

## **ONLINE COURT: Online Dispute Resolution and the Future of Small Claims**

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By 1999 Online Dispute Resolution (ODR) proponents like Colin Rule, ODR director for eBay and PayPal, predicted that every court would soon have an ODR kiosk out front.<sup>1</sup> After the dot-com bust, ODR disappeared from view, but has since seen a resurgence as online virtual worlds like Second Life<sup>2</sup> provide new forms of online interaction.<sup>3</sup> The typical ODR cases involve small dollar amounts, distant parties, and often relatively obscure issues.<sup>4</sup> ODR will be limited to such small dollar "online disputes" until the government drives the process by moving it's court activities online. If technology is the "4<sup>th</sup> party" in such disputes, the court can act as a "5<sup>th</sup> party" and provide much needed legitimacy to ODR. Small claims courts, with smaller dollar amounts and less complex issues, are ideally situated to transition their operations online.

In the first section, this paper defines and discusses the rise and fall of ODR, including the more recent Second Life phenomenon. ODR's benefits are discussed, along with an analysis of why ODR has not expanded to encompass non-internet based disputes. Section two describes prior efforts to create online courts, and the reasons such efforts have thus not been successful. Section three defines technology as the "fourth party" in ODR, and describes ways in which

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<sup>1</sup> Jason Krause, *SETTLING IT ON THE WEB: New technology, lower costs enable growth of online dispute resolution*, 93 A.B.A.J. 42, 43 (2007).

<sup>2</sup> See Second Life ([www.secondlife.com](http://www.secondlife.com)) (An online virtual world in which 8 million registered "residents" can hold jobs, date other users, and own real estate, among an array of unlimited possibilities).

<sup>3</sup> Krause, *supra* note 1, at 43.

<sup>4</sup> *Id.*, See Kyle Sutton, *Second Life Lawsuit Lands in Real-World Court*, PCWorld (<http://blogs.pcworld.com/staffblog/archives/005816.html>) (last accessed December 12, 2007) (Six Second Life merchants filed suit in a federal district court over the virtual theft of their "adult-themed virtual objects.").

technological advances address many of the challenges to creating an online court. Section four presents the notion of courts as a “fifth party” and describes how online courts can aid in bringing ODR to the mainstream of conflict resolution by providing much needed legitimacy. Finally, section five discusses the implications of technology, online courts, and ODR in general on lawyers, ADR practitioners, and legal education.

## **I. The State of ODR**

ODR involves the application of dispute resolution techniques over the internet. Generally ODR is used to resolve internet-related disputes such as e-commerce, but it also can be used for more traditional off-line disputes. ODR is the online utilization of arbitration, mediation, and negotiation techniques and can even include formal judicial proceedings.<sup>5</sup> On a more basic level, ODR can be anything from e-mailing documents and evidence to using videoconferencing.<sup>6</sup> It differs from Alternative Dispute Resolution (ADR) in one important respect, as ADR typically refers to processes outside governmental jurisdiction.<sup>7</sup>

ODR had its beginnings near the end of the last century. In 1999, eBay began a pilot ODR program that at first handled a few hundred cases. Today, the company handles millions of disputes each year in partnership with third-party resolution company Square Trade.<sup>8</sup> Colin Rule, ODR director for eBay and Paypal, states that at that time “we thought this would be huge,

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<sup>5</sup> Sarah Rudolph Cole and Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. Tol. L. Rev. 193, 196 (2006).

<sup>6</sup> Krause, *supra* note 1, at 43.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 44.

[and] every court would have a Kiosk out front for ODR.”<sup>9</sup> After the dot-com bust, ODR seemingly disappeared overnight.<sup>10</sup> Now ODR is making a comeback, only this time it is finding more acceptance from within the legal profession.<sup>11</sup> For example, Dan Rainey, director of the office of alternative dispute resolution services for the National Mediation Board, hopes to soon handle 10 percent of its arbitration cases online.<sup>12</sup>

Fueling the rise in interest in ODR is the rising influence of virtual online worlds. Second Life, an online virtual world in which 8 million registered “residents” can hold jobs, date other users, and own real estate, among an array of unlimited possibilities.<sup>13</sup> Companies have set-up virtual stores, leading to virtual internet commerce and a new type of relationship dispute.<sup>14</sup> Second Life thus appears to be the new frontier of ODR. From a legal and sociological standpoint, Second Life takes dispute resolution in a completely new direction. First, virtual items in Second Life, purchased with virtual linden dollars, now have real value. In a federal district court in Brooklyn, New York six Second Life merchants filed suit this past October for the theft of their “adult-themed virtual objects.”<sup>15</sup> Disputes over virtual items have thus become a reality. Second, virtual worlds provide an entirely new environment in which disputes can occur. One such dispute arose because one participant placed a nude image where another user would be forced to see it.<sup>16</sup> The dispute was resolved through Web mediation.<sup>17</sup>

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<sup>9</sup> *Id.* at 43.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See* Second Life, note 2.

<sup>14</sup> *Id.*

<sup>15</sup> Kyle Sutton, *Second Life Lawsuit Lands in Real-World Court*, PC World

(<http://blogs.pcworld.com/staffblog/archives/005816.html>) (last accessed December 12, 2007).

<sup>16</sup> Krause, *supra* note 1, at 43.

