pro se litigants.<sup>39</sup> But a better litigation outcome does not equate to a litigant being better off overall, and involving lawyers in dispute resolution is socially costly,<sup>40</sup> especially when attorney efforts on opposing sides are offsetting. From society's perspective, the relevant question is not how much a party's individual prospects improve with a lawyer, but how much net value a lawyer adds to the case in terms of outcome accuracy and its attendant benefits.

Even when a lawyer has critical skills and experience, a litigant's choice to hire that human being is always an imperfect strategy born of necessity. Lawyers as representatives suffer from agency issues,<sup>41</sup> at times second-guessing their client on the basis of "independent professional judgment."<sup>42</sup> Even when interests are roughly aligned, the frictions inherent to human communication limit the value of legal representation. Litigants hire people – not their expertise and experience. Litigants cannot download an attorney's judgment and know-how, nor can they upload the whole of their history and hopes. A client must communicate their preferences, constraints, and knowledge about the case to the attorney *without* knowing the law or what is possible and relevant. A lawyer has only limited time to prepare to "channel" their client when the moment of truth arrives. Far superior would be the ability to evaluate one's own case through the prism of a lawyer's training and

<sup>37</sup> See generally Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN ST. L. REV. 41 (2018); see also Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61, 61 (1897).

<sup>38</sup> E.g., Tianwang Liu & David Hao Zhang, *Do Judge-Lawyer Relationships Influence Case Outcomes?* 13 (Oct. 15, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3711873](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3711873).

<sup>39</sup> Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1844 (2018); Taylor Poppe & Rachlinski, *Do Lawyers Matter?* at 885. The picture is a complicated one, however. Compare D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?* 121 YALE L.J. 2118, 2197–98 (2012), with D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 925–31 (2013).

<sup>40</sup> See J.J. Prescott, *The Challenges of Calculating the Benefits of Providing Access to Legal Services*, 37 FORDHAM URB. L.J. 303, 321–22 (2010).

<sup>41</sup> See generally Lynn Mather, *What Do Clients Want? What Do Lawyers Do?* 52 EMORY L.J. 1065 (2003).

<sup>42</sup> See *id.* at 1068; Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 585 (2011).

professional history (and perhaps objectivity). All of this is to say that legal representation, even at its best, is far from perfect.

In what follows, I identify three specific benefits of legal representation – outcome prediction, options guidance, and obfuscation/translation – and I argue that they can be approximated through court technology. When evaluating this claim, keep in mind that the relevant comparison is to a costly, limited, and sometimes selfish human agent. I do not claim that ODR platforms can or will render lawyers obsolete. But in weighing its relative merits, enhanced ODR may be able to deliver, implicitly or explicitly, many of the benefits of an expert counselor. I also do not claim that ODR systems have yet to push any of these frontiers.<sup>43</sup> Rather, I maintain only that adopting courts ought to think holistically about how ODR can support litigants in ways that reduce the pro se representation gap. By keeping in mind what lawyers do and how clients and society benefit from their involvement, future ODR systems may generate better outcomes and more satisfaction.

### 12.2.1 *Experience and Predicting Outcomes*

One of the most important services a lawyer provides a litigant is an informed, experienced perspective on the likely outcome of a case, with some overall take on whether the outlook is “good.”<sup>44</sup> Typically, during intake, the prospective litigant describes the nature of the dispute, key aspects of the case, and the like, and the lawyer may even offer some preliminary advice. Once retained, however, the lawyer will engage in more intense prediction-oriented activity on behalf of the client, perhaps after researching the law, collecting more information, and weighing the necessary investment, probable venue, expected legal rulings, possible judges, and even likely jurors. These predictions are necessarily fuzzy; there is considerable uncertainty, but as time resolves many contingencies (e.g., the identity of the opposing attorney), predictions will become more accurate. Consequently, the lawyer is likely to revisit the prediction task repeatedly, presumably at each important decision point, when the litigant might seek advice on how to proceed. In a traditional litigation setting, the prediction problem is a complicated one; the environment is relatively unstructured, and the variables are nearly infinite. There are also conflicts of interest and cognitive biases tugging on a lawyer’s predictions.

