Online Dispute Resolution (ODR) – Promise and Pitfalls

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Section on Technology, Law & Legal Education

Welcome

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Logistics

- Format

- How to ask questions

- Webinar will be recorded and available for on-demand viewing

- Handout will be emailed

- Survey

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Presenter

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Association of
American Law Schools

Online Dispute Resolution – Promise and Pitfalls

Amy J. Schmitz

What is ODR (add a 4ᵗʰ party to DR)

Problem Diagnosis & Wizards

Guided pathways & "solution explorers" toward remedies & outcome predictions

Negotiation

Secure portals for direct communications often aided by eNudging, legal design to assist "getting to yes"

Mediation

Online platform augmented for caucusing and reaching enforceable agreements

Evaluation

Online hearing mechanisms

Goals for Presentation

- Illuminate reasons ODR helps solve justice problems

- Highlight ODR's move from private to public

- Uncover dangers in digitizing due process

- Encourage ideas to advance A2J through ODR

Reasons for ODR

- Litigation & F2F arb/med are costly

- Consumers want mobile access to remedies (CFPB study)

- ODR may use online neutrals to assist resolutions

- F2F involves hassle, travel & time off of work

- ODR may lower hurdles for debtors: See *2020 TX Civil Justice Committee Report* (Sep. 2020), 1 https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf.

Reasons for ODR

- ODR can adapt for language, physical & time differences

- ODR "fills a resolution void" in consumer contexts (New

  Handshake – 2017 book)

- Online "wizards," decision trees & chatbots can empower SRLs

- "Space" via CMC eases stress and fear of F2F interactions

- Text-based processes may ease F2F biases (MI study)

ODR Evolution

ODR Evolution

- Private: eBay, Amazon, Fairclaims, eJudicate, CREK...

- Public: Modria/Tyler, Matterhorn, TurboCourt...

- E-Court & Court ODR in the US

  - UT, OH, MI, NV, TX, NY (on steering comm)...

  - 2019 E-Courts article (more since Covid)

E-Courts & ODR Outside the US

- Canada: CRT, Parle, Cyberjustice, and more!

- China: Hangzhou Internet Court; AI & Big Data

- UK: Her Majesty's Online Court

- EU: Platform via ODR Regulation; uneven use

Contextual Dispute Resolution

- Small Claims – moving in direction of mandatory

- Tax Appeals – direct negotiation & mediation

- Traffic Tickets – click-n-settle

- Family Contexts – pre- and post-decree

- Condo & landlord/tenant Claims – CRT (w/PI)