<sup>17</sup> *Id.*

From a sociological standpoint, virtual worlds shift our means of interacting and lead to an increasing demand for ODR. Ric Hoogestraat, a 53 year old married former college computer graphics teacher, began spending every free second on Second Life after being diagnosed with diabetes and a failing gallbladder in early 2007.<sup>18</sup> In his real life Ric is paid \$14 an hour to work as a call-center operator for Vangent, Inc., a corporation that outsources calls for the government and private companies.<sup>19</sup> In his virtual life, Ric is a successful entrepreneur with a net worth of \$1.5 million lindens (the site's currency), which can be purchased for roughly 250 lindens per U.S. dollar.<sup>20</sup> He owns a mall, a private beach club, a dance club, and a strip club where he employs 25 online persons known as avatars who are operated by other Second Life participants.<sup>21</sup> Additionally, he is married to one of the participants, a woman he met on Second Life, and the two game players together own two virtual dogs, pay a mortgage together, and spend hours in their virtual world.<sup>22</sup> Ric's legal wife, Sue, is an export agent who married Ric just seven months ago.<sup>23</sup> Sue is not amused, and claims, "You try to talk to someone or bring them a drink, and they'll be having sex with a cartoon."<sup>24</sup> Sue joined a support group for spouses of obsessive gamers, and worries it will be years before her husband realizes that he's traded his real life for a fantasy, and lost his family in the process.<sup>25</sup> In a survey of 30,000 gamers, nearly 40% of men and 53% of women who play online virtual games stated that their

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<sup>18</sup> Alexandra Alter, *Virtual infidelity*, The Wall Street Journal (reprinted in The Week, Volume 7, Issue 35), August 31, 2007, page 36.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

virtual friends were equal or better than their real life friends.<sup>26</sup> Further, more than 25% of participants identified an online experience as the emotional highlight of the week.<sup>27</sup> The new reality of virtual gaming creates infinite potential for disputes, and thus also for ODR.

In addition to virtual gaming, advances in web technology are slowly starting to impact the resolution of disputes that had previously been handled in person.<sup>28</sup> Cybersettle recently signed a three-year contract with the City of New York to handle claims involving issues ranging from sidewalks to schools to personal injuries.<sup>29</sup> Cybersettle, one of the largest ODR companies, utilizes double-blind bidding software in cases where there is little factual debate and the sole issue is regarding the terms of settlement.<sup>30</sup> For a small fee, parties utilize Cybersettle's system over the internet.<sup>31</sup> The company's main source of revenue is from the insurance industry, where the company claims it has resolved smaller claims totaling more than \$1billion.<sup>32</sup>

While ODR remains a small part of dispute resolution in the United States, there is much greater acceptance of the practice overseas. Microloan agreements are mediated via the web in Kenya and Nigeria, while Sri Lankan factions have agreed to mediate their disputes online.<sup>33</sup> On a more basic level, developing countries that may lack the grounded telecommunications infrastructure may more quickly and easily adapt to a culture of wireless information and communication. The United Nations recently sponsored a conference in Liverpool, England for representatives of 29 nations to have a forum to create online communication protocols.<sup>34</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Krause, *supra* note 1, at 43.

<sup>29</sup> *Id.* at 46.

<sup>30</sup> *Id.* at 44.

<sup>31</sup> *Id.* at 46.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Additionally, The Mediation Room, An ODR service provider in England, is currently accepting referrals by English court mediators for online mediation on their internet platform.<sup>35</sup> Such international activities and involvement in ODR may influence the U.S. to adopt similar practices.

There are several benefits which make ODR especially attractive. These include cost savings, the speed of resolution, convenience, and individually tailored processes. In terms of money, ODR is most useful in cases where the attorneys' fees would exceed the likely award amount.<sup>36</sup> ODR is faster than a typical trial or even ADR because technology can shorten the distances parties might otherwise need to travel. Further, ODR does not depend on clearing time on a mediator's or a judge's calendar. Using e-mail, discussion groups, and web sites, agreements can be written and amended when convenient.<sup>37</sup> Further, instead of a cookie cutter approach, each dispute process can be tailored to fit the disputants' individualized needs.<sup>38</sup> One additional benefit is ODR's potential for growth as a means of dispute resolution. ODR will always be important for online businesses given the ever increasing amount of business transacted.<sup>39</sup>

Despite signs that ODR is on the rise, there remain few financially viable ODR efforts in the commercial sector.<sup>40</sup> ODR disputes are still mainly, although not exclusively, disputes

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<sup>35</sup> Learned through e-mailed communication with Graham Ross, Mediation Room CEO, who chaired a discussion on internet technologies at the 2008 International Forum on Online Dispute Resolution.

<sup>36</sup> *Id.* at 43.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Anita Ramasastry, *Government-To-Citizen Online Dispute Resolution: A Preliminary Inquiry*, 79 Wash L. Rev. 159, 162-163 (2004).

involving business-to-consumer (“B2C”) e-commerce.<sup>41</sup> More specifically, ODR is typically most effective in long-distance disputes involving technology issues.<sup>42</sup> There are several reasons why ODR has not taken hold as a dispute resolution method for non-internet based disputes.

The easiest explanation for why ODR is not widely used is that the public at large and lawyers in particular may not be aware that such opportunities exist. As described below, attorneys tend to be the gatekeeper of ADR processes and also tend to be more resistant than the general public to embracing technological change.<sup>43</sup> Further, ODR may simply be more expensive than other in-person dispute resolution methods. Rod Davis, the vice president of dispute resolution at the Better Business Bureau, knows that people like to say it saves millions, “but by the time you buy servers, security software and hire an IT staff, you’re spending more money and still have to do things the old-fashioned way.”<sup>44</sup>

Another factor limiting ODR’s profitability is the fact that the baby-boomer generation did not grow up online and many if not most still prefer to settle their disputes in person. It is often to teach “old dogs” new tricks, and some disputes may even be harmed by moving online. If one party is more adept at using technology, or if a personal apology is needed, resolution online may be more difficult to accomplish.<sup>45</sup> Often it is important to be able to see body

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<sup>41</sup> Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J. L. & Tech. 71, 73 (2004).

