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ODR, Access to Justice, and Self Represented Litigants

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Let me first thank Larry and Cat for asking me to be here today, and for giving up some of their time to allow me to make a few remarks about the state of online dispute resolution and self represented litigants. One could say that online dispute resolution has been a focus - or an obsession - of mine for quite some time.

I have been involved in the study of and the development of ODR since the late 1990's. About a dozen of my colleagues and I have separately and jointly developed ODR solutions for mediation, arbitration, e-commerce, and e-justice, and we were involved in the first National Science Foundation study of the impact of technology on alternative dispute resolution. You could say that we were ODR when ODR wasn't cool.

Now, ODR seems to be very cool - or very hot, depending on how you look at it. I just co-chaired a symposium in Liverpool where a lot of the talk was about blockchain and smart contracts, and there are an ever increasing number of applications being connected to court systems around the world. As one legal scholar put it, in the justice arena ODR seems to be taking the A out of ADR. What have been characterized as “alternative” approaches to dispute resolution that are not directly court processes are becoming more and more common, and are more and more accomplished using technology. We are very close to treating ODR according to a definition I offered a few years ago - simply the intelligent application of information and communication technology to any dispute resolution process.

For the past couple of years I have had the privilege of being a member of the Self Represented Litigants Committee of the Virginia Supreme Court’s Access to Justice Commission. In that role, and in the work I have done with legal services providers and the InternetBar.Org, I have focused on issues related to access to justice for those who are underserved or not served at all by the justice system. My colleagues in that work all recognize that ICT will play a large part in opening the justice system to SRL’s. When the question is asked, “how do we open up access to justice,” more and more the answer involves technology.

So, why am I not totally sold on technology as The Path to access to justice? Let me start with a story.

A Texas rancher was up in Maine on vacation, and while he was out driving around in his rental car he came across an old Maine farmer standing by the side of the road, looking over one of his fields. The Texan stopped and made polite conversation. “Is this your spread?” “Aya,” the Maine farmer responded, pointing, “It runs from heah, up to the ridge line theah, across to the fence line theah, down to the road over theah, and back to us heah.” The Texan was amazed. “Is that it?,” he asked. “Why, back in Texas

it takes me a half a day just to get in my truck and drive across my spread.” The Maine farmer thought about it for a moment and then said, “Aya. I had a truck like that once.”

What, you might ask, does that have to do with ODR and self represented litigants or access to justice generally? The key is that the Texan and Maine farmer’s conversation crosses without intersecting - the farmer is talking about the technology (the truck), and the Texan is talking about the territory. We do that a lot when we discuss ODR and A2J, and indeed ODR and dispute resolution of all kinds.

The truck, the technology, is undoubtedly important. But we seem to talk about ODR as though it will automatically open up the justice system and make things universally accessible the same way technology has revolutionized and opened up so many other things in our lives. Let’s set aside for the moment the issue of whether basic online technology is available equally to everyone - that’s another issue, and one that we must take seriously. But it is a given that the vast majority of people in the developed world do have access to online technology, largely through smart phones, and we might assume that opening up the justice system by using online tools will immediately improve A2J for them. That may be true - and it may not.

In the quest for access to justice there are some very sophisticated trucks - artificial intelligence and algorithm driven systems can offer legal advice, guide potential litigants through the maze of court filings and processes, and in some ways can take the place of lawyers and judges. One supreme court justice in the UK has referred to this as the “disintermediation” of lawyers and judges. That’s a fancy way of saying “replace,” but I have argued in other places that those lawyers and judges who adapt to a technology driven justice system will have more work, not less. That’s also another discussion for another day.

Not surprisingly, one of the first places that technology is applied in the search for access to justice is in the filing of forms. That is the classic low hanging fruit. In my home state of Virginia, the SRL committee has embarked upon a wide ranging project to automate court forms and make them available online. I understand there is a similar project underway here in Tennessee.

At that symposium in England, called “Re-Imagining Justice,” the UK “Online Court” project was front and center, and the Online Court forms project was touted as a great success. The statistics quoted by Lord Justice Briggs were really impressive. The error rate for filing by SRL’s went from 40% to 1% with the use of the automated online forms.

As we continue to upgrade the truck in the US, we’ll see these kinds of results, with the pathway into the justice system smoothed and access to justice improved.

But the question that drives me relates to the territory, not the technology: the use of technology improves access to justice for whom, exactly?