ODR Evolution

ODR Sites Per Year

Sites Added in Year ■ Total Sites by Year

American Bar Association,
https://www.americanbar.org/content/dam/aba/images/centerforinnovation/odrvisualizationreport.pdf
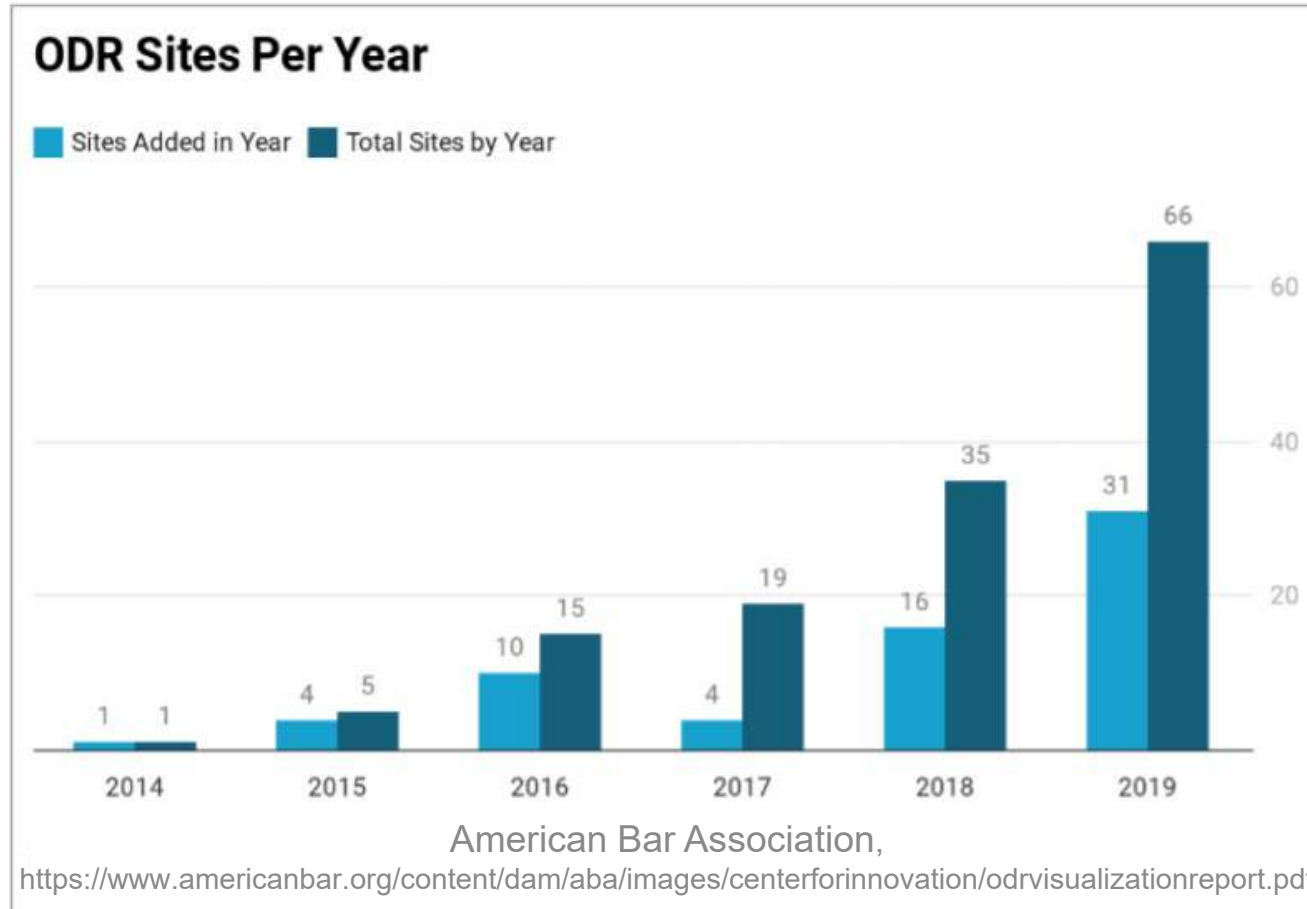
U.S. Case Types Per 2020 ABA Report

Number of ODR Sites for Each Case Type

- Tax (1)
- Divorce (1)
- Drivers License (3)
- Landlord Tenant (4)
- Contract Collection (5)
- Family Law (5)
- Parking (5)
- Past Due Judgement (5)
- Criminal (7)
- Small Claims (8)
- Civil Debt (11)
- Public Records Request (1)
- Traffic (34)
- Warrant (20)