<sup>42</sup> Krause, *supra* note 1, at 43.

<sup>43</sup> Roselle L. Wissler, *When does Familiarity Breed Content? A Study of the Role of Different Forms of ADR education and Experience in Attorneys ADR Recommendations*, 2 Pepp. Disp. Resol. L.J. 199 (2002); Robert J. Howe, *The Impact of the Internet on the Practice of Law: Death Spiral or Never-Ending Work?*, 8 Va. J. L. & Tech. 5, 12 (2003).

<sup>44</sup> Krause, *supra* note 1, at 43.

<sup>45</sup> *Id.* at 44.

language to know how people are reacting, and if not handled well, ODR can alienate users.<sup>46</sup> A lack of personal connection between parties makes it difficult to build trust online.<sup>47</sup>

Another factoring limiting the widespread use of ODR is the lack of legitimacy, which is affected by concerns regarding reliability and quality. Critics of ODR cite quality issues and focus on the lack of community standards.<sup>48</sup> One reason for a lack of standards is the online community's attempt to be free of tradition rules and regulations.<sup>49</sup> A second possible reason is the lack of market demand for rules and regulations to govern online dispute resolution.<sup>50</sup> Square Trade, a large ODR provider, has adopted ethical guidelines for its mediators derived from those of the Society for Professionals in Dispute Resolution.<sup>51</sup> Further, mediators may be bound by state laws and court rules requiring mediators within a jurisdiction to abide by proscribed codes of conduct.<sup>52</sup>

More broadly, consumers' lack of confidence in the reliability of ODR may also impact the legitimacy of ODR. According to Thomas Schultz, "ODR needs an architecture of confidence, something that will create tangible features, social contexts, and predictable remedies in case a problem occurs."<sup>53</sup> An architecture of known indicators and points of reference provide a framework for mutual trust between parties.<sup>54</sup> Such indicators are readily present in the physical world as we are able to enter a store and touch the merchandise, or sit in a lawyer's plush lobby. While such cues may not always be trustworthy, they still provide

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<sup>46</sup> *Id.*

<sup>47</sup> Ethan Katsh and Leah Wing, *Ten Years of online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. Tol. L. Rev. 19, 41 (2006).

<sup>48</sup> Cole, *supra* note 5, at 208.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Cole, *supra* note 5, at 209.

<sup>52</sup> *Id.*

<sup>53</sup> Schultz, *supra* note 41, at 72.

<sup>54</sup> *Id.*

guidance. Social trust is something that arises within a community where there is regular, honest, and cooperative behavior.<sup>55</sup> The potential users of ODR have none of these normal indicators to suggest that ODR is reliable or legitimate.<sup>56</sup>

While the first wave of ODR did not firmly take hold, technology has advanced to a point where it no longer makes sense not to use the web to resolve disputes.<sup>57</sup> In order to provide an “architecture of confidence” for ODR, moving certain court activities online can provide much needed legitimacy. Small claims courts, with smaller dollar amounts and less complex issues, are ideally situated to transition their operations online. Section five will further discuss online courts and their potential role in increasing the use of ODR. The next section describes the prior efforts to create a functioning online court and the many challenges to moving court operations online.

## **II. The Challenge of Creating an Online Court**

The idea of creating a fully functional virtual court is not a new one. Over the past fifteen years, legal education programs have introduced cutting edge courtroom technologies, from Courtroom 21 at William and Mary College of Law to the National Advocacy Center at the University of South Carolina, Columbia.<sup>58</sup> Such programs, while set in a particular physical location, are designed to increase the use of technology, improve court efficiency, and advance

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<sup>55</sup> *Id.* at 82.

<sup>56</sup> Louise E. Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution*, 70 Fordham L.Rev. 985, 1010 (2001).

<sup>57</sup> Krause, *supra* note 1, at 46.

<sup>58</sup> Lucille M. Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J. L. & Tech. 51, 53 (2002).

the sophisticated presentation of evidence.<sup>59</sup> They comprise one type of partially virtual cyber court. Another type of cyber court is one which does decide and resolve cases, but within an ADR framework. In the mid 1990's Villanova University established an ODR mechanism call the Virtual Magistrate. Providing online arbitration for disputes with Internet service providers, the program's goal was to assess the feasibility of ODR. Unfortunately the Virtual Magistrate's only opinion was an unenforceable default judgment against a non-participating party.<sup>60</sup>

In 2001, Michigan passed legislation (H.B. 4140) to establish the nation's first public and fully virtual court.<sup>61</sup> The court was to operate in cyberspace using e-mail, electronic filing, videoconferencing, and Web broadcasts to test the limits of technical innovations beyond the current bounds of physical courtrooms.<sup>62</sup> H.B. 4140 charged the Michigan Supreme Court with adopting rules to fully implement the court's operations, including appointing those elected judges who wish to participate in the Cyber Court program.<sup>63</sup> The cyber court was to locate in at least one county where there are technologically-equipped facilities, and proceedings at the selected courthouses were to be open to the public.<sup>64</sup> The proceedings of the Cyber Court were to be held at any time, conducted electronically, and broadcast, when feasible, over the internet.<sup>65</sup> The Court's jurisdiction included all business and commercial cases in excess of \$25,000 except landlord-tenant, tort, employment, administrative agency, criminal, and

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<sup>59</sup> *Id.*

<sup>60</sup> Cole, *supra* note 5, at 200. (The Virtual Magistrate is now hosted by the Chicago-Kent College of Law, [www.vmag.org](http://www.vmag.org) (last visited Dec. 12, 2007)).

