



JTC Quick Response Bulletin

Judicial Perspectives on ODR and Other Virtual Court Processes

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Abstract

Just a few months ago, most US courts significantly lagged behind banking, education, retail, healthcare, and other industries in the use of technology. Until mid-March 2020, that is, when US courts suddenly, overwhelmingly embraced some uses of technology, almost overnight, because they had to. Virtual hearings and ODR are opening up new possibilities that are not only keeping courts functioning during the pandemic, but also showing promise in helping resolve seemingly intractable access to justice issues. When the dangers of the COVID-19 virus have passed, courts anticipate a surge of filings. ODR and virtual hearings can “scale” to meet surges in demand in ways that traditional processes cannot. Out of necessity in response to an unprecedented pandemic, courts are boldly embracing changes that are bringing more court processes into line with available technologies and public expectations.

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To improve the administration of justice through technology

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NCSC Staff

Paul Embley

Jim Harris

Compiled and written by Lise Embley, technical writer, National Center for State Courts

Additional contributors

Chief Justice Bridget Mary McCormack, Michigan Supreme Court

Judge Brendan McCullagh, West Valley City (Utah) Justice Court

Serpil Ergun, Executive Director of Judicial Operations and Magistrate, Cuyahoga County (Ohio)
Domestic Relations Court

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Introduction

Just a few months ago, most US courts significantly lagged behind banking, education, retail, healthcare, and other industries in the use of technology. Less than five years ago, a small but steadily increasing number of courts began implementing online dispute resolution (ODR)¹ - court technology that provides a digital space for parties to work out a resolution to their dispute or case.² However, US courts have trailed industry ODR by decades. Some courts had been using audio/video technologies for remote hearings and employing technology in other ways to make court processes more accessible, efficient, and to use a term seldom used in the legal realm, *user friendly*. However, legal-tech enthusiasts have faced steady headwinds of opposition in efforts to get courts to make more processes available online. Change has been minimal and incremental.

Many states including Michigan moved to online dispute resolution for certain case types, and we have excellent responses from the public in those areas where we were making those options available ... but it was at a snail's pace. ... That's just the way change happens in our industry.³

Until mid-March 2020, that is, when US courts suddenly, overwhelmingly embraced some uses of technology, almost overnight, because they had to. As the COVID-19 pandemic forced severe limitations on in-person gatherings across the globe, US courts were compelled to shift almost all court operations to virtual processes. Within a matter of weeks, courts adopted virtual technologies to continue to do the functions essential for the judicial branch. Amazingly, with courthouses severely limiting in-person interactions, a wide variety of hearings went forward with parties and judicial officials alike participating remotely, often from their homes.

Impact of COVID-19 on Courts

The COVID-19 pandemic crisis has forced courts to be innovative and creative in real time, including forcing judicial officials to push through any personal aversion to technology and/or work to remedy deficits in technology abilities. What the courts have accomplished in 6-8 weeks in Q1 2020 provides a stunning view of the possibilities. There is a refreshing openness to virtual hearings, ODR, and other digital court processes. Magistrate Serpil Ergun, Executive Director of Judicial Operations of the

¹ For examples, see *Case Studies in ODR for Courts* (January 2020) and *Case Studies in ODR for Courts: A view from the front lines* (November 2017).

² "ODR for Courts." *JTC Resource Bulletin*. National Center for State Courts. November 2017.

³ McCormack, Bridget Mary. *Coronavirus and the Courts, Webinar I*. National Center for State Courts. NCSC.org/pandemic. 7 April 2020. (Presentation begins at 23:06.)

Cuyahoga County (Ohio) Domestic Relations Court observed, “ideas that just a month ago were considered radical or out of the question are actually being embraced now and are probably going to become the norm.”⁴ Chief Justice Bridget Mary McCormack of the Michigan Supreme Court expects that many pandemic-related “temporary” adjustments are likely to be permanent improvements: “I don’t think that things will ever return to the way they were, and I think that is a good thing.”

While the learning curve has been steep and there have been challenges and lessons learned, most courts have successfully transitioned to new, virtual ways of conducting many kinds of hearings. While methods and processes for each court differ and may be somewhat unique, the overall impact is innovative disruption throughout the entire court community.