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American Bar Association,
https://www.americanbar.org/content/dam/aba/image
s/centerforinnovation/odrvisualizationreport.pdf
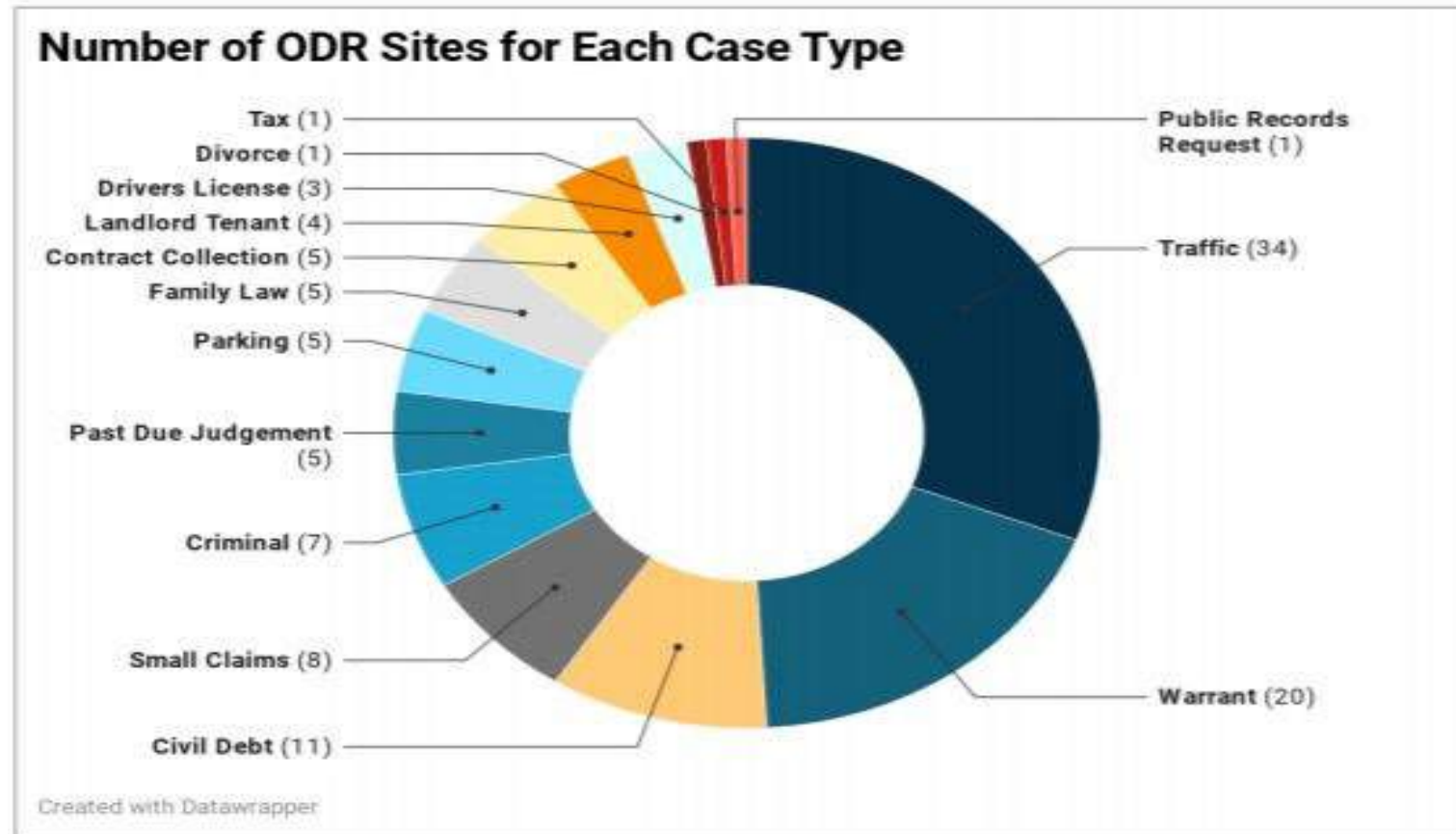
Expansion Into L/T and Debt