<sup>61</sup> H.B. 4140, 91 Leg. Sess. (Mi. 2001) (enacted).

<sup>62</sup> Ponte, *supra* note 56, at 55.

<sup>63</sup> *Id.* at 58. (Judges also are required to possess expertise in commercial litigation and be familiar with the application of technology to court proceedings. They will be appointed for three-year terms and receive special technology training.) *Id.*

<sup>64</sup> *Id.* at 59.

<sup>65</sup> *Id.*

enforcement of judgment matters.<sup>66</sup> It is important to note that the program was not designed to be mandatory, and if a plaintiff selected the Cyber Court as its forum, a defendant could remove the case to circuit court within fourteen days of the deadline for answering the complaint.<sup>67</sup> Judgments and rulings of the Cyber Court were appealable to the standard court of appeals.<sup>68</sup>

By 2003, the Michigan Cyber Court was all but a footnote as a lack of funding kept the cyber-court offline.<sup>69</sup> There were many other challenges inherent in running a successful online court. Concerns ranged from the reluctance of parties and their lawyers to gamble on an untested system, to uncertainty about the costs and use of new technologies in their case preparation and presentation, to a general distrust of technology.<sup>70</sup> Other concerns included the worry by parties and witnesses that their privacy could be threatened due to the potential broadcast of their personal information online.<sup>71</sup>

In the wake of the failed Michigan Cyber Court, there are several other logistical issues that present a challenge to the launch of an online court, including ensuring valid court appearances, issues with due process, and a digital divide between different segments of society. In terms of ensuring valid court appearances it is important to develop some means of verifying online identities so that someone's virtual presence matches their real-world identity. There are also significant due process considerations. The United States Constitution guarantees individuals both substantive and procedural due process rights. The Fifth Amendment's substantive due process right involves the ability to review legislation or government action to

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<sup>66</sup> *Id.* at 60-61.

<sup>67</sup> *Id.* at 61.

<sup>68</sup> *Id.*

<sup>69</sup> Amy Lane, *Lack of Funding Keeps Cyber-Court Offline*, Crain's Detroit Business, July 15, 2002 (<http://www.craigslist.com/apps/pbcs.dll/article?AID=/20020715/SUB/207150880>) (last accessed December 13, 2007).

<sup>70</sup> Ponte, *supra* note 56, at 75.

<sup>71</sup> *Id.* at 76.

determine whether it is substantively compatible with the constitution.<sup>72</sup> Procedural due process “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments<sup>73</sup>.”<sup>74</sup> The Fourteenth Amendment extends this protection to the states. Procedural due process seeks to assure a fair decision making process, including the opportunity to be heard.<sup>75</sup>

A key question is whether the use of technical aids would deprive a party of fundamental procedural fairness. In procedural due process cases, courts first examine the private interest affected, then whether there is a risk of deprivation and the value of any additional or different procedural safeguards, and finally what the government’s interest would be in any substitute procedural requirements.<sup>76</sup> With increases in technology, videoconferencing and even holography are potential communications mechanisms which very closely mirror in-person communications.<sup>77</sup> A general rule requiring technical equality would be inconsistent as there is no requirement that the parties be afforded equality of legal representation.<sup>78</sup> Clearly, a court could not permit or require the use of a particular technological aid if it were to deprive a party of fundamental procedural fairness.

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<sup>72</sup> U.S. Const. Amend. V. (“No person shall be...deprived of life, liberty, or property, without due process of law...”) *Id*; Susan Nauss Exon, *The Internet Meets Obi-Wan Kenobi In the Court of Next Resort*, 8 B.U. J. Sci. & Tech. L. 1, 24 (2002).

<sup>73</sup> U.S. Const. Amend. XIV, § 1. (No state “shall... deprive any person of life, liberty, or property, without due process of law...”) *Id*

<sup>74</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

<sup>75</sup> *Grannis v. Ordean*, 234 U.S. 285, 394 (1914).

<sup>76</sup> *Mathews*, 424 U.S. at 335.

<sup>77</sup> Exon, *supra* note 70, at 26.

<sup>78</sup> Thomas D. Halket, *Improving Arbitration Through Technology: A Quest for Basic Principles*, Disp. Resol. J., Sept.-Oct. 2007, at 54, 56.

An additional consideration in the creation of a viable online court is the existence of a technological divide between segments of the U.S. population. In 2003, 34.3 percent of U.S. households accessed the internet using dial-up connections.<sup>79</sup> This is important as broadband (high speed internet) users tend to use the internet more frequently and for a wider number of purposes.<sup>80</sup> In terms of geography, fewer households have broadband connections in rural areas (24.7 percent) than in urban areas (40.4 percent).<sup>81</sup> The digital divide is not limited to geography, as 65.1% of white Americans use the internet but only 45.6% of black Americans and 37.3% of Hispanic Americans.<sup>82</sup> When considering broadband usage, 25.7% of white Americans, 14.2% of black Americans, and 12.6% of Hispanic Americans use such a connection.<sup>83</sup>

There are also internet usage disparities by income, as 45.4% of households earning \$75,000 per year access the internet using broadband, but only 10% of households earning less than \$25,000 use broadband.<sup>84</sup> The main reasons cited for not having high-speed internet at home include a lack of need or interest (44.1%) followed by the cost (38.9%).<sup>85</sup> A sizable segment of the population lacks the necessary technology to access and utilize an online court. In the next section, technology as a “fourth party” is discussed, along with technological advances which address many of the above concerns.

