Technology, Conflict Resolution, and the Future
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[Slide 01]

I ended the video with a suggestion that e-commerce and large scale business ODR gives us a good look at what to expect in other fields as we all move forward, particularly in the courts and in efforts to increase "access to justice." Let me spend a bit of time explaining *why* I think that is true, and where I think we are heading - heading very quickly.

[Slide 02]

A decade and a half ago, Jeff Aresty, founder of the InternetBar.Org, described the justice system as a combination of **people, places, and paper.**

Before technology began to be inserted into the justice system, **people** was a relatively straightforward concept. A party physically approached an attorney, who interacted with another party and that party's attorney, and then, if they went far enough into the process, confronted a judge (and perhaps a jury). For some time now, it has been common in the US and elsewhere for the judge to refer the parties to work with a mediator, taking the case back if mediation did not succeed. Online legal services, sophisticated help for *pro se* litigants, and other platforms that increase communication and information options have redefined, to some degree, the notion of people in the system.

Technology created to handle large numbers of clients and customers in the e-commerce space is easily adapted to handing large caseloads and tracking the status of cases as litigants and counselors move through court systems. One could argue that

this technology increases the pool of people who may contact the justice system, but it is also the case that the redefinition of "people" created by ODR has caused some problems. For example, in traditional contexts, "people" were generally in the same venue or geographic area. Online communication has created a world in which people routinely interact with each other across national and legal boundaries. That changes the notion of "places."

In a traditional sense, **places** in the justice system referred to lawyer's offices, and courtrooms. With the creation of technology that allows for virtual interaction "places" has lost its specific meaning. With ODR platforms to handle business matters, ODR platforms to give legal advice and services, and ODR platforms to allow for pro se representation, "places" is now literally the air around us. There are obvious advantages in terms of access, but there are challenges brought along with progress. For example, in a traditional justice system one's status or standing was determined in part by the place one approached "justice." Legal systems are set up so that it is not appropriate to offer counsel across jurisdictional borders, a concept that works fine if litigants are bound to a specific venue. But when parties and lawyers are spread around the world, how will the justice system handle counsel and advice? As I've noted elsewhere, UNCITRAL spent six years trying to figure that out.

Paper is disappearing from the justice system. Wide accessibility of online platforms leading into the justice system has encouraged the use of online forms, e-filing, and electronic document management. I am involved in a sub-committee of the Access to Justice commission in my home state - the sub-committee is devoted to issues related to self-represented litigants, and one of the major projects is to create a "smart" form online that will fill out the proper judicial document to be filed with the court.

[Slide 03]

All of this describes the point to which we have generally come in the justice system - revamping and updating the basic business of the courts - but I think perhaps the biggest change will be in the addition of a fourth P - **process**.

The rules of procedure drive interactions in the justice system, and a set, predictable process is one hallmark of an effective justice system. Traditionally, the attorneys in a case would file with the court, and, if they could not work out a settlement or plea agreement, they would proceed to the courtroom, where they might or might not be directed to try formal mediation before engaging in a trial. A revolution in the US that began in the 1980's inserted mediation into the judicial system as a common precursor to certain kinds of litigation, and the use of ADR has become widely accepted. The difference we are beginning to see is that ODR platforms, offering AI guided assistance toward resolution, *and* AI guided mediation, *and* potentially mediation using "live" mediators, are becoming a desirable first step in the judicial process. In some cases, the use of the ODR platform will be mandatory, with the availability of litigation existing only after all ODR/ADR attempts have failed.

Coming online now is a new generation of ODR software, using very sophisticated algorithms and artificial intelligence to disrupt the traditional judicial process.

[Slide 04]

In 2015, the Civil Justice Council in the UK issued a report detailing the advantages of using ODR for low value civil claims - it argued that justice would best be served by making ODR a mandatory first stop.
https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Fin

al-Web-Version1.pdf That report and other work formed the foundation for an ongoing pilot project in the UK, making ODR an integral part of the justice system.

In the US, a joint committee of the National Center for State Courts, the Conference of State Court Administrators, and the National Association of Court Management, issued a Resource Bulletin on ODR in the Courts, describing ODR projects at various levels in courts across the US - and there are many ODR projects underway. http://www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx

One of the largest court technology companies in the world, Tyler Technologies, has integrated an ODR platform, Modria, into its court management suite. Modria is being adopted across the US, and I think serves as a model of what's to come worldwide, offering basic information, case guidance, negotiation space, and third party assistance. https://www.tylertech.com/solutions-products/modria/ODR

Modria uses algorithms and artificial intelligence to move parties toward resolution, but there are other platforms that maintain a more traditional approach to online ADR. Trokt is involved in a project bringing pro bono mediator/lawyers to work online with families struggling with parenting issues, without using algorithms or artificial intelligence. https://www.trokt.org/