American Bar Association,
https://www.americanbar.org/content/dam/aba/images/cente
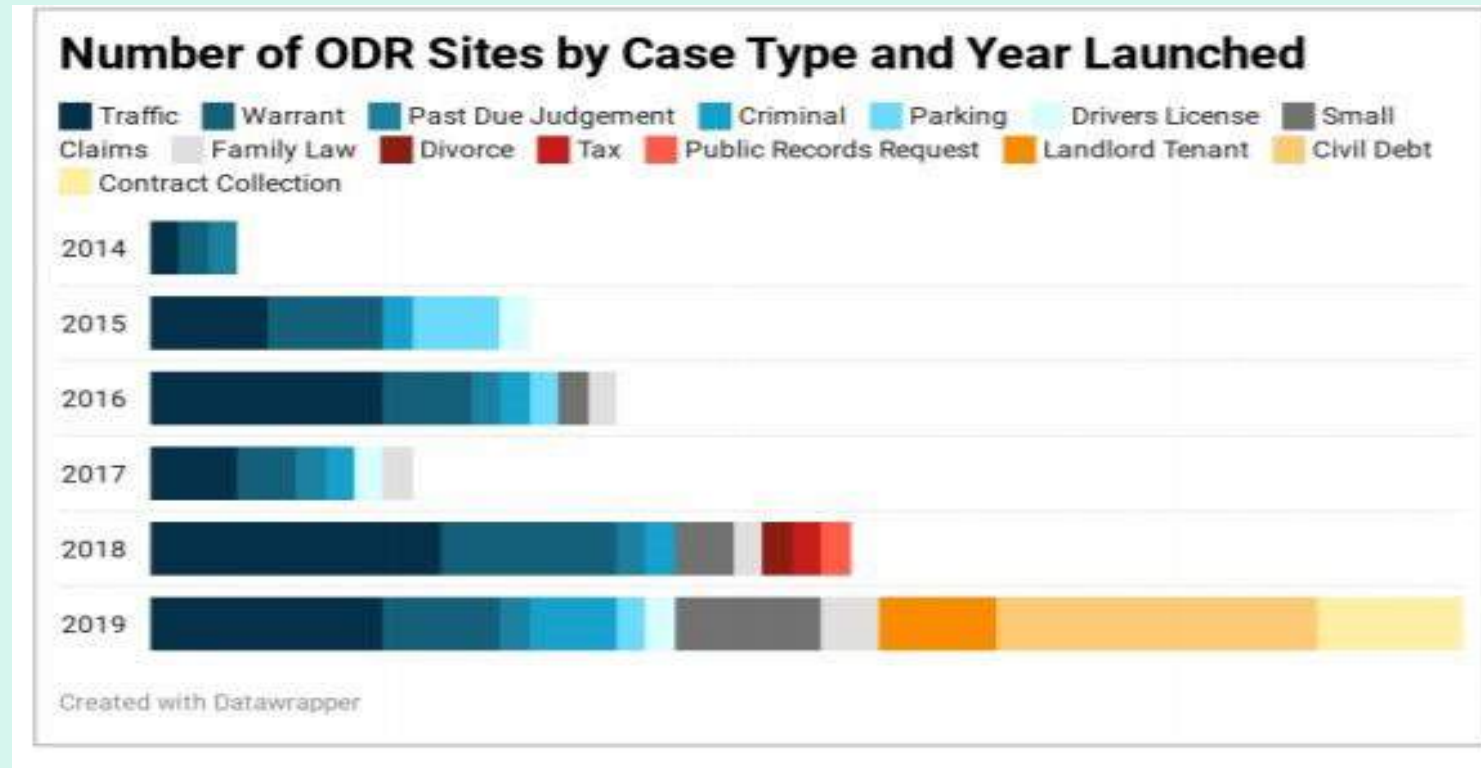rforinnovation/odrvisualizationreport.pdf

But is ODR Expanding A2J?

"Justice depends on having a **fair chance to be heard**, regardless of **who** you are, **where** you live, or how much **money** you have. At minimum, a person should be able to **learn about her rights** and then give **effective voice** to them in a **neutral and nondiscriminatory**, formal or informal, process that determines the facts, applies the **rule of law**, and **enforces** the result.

That is Access to Justice."

Access to Justice index (Fordham): https://justiceindex.org/
*Also See CoPraxis examining methodologies for measuring A2J

But is ODR Solving Problems?

Features of ODR Systems

Provides Legal Information: Yes 32%, No 36%, Unknown 32%

Non-English Language Access: Yes 8%, No 21%, Unknown 71%

Accessible for People With Disabilities: Yes 24%, No 5%, Unknown 71%

Electronic Document Management: Yes 79%, No 9%, Unknown 12%

Parties Can Upload Documents: Yes 77%, No 6%, Unknown 17%

Parties Can Caucus with a Lawyer or a Neutral Third Party: Yes 30%, No 53%, Unknown 17%

Mechanism for Litigants to Pay Fines/Fees: Yes 41%, No 42%, Unknown 17%

Judge/Court Administrator Reviews the Outcome Documents: Yes 79%, No 9%, Unknown 12%