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<sup>79</sup> U.S. Dep’t of Commerce, *A Nation Online: Entering the Broadband Age*, 1 (2004).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at Appendix 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 14.

### III. The Role of Technology

Ethan Katsh, director of the National Center for Technology and Dispute Resolution at the University of Massachusetts Amherst, sees ODR not “as a method for resolving disputes as much as it is a way to build trust.”<sup>86</sup> Instead of finding disputes well-tailored for ADR, the challenge is to find tools that will deliver expertise, trust, and convenience for a variety of disputes.<sup>87</sup> Technology can then take the role of a “fourth party” in a dispute, becoming a vehicle (such as software) that helps parties create an agreement either independent or in collaboration with the third party.<sup>88</sup> Such technology typically aids the third party in managing the stream of information.<sup>89</sup>

Advances in technology can help to address many of the challenges inherent in developing an online court, including the technology gap, the validation of online identity, service of process, the treatment of evidence, and even the lack of personal connections. Further, technology is capable of aiding in the creation of an “architecture of confidence” and to provide comprehensive online adjudication and ODR capabilities.

The digital divide is shrinking and the use of private competition and the creation of public networks is lessening the gap even further. From 2001 to 2003, the proportion of U.S. households with broadband internet connections rose from 9.1 percent to 19.9 percent.<sup>90</sup> As one of the fastest-growing technologies in the history of the United States, broadband’s rate of

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<sup>86</sup> Ethan Katsh and Leah Wing, *Ten Years of online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. Tol. L. Rev. 19, 21 (2006).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 30.

<sup>89</sup> *Id.* at 31.

<sup>90</sup> U.S. Dep’t of Commerce, *supra* note 77, at 1.

diffusion is outpacing past technologies such as VCRs, the Internet, and personal computers.<sup>91</sup> Competition is on the rise due to deregulation, and both Verizon and AT&T are hoping to compete with cable TV providers by spending billions of dollars installing high-speed fiber-optic lines.<sup>92</sup> Increased competition and the installation of Municipal WiFi networks in over 400 U.S. communities will result in 70 percent of U.S. households using broadband to access the internet by 2012.<sup>93</sup> Despite astronomic growth, not everyone will be able to access the technology. Using public sector kiosks and terminals in government buildings and courthouses will ensure greater access to online courts and ODR methods.<sup>94</sup>

Technological advances also can aid in ensuring that participants in an online court proceeding are who they claim to be. Currently most identification is accomplished by mailing a password of the individual's choosing through the postal system.<sup>95</sup> Other identification systems include biometrics, a method which identifies individuals biologically by a finger print or retinal scan.<sup>96</sup> Additional concerns surround the validity of electronically signed documents. Currently, parties can digitally sign documents using software like Adobe Acrobat 8.<sup>97</sup> Further, the use of electronic signatures and documents was validated with the federal E-sign Act (formally the Electronic Signatures in Global and National Commerce Act) of 2000.<sup>98</sup> Additionally, service of process can be completed in a variety of ways, including simply using e-mail read receipts.

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<sup>91</sup> *Id.* at 5.

<sup>92</sup> Mark Boslet and John Boudreau, *U.S. in the Broadband Slow Lane: Gap with Other Countries is Widening*, San Jose Mercury News, Nov. 22, 2007, [http://origin.mercurynews.com/ci\\_7531570?nclick\\_check=1](http://origin.mercurynews.com/ci_7531570?nclick_check=1) (last accessed Dec. 12, 2007).

<sup>93</sup> *Id.*

<sup>94</sup> Ramasastry, *supra* note 40, at 173-174.

<sup>95</sup> Natale, *supra* note 56, at 167.

<sup>96</sup> *Id.*

<sup>97</sup> Krause, *supra* note 1, at 44.

<sup>98</sup> *Id.* at 46.

The treatment of evidence is yet another area greatly simplified by technology. Even doodles and sketches, often useful for comparing figures or diagramming car crashes, can now be shared over the Web using digital whiteboard technology.<sup>99</sup> For the sharing of non-digital documents, free services like ScanR create PDFs out of photo images.<sup>100</sup> While the general public and a majority of attorneys may not be comfortable using the technology (something described below), the technology exists to allow for courts to conduct business entirely online.

Technological advances are also instrumental in the continued effort to keep confidential information private. The shift from paper to electronic court records demands that users' information remain secure and confidential.<sup>101</sup> In Section 205 of the E-Government Act of 2002, Congress made the court responsible for the management and oversight of their own records.<sup>102</sup> Where indiscriminate access conflicts with the administration of justice there become unnecessary invasions of privacy exposing litigants, witnesses, and other innocent third parties to the misuse of their personal information.<sup>103</sup> Technology must continue to adapt to an environment in which challenges to privacy and the security of information are commonplace. The resolution of disputes online may present new challenges to the security of confidential information.

One of the biggest technological obstacles to overcome is the lack of personal connection inherent in conducting a court or ODR proceeding electronically. ODR proponents point to the prevalence of Web cameras as evidence that dispute resolution and even court proceedings can

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<sup>99</sup> *Id.* at 43.

<sup>100</sup> *Id.*

<sup>101</sup> Peter A. Winn, *Online Court Records: balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash L. Rev. 307, 315 (2004).

<sup>102</sup> *Id.* at 319.