<sup>43</sup> For example, British Columbia’s public legal aid system, MyLawBC, recently expanded from ODR to also offering “self-help” online legal aid in family law, including “guided pathways” for mediation. See *Tyler Technologies and Legal Aid BC Expand Partnership to Provide Full Service Online Dispute Resolution*, BUS. WIRE (July 7, 2021), <https://www.businesswire.com/news/home/20210707005171/en/Tyler-Technologies-and-Legal-Aid-BC-Expand-Partnership-to-Provide-Full-Service-Online-Dispute-Resolution>.

<sup>44</sup> Osbeck, *Lawyer as Soothsayer*, at 43; Daniel Martin Katz, *Quantitative Legal Prediction – Or – How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909, 912 (2013).

A lawyer's ability to "predict" a dispute's outcome builds on the human equivalent of supervised learning.<sup>45</sup> In most cases, the client defines a "good" outcome for the lawyer.<sup>46</sup> But even if the target is unclear or moving, the client and the lawyer are normally decided on the type of outcome that matters (e.g., damages, liability, share of custody, opportunity to be heard, etc.). The lawyer's task is to take the client's account, the law, the client's set of plausible "moves," the presiding judge, and anything else observable to the lawyer and then predict an outcome using the agreed-upon metric of success. This prediction may come in the form of an expected outcome alone and possibly with some measure of uncertainty that implicitly conveys the expected accuracy of the prediction (e.g., "I think you'll get \$75K, give or take \$10K"). If the client defines a minimally acceptable outcome, the lawyer will review the likely consequences for each set of potential moves and either report that this outcome is unrealistic or that taking a particular set of actions will be necessary (under current circumstances).

How does a lawyer do this? The lawyer effectively cognitively "models" prior cases to understand the complicated relationships between facts, choices, and outcomes. Put another way, lawyers detect patterns between predictors and outcomes.<sup>47</sup> The greater the number and variety of cases and types of predictors that lawyers incorporate into their modeling, the more flexible, unbiased, and accurate their predictions can be. A mental model is what we mean when we talk about the value of experience. An expert lawyer has witnessed many cases with many different characteristics proceed under many different circumstances. Delivering accurate predictions is helpful because they can guide a litigant's behavior toward their preferred outcome, whatever it happens to be. If the litigant's goal is to maximize their net "return" from a dispute, a schedule of litigation strategies (including their costs) and their likely outcomes (and uncertainties) produced by a lawyer is what a litigant needs to succeed.

ODR platforms can perform this task. In fact, under the circumstances, they may be able to do a better job.<sup>48</sup> First-gen ODR platforms already access an individual litigant's case, drawing information from the court's case management system. Once a case resolves, the platform archives the record and moves onto the next case. But there is no reason an enhanced platform cannot build models from *all* prior cases and even from data outside the court's case management system. Models can

<sup>45</sup> TREVOR HASTIE ET AL., *THE ELEMENTS OF STATISTICAL LEARNING: DATA MINING, INFERENCE, AND PREDICTION* 1–2 (2nd ed. 2009). Lawyers build mental models using their experience with prior disputes or transactions. See also *Supervised Learning*, IBM CLOUD LEARN HUB (Aug. 19, 2020), <https://www.ibm.com/cloud/learn/supervised-learning>.

<sup>46</sup> But see generally Kruse, *Engaged Client-Centered Representation*; Mather, *What Do Clients Want?*

<sup>47</sup> Hanspeter Pfister et al., *Exploring the Gap between Informal Mental and Formal Statistical Models*, 3 HARV. DATA SCI. REV. (Jul. 30, 2021), <https://doi.org/10.1162/99608f92.bao0865a>.