Generates Court Approved Documents: Yes 56%, No 27%, Unknown 17%

Integrated with Court's Case Management System: Yes 39%, No 35%, Unknown 26%

Legend: Yes, No, Unknown

American Bar Association,
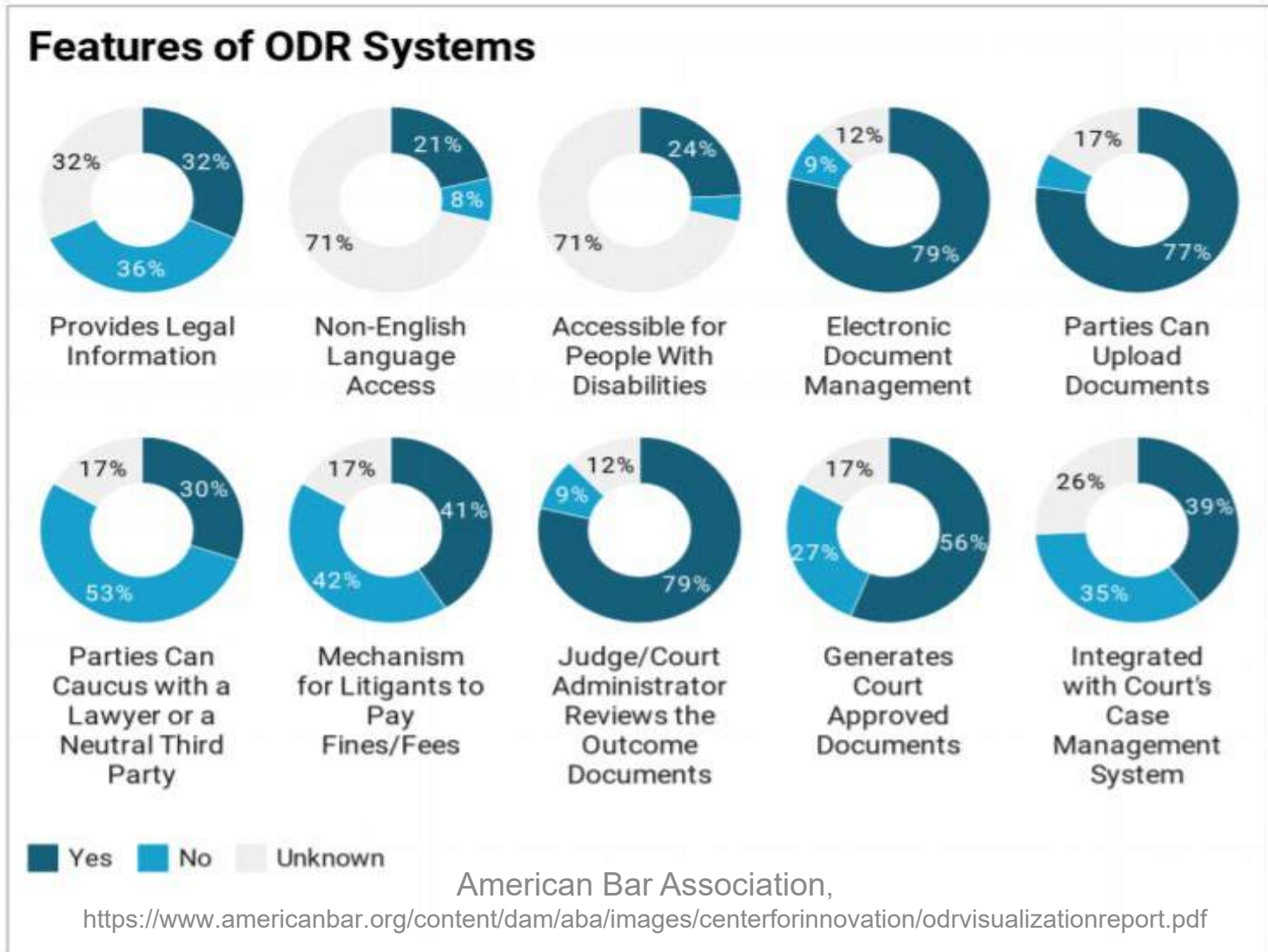https://www.americanbar.org/content/dam/aba/images/centerforinnovation/odrvisualizationreport.pdf

Need for ODR Research

- **Pew RFP** lists many research questions with focus on **whether** and **how** ODR helps A2J.

- **NCSC** will assist with stakeholder engagement and other aspects of **court ODR** platforms.

- **ODR Task Force** is developing "guidance" and "best practices" around ethics.

- **CARES Act** pass-through funding may be used to advance ODR to address backlog.

- **ODR TF, NCTDR, ICODR, ACT/Cyberjustice Lab, ABA DR Tech Expo (July!)….**

3 Pew Projects

- University of Arizona
  - UX study was published in September 2020

- Harvard A2J Lab
  - Data collection is ongoing for Matterhorn traffic platforms in IA & FL
  - They propose longer term RCT

- UC Davis/RSI
  - Data collection is ongoing for a study of Ottawa County, MI's child support/parenting ODR with reporting by December 2021 or 2022
  - Data analysis has commenced for Collin County TX study (family ODR)

Methodologies of Current Projects

1. Randomized control trial (RCT)—test effects of an intervention by exposing 1 randomly selected group to ODR vs. control group (Harvard).

2. Observation-based usability testing (UX) –focus on whether ODR platforms are accessible and user-friendly (AZ group).

3. Procedural justice surveys --gauge litigants' perceptions of the fairness of ODR versus traditional court process (UC Davis/RSI).