[Slide 05]

Taking into account all of these factors, pressure to adopt ODR solutions is being given impetus because justice systems around the world are in crisis - some of the critical problems involve issues that are local in nature, but three problems that almost all justice systems share are echoes of the problems faced by e-commerce, all of which are problems that ODR may help address:

1. An overwhelming case load;

2. Diminishing budgets, and;

3. A significant under-served or un-served population.

There are some obvious advantages to the changes that are coming, and there are some challenges. The challenges, at least from one perspective, have been examined by the JUSTICE group in the UK. They will soon release a full white paper on issues related to disenfranchisement and ODR.

[Slide 06]

Whether one thinks ODR will open up access to justice or disenfranchise the poor, discussions about the challenges and the advantages fit into three general categories: **Access, Concept,** and **Attraction**.

Access to justice, in one sense, will obviously be enhanced by access to virtual platforms offering ODR. The ability to connect to the justice system from anywhere, at any time, virtually, will make the pathway into the justice system quicker and smoother for those who choose to use it. The advent of more ODR platforms will, automatically, give easier access to justice *to those who already have access*. It is not clear that more ODR will mean more access to justice for those who are currently underserved or unserved.

The limitation of A2J offered by ODR, or at least the perception of the limitation, has centered around three areas - the digital divide, platform limitation, and perception of inclusion.

For many years, a strong argument against ODR used the "digital divide" as proof that those who are poor or are in areas not served by high speed internet will be disenfranchised by the mandatory use of online platforms. Every year that passes reduces the impact of the divide - by 2017, over 80% of the world's population lived in an area with access to mobile broadband.

Platform limitation is also an argument that has passed its effective date. Approximately 75% of the world's population has access to mobile phones. In developed countries, you can be sure that figure approaches 100%. All of the ODR platforms being created now are mobile friendly, allowing access to almost anyone.

In short, challenges related to physical access to ODR programs have been addressed and, at least partially, overcome.

The **Concept** of what it means to have access to justice, with ADR/ODR taking a major role in justice systems, will bring the advantage of opening the door wider. In the long run, a challenge for all of us is to work on broadening the definition of access to justice, moving from "A2J = Access to the Courts," to "A2J = Access to information and fair treatment."

I think the greatest challenge to justice systems generally, and certainly the greatest challenge for the integration of ODR into court systems, is what I'll call "**Attraction**" - the challenge of how to attract individuals who have never been confident of their ability to approach the justice system.

[Slide 07]

In the United States, estimates of how many justiciable issues never enter the justice system at all range as high as seventy percent. Seven out of ten who have experienced

a dispute or trauma that would have standing in a courtroom, never get so far as consultation with an attorney.

The most common ways to explain this phenomenon are pretty obvious to anyone who has ever had anything to do with the justice system. The perception, and the reality, among many is that even talking to a lawyer, much less engaging in a legal proceeding, is too expensive in terms of time and money. The perception, and the reality, among many is that, even if one could afford the initial approach, the system favors those with enough money to use the judicial system as a weapon. For many, there is, generally, a basic lack of understanding of the judicial process: for them it is not obvious whether something that has happened is appropriate for legal action, and there is a basic lack of knowledge about how to proceed even if legal action is appropriate. Finally, and perhaps most powerfully, there is a basic fear of the justice system. Literature abounds that offers tips on how to overcome anxiety related to the justice system - and this literature is for licensed attorneys and experience clients in well established legal systems with a reputation for treating people fairly. For a great many, if not most of the general world population, courts are where things happen TO you, not FOR you. Attracting people to the justice system, virtually or physically, will continue to be a major challenge.

So, what are my predictions for the future of technology and conflict resolution?

[Slide 08]

- Outside the courts, ODR platforms that handle traditional ADR on a small scale (divorce mediation, community mediation, etc.) will continue to develop, and will beging to use artificial intelligence and big data to enhance third party work.
- The use of ODR platforms as a mandatory "front door" to the courts will become common.

- The use of ADR through ODR will likewise become increasingly mandatory - this will mean that third parties will have to be trained to use the online platforms.
- The development of algorithms and artificial intelligence, using the "big data" information that can be gleaned from ODR use, will become an integral part to A2J - this will put those who approach the courts in the same position as those who use social media - their information will be available to analysis and use.
- In the future, it is likely that most people who bring most kinds of cases to court will have to go first to an ADR/ODR platform, and that they may never actually talk to a "live" person, even if they think they have.

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Thanks for your attention - I think we have time for a good bit of discussion if you are interested in following up on any of my projections about the future.