<sup>48</sup> See Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 240–41 (2018).

incorporate any plausible predictor, including judge identity, hearing timing, and docket backlog. By contrast, lawyers build models only from their own cases or those about which they hear or read (inevitably with error and uncertainty), and only with what they can observe about those cases and their circumstances. In effect, an enhanced ODR platform could display a distribution of how similar past cases – or, with enough data, only identical ones – fared using the litigant’s preferred measure of success. These “predictions” (tendered as descriptions of what happened in prior cases – not as promises or legal advice!) can be presented at decision points and can be joined with statistics to impart precision.<sup>49</sup>

The challenges to operationalizing these ideas are manageable.<sup>50</sup> In many ways, litigation that occurs in an ODR environment may be more amenable to accurate prediction than litigation in a more traditional environment because the platform can easily capture the information about cases, choices, and outcomes needed for prediction. An ODR system may be more structured and less nuanced, either by necessity or design, which might also simplify the prediction problem. Consider an enhanced platform with asynchronous, text-based communication that requires parties to answer the same questions in the same order with the same answer options as part of an online hearing (versus open court with a judge asking different questions in different ways and expecting a narrative response on the spot) and where the system necessarily prevents or obscures certain actions (e.g., a litigant can’t visibly sigh or roll their eyes at a judge).<sup>51</sup> The number of predictors would no longer be infinite *because* the environment eschews legally irrelevant details; in other words, the medium itself might simplify some of the prediction problems a lawyer would normally face in court.<sup>52</sup>

<sup>49</sup> Decision support of this sort has long been proposed for judges, just not for litigants, who are presumably assumed to have attorneys near at hand for such wisdom. Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351 (2005). Again, the legal tech industry has already developed many successful such tools, so the push here is to incorporate these tools into ODR in an easy-to-digest format for pro se litigants.

<sup>50</sup> But see David Freeman Engstrom & Johan B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 160 U. PA. L. REV. 1001, 1018–30 (2021).

<sup>51</sup> See generally Arthur Dyevre, *Text-Mining for Lawyers: How Machine Learning Techniques Can Advance Our Understanding of Legal Discourse*, 2021 ERASMUS L. REV. 7 (2021).

<sup>52</sup> Enhanced platforms would also need to contemplate, measure, and operationalize outcomes that litigants value. With a lawyer, a litigant might ask, “How angry do people get when you make this argument?” and litigants might *value* an outcome in which the other party emerges from a hearing angry at them. A lawyer can build a model on the spot, probably one that is at least marginally useful, see Kruse, *Engaged Client-Centered Representation*, and then share the likelihood of the outcome, allowing the litigant to decide whether the argument’s worth trying. In the ODR context, many idiosyncratic outcomes would be practically unobservable (i.e., not recordable) – especially if observation must occur in person. To keep things simple, ODR systems might opt to forgo making predictions about many less idiosyncratic outcomes even when they might be easy to observe.

### 12.2.2 Navigating, Counseling, and Identifying Options

Lawyers often present options. They take raw facts and abstract law and suggest possible legal solutions. They also identify various strategies (or implement them directly), and they help clients weigh the upsides and downsides of those strategies. Lawyers do not necessarily perform this task well. The quality of counseling, when it occurs, is often suspect. Lawyers implicitly build models, but they also suffer from biases (e.g., availability), have limited observational and processing capacity, and must navigate their own conflicts (like economizing on time and avoiding high-risk innovations). In most contexts, lawyers are also busy. Identifying options, discussing them with clients – these activities take time. Consequently, lawyers work from scripts,<sup>53</sup> stocked with standard “moves” that usually do the trick in the vast majority of situations. Lawyers may deliver these options in rote fashion, with little thought paid to details that are individually unlikely to make a material difference in the long run (even if, collectively, such details can alter a legal dispute’s trajectory).

This account is designed to present a human lawyer as a fairly simple algorithm. The lawyer asks intake questions, processes the answers, identifies the nature of the dispute and a set of typical solutions, explains the most common approaches to the client, and translates the client’s reaction into a set of choices or next steps. Two tasks are occurring here. One is pattern recognition (the main point here). The second is prediction combined with an interpretation of what the client values. Put differently, lawyers determine the sort of dispute they face, collect relevant information for a dispute involving such features, identify an array of potential approaches or strategies, and assist the client in understanding and deciding between them.

This last step – helping a litigant understand and evaluate various options – falls squarely in the camp of outcome prediction. Enhanced ODR can define a large number of potential outcomes. Not all, true, but easily those outcomes that would matter to 99 percent of litigants. Counseling between options can be carried out simply by informing litigants of the likelihood that certain outcomes will manifest if the litigant pursues, say, track 1 or track 2.