<sup>103</sup> Peter A. Winn, *Online Court Records: balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash L. Rev. 307, 327 (2004).

be done over the web and involve similar human interaction as a live person to person meeting.<sup>104</sup> With services like Skype and LiveOffice, teleconferencing is nearly free and offers controls for multiple parties.<sup>105</sup> Witnesses can then avoid the high costs of travel and it is more common for courts to allow testimony via video conferencing.<sup>106</sup> As more sophisticated tools become available people are becoming gradually more comfortable with technology.<sup>107</sup> Compared to the improvements in technology, however, efforts to improve online trust have been far fewer and far less significant.<sup>108</sup>

Aiding in the creation of “architectures of confidence,” technology provides tangible features, social contexts, and reputation. Tangible features include digital signatures and marks providing identifications of web traders.<sup>109</sup> In terms of social contexts and reputation, a logical way to build trust is to connect buyers and seller to a system that keeps track of their transaction history. Over time a comprehensive history develops that new customers can consult before deciding to do business with that buyer or seller.<sup>110</sup> Ebay uses such marks to validate which sellers and buyers conduct a certain volume of business and their respective customer satisfaction rates.<sup>111</sup>

Technology can help to manage information in a way that develops the indicators of reliability and trust. But technology in no way can be a substitute for trust. Technological capacity is an important aspect of moving dispute resolution activities online, but the desire and

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<sup>104</sup> *Id.* at 44.

<sup>105</sup> *Id.* at 43.

<sup>106</sup> Natale, *supra* note 71, at 177.

<sup>107</sup> Krause, *supra* note 1, at 44.

<sup>108</sup> Katsh, *supra* note 46, at 27.

<sup>109</sup> Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J. L. & Tech. 71, 81 (2004).

<sup>110</sup> *Id.* at 83.

<sup>111</sup> Ebay, Inc. (<http://pages.ebay.com/services/forum/feedback.html>) (accessed Dec. 13, 2007).

willingness to do becomes the essential missing link. ODR will not flourish as a dispute resolution mechanism without legitimacy, something that the courts can and should provide. Section five discusses why the courts should take this role, and how the courts can provide ODR with legitimacy.

#### **IV. The Courts as the “Fifth Party.”**

If technology serves as the “fourth party,” the courts have a unique opportunity to serve as a “fifth party.” Technology is key in managing information and creating the capacity for resolution, and likewise the courts can play an instrumental role in providing legitimacy through control. There are actually many advantages to utilizing an online court process (more traditional adjudication facilitated with technology) over a more informal ODR process. First, online courts have more predictable remedies in that the decisions are appealable and enforceable.<sup>112</sup> Judicially mediated settlements are much easier to enforce as they can qualify as “consent judgments” or as another form of enforceable instruments.<sup>113</sup> Also, courts can benefit from the democratic accountability of judges.<sup>114</sup> As an institution, judges have great symbolic capital in the field of dispute resolution.<sup>115</sup> Additionally, online courts, as an arm of the state, have much greater authority to demand accountability from businesses than do private dispute resolution providers.<sup>116</sup>

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<sup>112</sup> Schultz, *supra* note 107, at 103.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 104.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 105.

Even with the benefits of an online court, technological advances and the rise of virtual Second Life worlds suggests that ODR will, even without the assistance of an online court, eventually take hold as a commonly used dispute resolution practice. Further, some believe that the future of dispute resolution lies in the absence of the state and should only rely on self-regulation.<sup>117</sup> Others feel just the opposite, and believe that ODR requires the intervention of government to fully develop.<sup>118</sup>

Beyond government intervention, why would a small claims court, in particular, be the best option for founding and operating a small claims court? Critics believe that courts are not likely to resolve most small and medium-sized internet disputes (the majority of existing e-commerce disputes) as courts are too slow and expensive.<sup>119</sup> Small claims courts tend to involve less complicated issues and claims and are thus the ideal types of courts with which to initially test the online court waters. Further, small claims courts and ODR both make the most sense in cases in which attorneys' fees would exceed what could be recouped.<sup>120</sup>

There are many other advantages of utilizing an online court to create trust, including the fact that ADR is already commonly used in conjunction with small claims actions. A mandatory ODR system linked to an online small claims court (where claims are first referred to ODR) provides the legitimacy ODR currently lacks. Further, pairing ODR with online small claims courts allows ODR to be employed as a public good rather than a private commodity, making the economics of seeking redress as a business less of a concern.<sup>121</sup> The prices for necessary Web technology are declining due to increased competition and licenses now cost in the range of \$500

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<sup>117</sup> *Id.* at 82.

<sup>118</sup> *Id.* at 72.

<sup>119</sup> *Id.* at 84.

<sup>120</sup> Krause, *supra* note 1, at 43.

<sup>121</sup> Ramasastry, *supra* note 38, at 168.

or less.<sup>122</sup> Other cost incentives might include reduced or waived filing fees for online adjudication, subsidized costs for scanning documents, preparing video depositions or developing computer animated or video clips for trial.<sup>123</sup> Further, free technology seminars and training can be provided to parties and lawyers who utilize the online court's services.<sup>124</sup> In addition to providing cost benefits, lawyers and parties become more familiar with technology and more willing to utilize online processes.

The use of online small claims courts will also help to develop the following best practices of ODR:<sup>125</sup>

- i. **Transparency**—ODR programs should provide readily-accessible information about all aspects of their services
  
- ii. **Independence**—ODR programs should operate independently of business interests.
  