- **Who:** does ODR open A2J for those w/out representation, or those who face other resource, language, ability, education, or physical barriers?

- **How:** do ODR users perceive the process as fair & feel it works well (is user & human-centric)? Real-time user-experience testing? Drop outs?

- **What:** Do ODR users get fair or different remedies than they would obtain through court of other F2F processes? "Compared to what" DSD?

Framing: Who, How & What

Guiding Approaches

- Craft user-testing in order to uncover what works & doesn't work

- Aim for transparency regarding all aspects of research

- Design quantitative studies with regression analysis to uncover correlations

- Emphasize qualitative survey and focus group research beyond court users from citizen's perspective (community groups, legal aid, BBB, etc.)

- Hague/Tilburg model resolves debate re theories of justice – ask if needs met?

My Early Survey (Pre-Covid)

- 11 interviews with people of varied demographic backgrounds

- Tailored questions to learn what individuals want from court ODR

- Used a standard set of questions, but encouraged general thoughts

- Included non-legal perceptions of ODR (not scientific)

- **Value** – Skepticism about ODR's value for time/resources spent
- **Privacy and Trust** – Concern that the process is not secure
- **Live Assistance** – Need for live and in-person helpers
- **Clear consent** – Control as a cornerstone of procedural justice
- **User-centered design** – Desire for easy and intuitive processes
- **No quick fix** – Awareness that ODR is not a "fix-all" for upstream systemic challenges and inequalities (i.e. predatory lending)

Preliminary Observations

Kiosks and Helpers!

Saint Louis Online Mediation Kiosk for Eviction 2020

Assuring ethical standards – ICODR

See http://icodr.org/

ICODR believes that ethical ODR must be:

- **Accessible**: easy for parties to find and participate in and not limit their right to representation; available through both mobile and desktop channels; easy for people with different physical ability levels.

- **Accountable**: continuously accountable to the institutions, legal frameworks, and communities that they serve.

- **Competent**: run by those with relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas.

- **Confidential**: respectful of party communications in line with policies that must be made public around a) who will see what data, and b) how that data can be used.

- **Equal**: respectful of all participants, including those that are often silenced or marginalized.

ICODR believes that ethical ODR must be:

- **Fair/Impartial/Neutral**: provided without bias or benefits for or against individuals, groups, or entities, with full disclosure of any concerns before ODR begins.

- **Legal**: in accordance with the laws in all relevant jurisdictions.

- **Secure**: provided with assurance that data collected and communications between those engaged in ODR is not shared with any unauthorized parties.

- **Transparent**: in full disclosure of a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation.

See http://icodr.org/

- It is not simple to ideate, design & build ODR systems that are secure, equal, confidential, accessible, accountable, fair & legal.

- Deep debates continue re security, consent, privacy & transparency.

- ODR has **potential to expand A2J** – but only w/**user & human-centric legal design** that **continually evolves** based on research.

Research -> Revise -> Repeat -> Reimagine

There are **dangers in digitizing due process** & we must be vigilant to engage in **research** that informs **user-centric design** that **expands A2J** for the **most vulnerable** individuals.

See Amy J. Schmitz, *Measuring 'Access to Justice' in the Rush to Digitize,* 88 Fordham Law Rev. 2381 (2020), SSRN: https://ssrn.com/abstract=3604717; Amy J. Schmitz**, *Dangers of Digitizing Due Process*,** in AI AND LAW: A CRITICAL OVERVIEW, Karim Benyekhlef editor, Les Éditions Thémis (2021).SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525757

Conclusion

Thank You!

Professor Amy J. Schmitz

- Twitter: @AmyJSchmitz1

- Webcast & blog: Arbitrate.com

- Outreach: MyConsumertips.info (website/app)

- SSRN: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=522704

Upcoming Section on Tech Summer Webinars

Top 5 Lessons Learning about Teaching from Pandemic – *June 16*

Cybersecurity – *June 23*

Cyberlaw, Plain View, and Officer Inadvertence – *June 30*

Multi-Media Grading Tools: Advancing the Community of Inquiry – *July 14*

Technology & Professional Responsibility – *July 21*

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Wrap Up

Survey – Your Feedback is Important!

Please consider joining the Section on Technology, Law and Legal Education

Thank you for your attendance!

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