With a real lawyer, counseling involves nuance.<sup>54</sup> But much of that nuance is the lawyer attempting simultaneously to ascertain a client’s preferences. An enhanced ODR platform would do less “screening” and instead make much more information available to the client so they may digest with their own priorities in mind instead of relying on a black-box lawyer. There are challenges here: Litigants also face

<sup>53</sup> Jack Chorowsky, *Thinking Like a Lawyer*, 80 U. DET. MERCY L. REV. 463, 464 (2003) (“Across . . . different subjects, you’ll start to see similar types and styles of questions and arguments. Look for patterns; try to understand the common ‘moves’ that lawyers make in certain situations.”).

<sup>54</sup> Heather Heavin & Michaela Keet, *Client-Centered Communication: How Effective Lawyering Requires Emotional Intelligence, Active Listening, and Client Choice*, 22 CARDOZO J. CONFLICT RESOL. 199, 206 (2021).

cognitive limits, and while they may have more time to immerse themselves in their own affairs, too much data can be worse than too little.<sup>55</sup> Just as an intimidating courthouse can paralyze, so too can an environment that dumps unstructured information on litigants and then asks them to sift it.<sup>56</sup> Thus, ODR platform structure and design must not only be accessible but also support effective decision-making.<sup>57</sup> We already use technology to help people make important choices about many things.<sup>58</sup> Even in the legal-aid and access-to-justice contexts, existing decision support tools streamline processes, minimize confusion, and improve decision-making.<sup>59</sup> Efforts are imperfect but improving,<sup>60</sup> and one must remember that the relevant benchmark is a pro se world with no support whatsoever.

To counsel, lawyers categorize a dispute and then compile the information necessary to identify options, avoid legal and factual pitfalls, and assemble plausible strategies (matched with predictions). This is complex, and early versions of enhanced ODR will likely be subject-matter specific. But precedents for algorithmic technology of this sort already exist, and courts should avoid letting the perfect be the enemy of the good. Legal aid groups already deploy triage and intake forms that are “smart.”<sup>61</sup> An initial goal for next-gen ODR might be to determine a litigant’s eligibility for digital or other assistance by collecting critical information about the litigant’s situation.<sup>62</sup> The law’s many branches can be incorporated directly into questions put to users.<sup>63</sup> Structure in the law and implicit groupings of fact patterns will lay bare most likely strategies.

<sup>55</sup> Ron Friedman, *Why Too Much Data Disables Your Decision Making*, FAST CO. (Aug. 24, 2012), <https://www.fastcompany.com/3000676/why-too-much-data-disables-your-decision-making>.

<sup>56</sup> See Timothy Van Zandt, *Information Overload in a Network of Targeted Communication*, 35 RAND J. ECON. 542, 542 (2004); see also Kathryn Hensiak, *Too Much of a Good Thing: Information Overload and Law Librarians*, 22 LEGAL REF. SERVS. Q. 85 (2003).

<sup>57</sup> See Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO ST. J. DISP. RESOL. 91, 139 (2018).

<sup>58</sup> Consider Amazon’s automated customer service chatbots. Jared Kramer, *Amazon.com Tests Customer Service Chatbots*, AMAZON SCI. (Feb. 25, 2020), <https://www.amazon.science/blog/amazon-com-tests-customer-service-chatbots>.

<sup>59</sup> E.g., British Columbia’s online legal aid service, MyLawBC, <https://mylawbc.com/>.

<sup>60</sup> See, e.g., Margaret Hagan, *Participatory Design for Innovation in Access to Justice*, 148 DAEDALUS 120 (2019); Daniel W. Bernal & Margaret D. Hagan, *Redesigning Justice Innovation: A Standardized Methodology*, 16 STAN. J.C.R. & C.L. 335 (2020).