- iii. **Impartiality**—ODR programs should operate without bias favoring business interests. According to Colin Rule, “government is the ideal host for dispute resolution, because it usually has no vested interest in the outcome of most of the matters it is in charge of deciding.”<sup>126</sup>

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<sup>122</sup> Krause, *supra* note 1, at 44.

<sup>123</sup> Ponte, *supra* note 55, at 89.

<sup>124</sup> *Id.* at 90.

<sup>125</sup> See Ramasastry, *supra* note 38, at 173.

<sup>126</sup> Schultz, *supra* note 107, at 89.

- iv. **Effectiveness**—requires mechanisms to ensure business compliance with ODR outcomes. The courts can provide the necessary legitimacy as they are much more able to enforce judgments than are private ODR service providers. Effectiveness to some degree is a result of certainty. Courts are able to increase predictability and confidence due to their ability to create rules, a feature that ODR does not have.<sup>127</sup>
- v. **Fairness and Integrity**—ODR programs must observe due process standards to ensure that all parties have equal opportunities to express their viewpoints. Courts are more experienced in dealing with issues of due process.
- vi. **Accessibility**--ODR programs should facilitate easy use by consumers. Many large organizations, such as insurance companies and municipalities, find that ODR saves the money because a matter can be handled much faster.<sup>128</sup> It is imperative that online small claims courts be dedicated to a swift resolution of the cases on the docket. Creating small claims courts that utilize ODR processes should result in a dispute resolution method that combines a court's credibility with the technological benefits of ODR. Additionally, providing access to information increases access to justice, but only if all segments of the population are able to access the internet via high-speed connections.

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<sup>127</sup> *Id.* at 85.

<sup>128</sup> Krause, *supra* note 1, at 43.

- vii. **Flexibility**—ODR Programs should permit adaptation of their procedures to suit the circumstances of the particular dispute at hand;

Further, there are three basic models of how an online small claims court can build legitimacy and lay the framework for not only future use of ODR, but also the online adjudication of more complicated cases. The first is Accreditation, where a central body provides information regarding ODR providers that may only be contact details, may provide more complete information, and may assess or certify listed providers.<sup>129</sup> Clearinghouse is the second framework, and involves controlling access to the ODR providers by acting as a go-between for ODR users and providers.<sup>130</sup> A clearinghouse, similar to Ebay, provides information, the necessary forms, and provides a history of a provider's activities.<sup>131</sup> A third framework involves an online appeals process controlled on a case-by-case basis.<sup>132</sup> A mandatory ODR system linked to an online small claims court provides an automatic appeals process.

Each of the above factors is an element in the formula for social legitimacy. While our judicial system is often criticized on issues of efficiency and effectiveness, the system's legitimacy is generally not questioned.<sup>133</sup> Symbolic capital and funding are the two main sources of our government's legitimacy.<sup>134</sup> Symbolic capital is the wealth gained by being attached to symbols of trustworthiness.<sup>135</sup> As an example, companies with recognized brands do

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<sup>129</sup> Schultz, *supra* note 107, at 94-95.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 98-99.

<sup>132</sup> *Id.* at 100.

<sup>133</sup> *Id.* at 89.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 90-91.

not typically have confidence problems in their Web stores.<sup>136</sup> Symbolic capital also plays a role in dispute resolution. In their study of international commercial arbitration, Dezalay and Garth showed that the social recognition of an arbitrator is one of the crucial factors for his selection as an arbitrator.<sup>137</sup> Judges have symbolic capital in the field of dispute resolution, and they thus receive people's trust to help them resolve disputes.<sup>138</sup>

As governments do not need to generate economic profit, they can regulate lawyers and legal practice even though they are not profitable activities.<sup>139</sup> Governments can support the further development of internet-based adjudication by using judicial funds to invest in online small claims courts that include ODR components. Overall, court legitimacy is the key to parties utilizing online technology to resolve their disputes. In order for courts to begin conducting litigation proceedings online, they use the expertise and exuberance of the ODR community by linking internet dispute resolution to online small claims courts. Such a move will begin to phase in the use of technology, and safeguard against unforeseen difficulties inherent in more complex proceedings.

## **V. Implications for Lawyers and for Legal Education**

It is no secret that lawyers are slow to adapt to changing technologies. In the 1990's lawyers began working online to conduct legal research, and now being online is fully integrated

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<sup>136</sup> *Id.*

<sup>137</sup> See generally Yves Dezalay and Bryand G. Garth *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* University of Chicago Press 1996.

<sup>138</sup> Schultz, *supra* note 107, at 91.

<sup>139</sup> *Id.* at 92.

with a lawyers' daily routines—from communication to research to marketing.<sup>140</sup> As technology continues to impact legal work, the public's increasing ease of access to information will make the practice more vulnerable.<sup>141</sup> Instead of seeking legal counsel, individuals can go online and find information relating to online tax filing, do-it-yourself wills, marriage contracts, divorce software, computerized real estate and mortgage search programs.<sup>142</sup> New technology creates new hardships, but also new opportunities in the form of privacy law compliance, domain name disputes, consumer protection, choice of forum and choice of law issues, and ODR.<sup>143</sup>

In part due to a fear of increased demands on their time, lawyers see the changing technology as a barrier to professionalism instead of as a bridge to success.<sup>144</sup> Lawyers' personalities differ from those in the general public in three main areas, possibly explaining the resistance to new forms of technology.<sup>145</sup> First, 89% of lawyers have a high degree of the trait of autonomy compared with only 50% of the general population.<sup>146</sup> Lawyers like to be left alone to do their work, and resist input or interference and typically do not want to be told how to do their work.<sup>147</sup>

Second, 71% of lawyers have the trait of urgency as compared to only 50% of the general public.<sup>148</sup> This translates into a “bedside manner” that is often perceived as cold, calculating, and uncaring but stems mainly out of a desire to get closure, clarity and uncluttered

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<sup>140</sup> Howe, *supra* note 41, at 13.