So far, I would argue, ODR has made it quicker and easier to get across the legal territory for those who are already trying to navigate that landscape. It has done very little to increase access for those who are underserved or not served at all - those who never enter the territory at all.

A few years ago, an ABA study group suggested that as many as 70% of justiciable issues in the US never got as far as consultation with a lawyer, let alone as far as the front door of the courthouse. I don’t think the development of ODR and A2J technology will, by itself, make much of a dent in that number.

Why are the unserved hesitant to approach the justice system?

First, the very idea of getting involved in the justice system is anxiety producing. There are a plethora of training programs, books, and guides for how to deal with the anxiety of going through legal proceedings - and most of those are written for lawyers and experienced litigants. You can imagine the anxiety for those who are totally outside the system. Development of technology alone will not alleviate this anxiety.

Second, there is a perception that fair treatment in the justice system is purchased, not a natural outcome of balanced proceedings. In a recent ABA publication, a federal judge noted that high priced lawyers using strong arm tactics have increasingly made the law a club to beat those who can't afford to keep up in the representation race. A prominent public figure who will remain unnamed was involved in over 4000 lawsuits before taking elective office, most of which were designed to outspend and beat down opponents. It's the way of life in much of the legal world, and this isn't lost on those who don't have a lot of money or influence. Development of technology alone will not change this perception.

I have been involved in a pilot program with the Veterans Administration here in Tennessee that has driven this home to me. We set up an online platform that will give families involved in parenting order disputes a way to get safe, private information about their options, and to connect them to lawyer/mediators who will work with them online, *pro bono*. We have, theoretically, set up a system that can be accessed anonymously for information, and that offers non-biased help with filing proposed orders, eliminates the need to be in the same room with the other party, and relieves the parties from having to appear in stressful court proceedings. Again, theoretically, we have addressed some of the major barriers to access - but routinely one or both parties express the conviction that they cannot get fair treatment in the justice system, so they refuse to participate in the pilot.

Finally, the reality is that approaching the justice system in a *traditional* way is costly, and the perception is that approaching the justice system in *any* way is costly. Recently I needed some advice about an issue that probably will never amount to anything, but for which I wanted to be prepared. I got a referral to counsel with particular expertise, and for \$850 per hour I was privileged to have a discussion with him about the issue. I assume I got good advice for that price, but I won't know unless I actually have to use the advice. Like all of us in this room, I don't *like* the idea of putting out that kind of money for a short discussion, but we can afford it if we see the need. Most of our fellow citizens, particularly those who currently are unserved by the justice system, would literally be scared away from getting the advice by the cost, even if they could find and contact an attorney who would work with them.

Overall, the justice system for most of our fellow citizens is a place where things happen TO them, not FOR them.

What does this have to do with the truck and the territory - the technology and the law? It means, for me, that all of the advances we make in technology that look, from our perspectives, like giant leaps forward in A2J, are in fact invisible to many who could benefit from the improved access.

A colleague with whom I did a bit of work years ago told me a story that I think could be instructive for those of us who get excited about ODR technology and A2J. My colleague grew up black in middle Tennessee. All through his childhood, Bob walked past a dry cleaners with a sign in the window that said "Whites Only." He left the south, made a very good career, and years later was back to visit family in Tennessee. He noticed that the Whites Only sign was no longer in the window of the cleaners. His comment to me was that just taking down the sign was not enough to make him feel comfortable going in that establishment - some overt sign that things had changed, positive notice that not only was the cleaners available to him, but that he was *welcome*

there, might get him to go in. I think there's a parallel here. Just building the technology systems and opening up access to the already served will not be welcoming for the 70%.

What Larry and Cat have talked about here today are good steps in that direction. If we involve the un-served in our development of ODR A2J pathways, *and* stress the need to develop outreach and education, we *may* pull in some of the 70%.

For me, the key is to slightly change our definition of access to justice. We have generally spoken of A2J as access to the courts. I think we should think of A2J as access to fair treatment and a chance for safe, affordable, problem solving.

In other venues, I have talked about the difference between evolutionary progress and revolutionary progress in access to justice. ODR technology is developing rapidly and that will bring *evolutionary* progress in A2J. We can develop ODR technology, make it easier to file the forms, give advice privately online for free or cheaply, and do all of the other things that ODR can do, and that really is important and helpful - but until we find a way to push that technology out to the 70% and make them understand that things have changed, we will not have made *revolutionary* progress in access to justice.

That's why my dedication to the development of technology solutions for dispute resolution of all kinds does not lead me to believe that technology is a magic cure for the ills of our justice system.

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