<sup>61</sup> SLRN Brief: *Examples of Legal Aid On-Line Intake and Triage Projects* (SLRN 2016), SELF-REPRESENTED LITIG. NETWORK (Mar. 22, 2022), <https://www.srln.org/node/458/srln-brief-examples-legal-aid-line-intake-and-triage-projects-srln-2015>; *Online Triage and Intake*, LEGAL SERVS. CORP., <https://www.lsc.gov/i-am-grantee/grantee-guidance/lsc-reporting-requirements/tig-reporting/online-intake-triage>.

<sup>62</sup> Algorithms can quickly and precisely identify eligibility given explicit criteria and high-quality records, helping legal-aid organizations and governments allocate scarce resources to the people they can help most. See Carla L. Reyes & Jeff Ward, *Digging into Algorithms: Legal Ethics and Legal Access*, 21 NEV. L.J. 325, 330–31 (2002).

<sup>63</sup> See *Interactive Online Portals Offer Targeted Legal Resources on Demand*, PEW CHARITABLE TR. (Jan. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/inter>

There is no limit to how complex any enhanced ODR data collection process might be. But this is *also* true when a litigant hires an attorney: The litigant explains their situation, and the attorney asks questions in response. The attorney may also look over papers, review video, or examine other evidence. This exchange might take a while, but lawyers ultimately triage and end their information gathering, and ODR software can too. As natural language processing improves, faster intake methods that ask open-ended questions instead of closed-ended questions can reduce the total number of questions.<sup>64</sup> Analysis of narrative answers can trigger relevant follow-up inquiries.<sup>65</sup> But there are reasons doctors don't only ask "so, what's bothering you?" at an appointment. Instead, you are first subjected to a long list of questions designed to prompt you to think about every system and part of your body.<sup>66</sup> Any natural language response to an open-ended question like "what's your legal problem?" may come from a person unfamiliar with the law whose take on what matters may be off-base.<sup>67</sup> Still, natural language responses, perhaps even voice submissions, might be a better, more accessible option for some litigants.<sup>68</sup>

A barrier to making data-collection functionality successful in next-gen ODR platforms is simply *how long* it might take a litigant to get in the front door. So much of what is good about ODR is that it is easy to use and minimally costly to try. Next-gen ODR might dissuade people from using courts all over again if it bogs down with seemingly countless questions and checklists. But consulting with a lawyer takes no small amount of time, and stacks of forms are not new to human institutions. Nevertheless, enhanced ODR platforms might be more attractive to more people if guidance and counseling functions were designated as optional.

### 12.2.3 Replication/Obfuscation/Translation versus Representation

Lawyers aren't just analytical input-output machines offering a litigant legal expertise in the background. Lawyers are corporeal and play a physical role on the stage of our justice system.<sup>69</sup> They actually "do" law by going to a courthouse to serve as

[active-online-portals-offer-targeted-legal-resources-on-demand](#) ("For example, ... 'My landlord is kicking me out of my house' would be identified as an eviction issue.").

<sup>64</sup> See *id.*

<sup>65</sup> See Claudia King, *5 Lawyer Bots You Can Try Now*, FIRMSY (Mar. 27, 2018), <https://firmsy.com/blog/5-lawyer-bots-you-can-try-now>.

<sup>66</sup> See Lizzie O'Leary, *How IBM's Watson Went from the Future of Health Care to Sold Off for Parts*, SLATE (Jan. 31, 2022, 9:00 AM), <https://slate.com/technology/2022/01/ibm-watson-health-failure-artificial-intelligence.html>.

<sup>67</sup> See generally Jeena Cho, *5 Mistakes to Avoid at Client Intake*, ABOVE THE LAW (Aug. 10, 2015, 1:00 PM), <https://abovethelaw.com/2015/08/5-mistakes-to-avoid-at-client-intake/>.

<sup>68</sup> Margaret Hagan, *The Justice Is in the Details: Evaluating Different Self-Help Designs for Legal Capability in Traffic Court*, 7 J. OPEN ACCESS L. 1, 8 (2019).