<sup>141</sup> *Id.* at 15.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 27.

<sup>144</sup> Edward Rholl, *Lawyers, Technology & the Requirement for a Transformation in our Thinking*, Cyberweek Fall 2006, Internetbar.org (<http://www.internetbar.org/cyberweek/fall2006/>) (Last accessed December 12, 2007).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

information.<sup>149</sup> Third, only 7% of lawyers have the trait of sociability compared to 50% of the general public.<sup>150</sup> This makes sense as lawyers typically prefer objective facts over compassion.<sup>151</sup> Many attorneys who are attracted to ADR and ODR do not fall into the typical “lawyer” categories described above, and sought dispute resolution for that very reason.

It is thus the attorney who is naturally attracted to ADR who can best navigate the obstacles of changing technology. The main obstacle in transforming the internet from a threat into a business opportunity is a lack of imagination.<sup>152</sup> This is largely because the tendency to resist change is very deeply embedded within the legal profession.<sup>153</sup> Another obstacle to embracing internet opportunities is a tendency among lawyers to resist sharing information with their colleagues.<sup>154</sup> Whether as a result of perceived competition or professional insecurity, resistance to collaboration is an obstacle to pursuing effective online strategies.<sup>155</sup> Law, like any other business, will not survive without an effective Internet strategy.<sup>156</sup> Lawyers need to ask themselves how they can use the Internet to better serve their clients.<sup>157</sup>

Lawyers, as the traditional buyers of dispute resolution, may be forced by client demand to adapt their law practices to a more technological environment. There are, however, ways to engage lawyers while at the same time promoting ODR as a valuable form of dispute resolution. First, it is important to engage lawyers whose resistance to technology is lower or even non-existent. This may include young lawyers, but also those lawyers who are aware of their own

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Howe, *supra* note 42, at 12.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 24.

<sup>157</sup> *Id.*

resistance but can sense a greater purpose in moving past that paradigm to embrace a new viewpoint.<sup>158</sup> Organizations, such as the InternetBar.org strive to create new opportunities for interaction between attorneys.<sup>159</sup>

Many attorneys are struggling to make sense of the changing technology and how it interacts with both court and dispute resolution practices. As consumers learn to demand and utilize ODR and online court processes, attorneys will be drawn by necessity into the field. Until the, the growing trend towards ADR and the lousy public perception of lawyers, in addition to the ever growing amount of legal information available on the web, points to the lessening influence of the traditional legal profession.<sup>160</sup> Traditional legal counsel will always to some degree be sought and needed, but the number and scope of those instances is in many cases being replaced with other options.<sup>161</sup> On a more basic level, the profession must find a new mission in the world that is greater than simply business growth.<sup>162</sup> One hundred and fifty years ago Abraham Lincoln urged lawyers to be healers of conflict because it would not only create more fulfilling communities, but would also generate long-term goodwill that would lead to more business.<sup>163</sup> Further, lawyers must reconsider how they treat one another as technology must be an aid and not a means of harming our peers.<sup>164</sup>

Legal education can play a key role in training tomorrow's conflict resolution professionals. Lawyers need to be retrained to properly use technology, a transition that will

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<sup>158</sup> Roll, *supra* note 142.

<sup>159</sup> See [www.internetbar.org](http://www.internetbar.org), (last accessed June 1, 2008).

<sup>160</sup> Roll, *supra* note 142.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

take time.<sup>165</sup> Currently, courtroom technologies provide a mixed picture regarding time and cost savings.<sup>166</sup> Much of this is due to the fact that the benefits of electronic storage and retrieval of documents is not being realized in the short term.<sup>167</sup> Judges, lawyers, and court administrators, in their resistance to the changed format, print out the electronically filed documents to read them.<sup>168</sup> Further, many lawyers do not recognize the value in learning and utilizing videoconferencing tools.<sup>169</sup> Law schools must actively promote the integration of courtroom technologies into law school education.”<sup>170</sup> The lawyers most likely to use ODR have yet to be trained as lawyers. Further, online consumers need to educate themselves to demand uniform specialized training for ODR practitioners.<sup>171</sup> There needs to be oversight of ODR provider standards, either in the form of a self-regulating internet body or a single government entity within each jurisdiction.<sup>172</sup> Through such educational efforts, today’s lawyers can compete and thrive despite the ever increasing impact of technology on legal practice.

## **Conclusion**

Overall, greater public awareness is needed to create demand-side changes to the field of ODR. ADR and ODR both share a lack of public awareness and understanding about ADR methods.<sup>173</sup> One initiative that will broaden public understanding and confidence in ADR and

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<sup>165</sup> *Id.*

<sup>166</sup> Ponte, *supra* note 56, at 80-81.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 88.

<sup>173</sup> *Id.* at 90.

ODR is the use of online small claims courts to begin to expose the public to both dispute resolution and ODR. The courts can thus act as a “5<sup>th</sup> party” and aid in bringing ODR to the mainstream of conflict resolution by providing much needed legitimacy. Small claims courts, with smaller dollar amounts and less complex issues, are ideally situated to transition their operations online. Without a concerted effort, ODR will continue to exist “on the fringes of Web consciousness.”<sup>174</sup>

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<sup>174</sup> *Id.* at 90-91.