<sup>69</sup> For example, only a lawyer can represent someone in court. E.g., STATE BAR OF MICHIGAN, UNAUTHORIZED PRACTICE OF LAW: FACTS AND INFORMATION (2009), <https://www.michbar.org/file/professional/pdfs/uplfacts.pdf>.

their client's mouthpiece. The corporeal representation function of lawyering matters in at least three ways in the context of court-connected ODR: lawyers replicate a litigant's ability to be physically present, lawyers obfuscate litigant traits, and lawyers translate and distill a litigant's lay arguments into an "expert's" legal arguments. Considering these roles separately demonstrates that enhanced ODR can advance these functions through text on a screen or other digital-information display even without a human body in a courtroom.

First, lawyers allow clients to be in two places at once. This function reduces the cost of litigation to clients, courts, and other parties, since schedule conflicts can slow litigation. Representation offers flexibility to meet competing obligations. Often, a client and their attorney come together in a courtroom at critical junctures, but there are many stages when a lawyer can physically "be" the client for purposes of advancing a case. Technically, ODR is unable to fulfill this function because, whatever it is, software does not stand in for a litigant before other parties or decision-makers. Yet, in an ODR environment, there is arguably no *need* for such a service in the typical case. Indeed, unlike hearings that take place at a particular time and place, ODR can be more flexible, accessible, and efficient, making the use of a lawyer to "cover" for someone less important.

Second, lawyers can "obfuscate" client traits. When judges walk into a courtroom and see a litigant's race, gender, age, or other identity traits, evidence suggests that unconscious implicit bias, if not explicit bias, affects subsequent decision-making.<sup>70</sup> Furthermore, the anticipation of such bias can alter a litigant's ability to communicate well in a courtroom. One strategy for a litigant facing the possibility of discrimination is to hire a lawyer with different – perhaps socially "preferred" – characteristics to block, blunt, or attenuate any such bias. Lawyers even advertise on this basis – for example, hinting at the advantages of a female lawyer defending a male defendant accused of sexually assaulting a female victim.<sup>71</sup> True, having a lawyer does not necessarily preclude a judge from ascertaining litigant identity traits, but outside of explicit, intentional discrimination, even sharing the stage with an in-group lawyer may disrupt the psychological processes that lead to bias.

For those unable to reduce their exposure to bias by using a lawyer,<sup>72</sup> ODR offers a substitute, perhaps superior solution. ODR can structure online communication to insulate judges and other decision-makers from legally irrelevant information that

<sup>70</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1209–11 (2009).

<sup>71</sup> E.g., *Hiring a Female Lawyer for a Criminal Sexual Conduct Case*, SHANNON SMITH LAW, PC, <https://defendingabuse.com/blog-items/hiring-a-female-lawyer-for-a-criminal-sexual-conduct-case>. Evidence suggests that an attorney's race and gender can influence a trial's outcome. See Alexis A. Robinson, *The Effects of Race and Gender of Attorneys on Trial Outcomes*, JURY EXPERT, May 2011, at 1, 4–5, <https://www.thejuryexpert.com/wp-content/uploads/RobinsonTJEMay2011.pdf>.

<sup>72</sup> System-level or court-level debiasing strategies exist to address disparate treatment. Most begin by assuming decision-makers will come into personal contact with litigants, triggering bias. The

might trigger implicit biases (or allow purposeful discrimination). At least some first-gen ODR systems, for example, do not include a litigant's driver's license picture in the judge's dashboard. At least one court collects required picture ID information only *after* the judge decides the case but before the ruling is entered. First-gen ODR systems, by tracking traditional in-person processes, still tend to make a litigant's name visible (which may reveal gender and ethnicity) and, in some instances, date of birth (which, with some math, reveals a litigant's age).<sup>73</sup> ODR platforms can go further by thoughtfully, comprehensively obscuring litigant traits that are legally irrelevant (or even legally relevant when they are likely to bias or confuse decision-making),<sup>74</sup> whenever it is consistent with fair process.

Third, lawyers provide a "translation" function to clients. Lawyers distill what they learn from clients into core substantive facts, and then assemble and present those facts in the highly reticulated way that legal actors expect from legal professionals.<sup>75</sup> This professional repackaging may augment a litigant's story and substantive arguments by making them more palatable, reliable, and understandable to a judge.<sup>76</sup> Or it may just be a key into the club. If there are lawyers on both sides, any imprimatur may cancel out, yet the dynamics of the prisoner's dilemma apply, so all who can "lawyer up" still do so. Pro se litigants are left behind. Even if translation and delivery by an expert improves the litigant's prospects (relative to a counterparty), it remains an open question whether this function enhances the accuracy or efficiency of any adjudication. Regardless, if only one party has access to an attorney's stamp of approval or can speak "legalese," a pro se gap might develop.<sup>77</sup>

Enhanced ODR can diminish the role that legalese and professional status might play in litigation by reducing their use, making them ambiguous or less salient, or facilitating a pro se litigant's ability to employ them within the platform. ODR design can encourage (or require) litigants to use plain language, either via the structure of its data collection strategies (e.g., forms) or through ex post screening of user language. Alternatively, one can imagine a more involved ODR process that educates litigants about the meanings of legal words or legal communication norms or that offers something closer to a translation service, much the way smart form

goal is therefore to unwind or inhibit the effects of any such bias. Mentovich et al., *Are Litigation Outcome Disparities Inevitable?* at 903–12.

<sup>73</sup> See *id.*

<sup>74</sup> Cf. FED. R. EVID. 403.

<sup>75</sup> See Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 529–30 (1984–1985).

<sup>76</sup> Importantly, critics of this portrayal argue that lawyerly translation can corrupt a client's story in a way that is harmful to clients, by shoehorning their views into poorly fitted legal categories or by substituting their own views for those of their client. See generally TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES (2009).

<sup>77</sup> This is not certain, however. See Scott L. Garland, *Avoiding Goliath's Fate: Defeating a Pro Se Litigant*, LITIGATION, Winter 1998, at 45, 45.

procedures operate today, by giving people choices. Either way, ODR platform “rigidity” in the allowable scope and style of communication can be a disparity-reducing positive;<sup>78</sup> such structure can ensure that parties speak the same language while also giving them equal opportunities to be heard.

Importantly, reducing “degrees of freedom” in ODR communications can also close a back-door source of implicit bias. An ODR system that scrubs case materials of identity-trait data after having encouraged a litigant to submit an open-ended statement may be closing the barn door after the horse has bolted. Intentionally or unintentionally, litigants reveal personal traits in their communications:<sup>79</sup> they explicitly indicate their race, gender, occupation, or age,<sup>80</sup> or they implicitly reveal these traits through language that correlates with demographic characteristics.<sup>81</sup> In any event, to the extent that legal representation liberates litigants from the need to speak legalese in the courtroom and insulates litigants from implicit bias by insulating judges from triggering face-to-face interactions, ODR systems have the potential to do much the same through careful design and creative solutions.

### 12.3 CONCLUSION

Courtrooms (spaces) and lawyers (people) complement each other in the resolution of disputes. Courts appear to be fixed, reactive, and generically available to all; lawyers, by contrast, seek justice by customizing how courts resolve disputes to align with client circumstances and preferences. A lawyer “configures” a court and the law it embodies by leveraging their experience, expertise, and corporeality to serve their client’s interests. First-gen ODR makes courts more accessible, but platform technology, data science, and thoughtful design allow for so much more. In this chapter, I argue that courts should view ODR going forward not only as a potential opportunity for courtroom-like engagement in the traditional sense but as a substitute for many of the services historically provided by lawyers, which, in the end, are mostly about helping litigants understand how a court will perform and what it will produce in the specific instance of their case. Conceiving of ODR in this way – as the use of online communication technology and data science to make it easier for potential litigants to *use*, *understand*, and *benefit from* law in action – will get us much closer in the years ahead to “courts as a service.”

<sup>78</sup> Mentovich et al., *Are Litigation Outcome Disparities Inevitable?* at 965.

<sup>79</sup> O’Neil & Prescott, *Targeting Poverty in the Courts*, at 223–24.

<sup>80</sup> For examples of unfiltered and revealing language, see some preliminary analysis from Matterhorn litigants at Stanford Law School, *Legal Tech and the Future of Civil Justice* (Session 3), YouTube (Mar. 1, 2021), <https://www.youtube.com/watch?v=X31czG4NbBc> (beginning at approx. 49:05).

<sup>81</sup> *Id.* (beginning at approx. 49:40).