Most [courts] are learning months’ worth of lessons in days. They are learning new skills because they had to. Once you have to ... you keep the parts that are helpful. This was not the disruption we wanted, but it was the disruption we needed.⁵

More significantly, many have learned that virtual court processes are not only adequate, they are in some cases superior. Some Arizona Courts, for example, are experiencing a notable increase in participation in hearings related to evictions since they started holding hearings online. In one court last year, 90% of defendants did not show up for an eviction hearing. Since going virtual, the participation rate skyrocketed to 80%.⁶ Statewide, the average default rate as a percentage of cases is down 8% in a year-over-year comparison. While this unanticipated level of participation requires an adjustment in the court’s scheduling, increased participation in court processes is progress. This anecdotal information suggests the public is embracing virtual hearings.

I hope ... people realize that nothing terrible happened by giving people remote access. And in fact, it's a lot more convenient for people to participate in their hearings.⁷

Virtual hearings are also revealing unique benefits to the judiciary. Attorneys can handle more hearings in a day when they don’t have to travel between courthouses and

⁴ Ergun, Serpil. *Coronavirus and the Courts, Webinar II*. National Center for State Courts. NCSC.org/pandemic. 15 April 2020. (Presentation begins at 41:30.)

⁵ McCormack, Bridget Mary. *Coronavirus and the Courts, Webinar I*. National Center for State Courts. NCSC.org/pandemic. 7 April 2020. (Presentation begins at 23:06.)

⁶ Email correspondence with Arizona court administrator.

⁷ Marz, Stacey. *Coronavirus and the Courts, Webinar II*. National Center for State Courts. NCSC.org/pandemic. 15 April 2020. (Presentation begins at 23:00.)

courtrooms. Judges (once they are comfortable with the conferencing platform) can handle more cases in a day resulting in faster case dispositions. Hearings are more straightforward and focused. The ability to “mute” participants helps keep people from talking over each other. Conferencing platforms provide free or low-cost recordings and automatic transcription that judges can use to more easily review testimony when writing decisions, relying less on notes and requiring less effort and time to review testimony.⁸ A groundswell of judges and court administrators are joining parties in expressing enthusiasm for the use of technology to facilitate remote court processes.⁹ This sudden shift was unexpected but welcomed, particularly by those who have been working to help courts adopt technology.

I find it immensely ironic that the coronavirus crisis will do more for virtual courts than decades of work by NCSC. I’m glad to see it come, even if this is not the way I would wish it to happen.¹⁰

Improving Access to Justice

Virtual hearings and ODR are opening up new possibilities that are not only keeping courts functioning during the pandemic, but also showing promise in helping resolve seemingly intractable issues. Access, cost, and process complexity are problems courts have struggled to resolve for decades.

... even before this public health crisis, we were facing enormous obstacles ... delivering on access to justice for so many in our communities. We had big challenges. And we were all working on how we could address those challenges...¹¹

These big challenges and other issues contribute to a lack of participation in court processes, particularly by defendants in consumer debt actions and evictions. This is concerning to consumer advocates as well as judges. Justice Deno Himonas of the Utah Supreme Court noted that “...our court system should not just turn into a place where debt collectors go to file and receive defaults...”¹²

⁸ Ergun, Serpil. Personal email correspondence. 16 May 2020.

⁹ See remotecourts.org for anecdotes from the global community of justice workers using 'remote' alternatives to traditional court hearings as a result of the COVID-19 pandemic.

¹⁰ Clarke, Thomas, Ph.D. Personal email correspondence. 18 March 2020.

¹¹ McCormack, Bridget Mary. *Coronavirus and the Courts, Webinar I*. National Center for State Courts. NCSC.org/pandemic. 7 April 2020. (Presentation begins at 23:06.)

¹² Himonas, Deno. “Utah’s Online Dispute Resolution Program.” *Dickinson Law Review*, Penn State Dickinson Law. Spring 2018.

To address these and other concerns, some courts have implemented ODR for case types like traffic and small claims, where the complexity of cases is generally low, and most defendants are unrepresented. ODR platforms guide parties through negotiation, reduce confrontation, and help level the playing field. People can participate in a dispute resolution process at a distance (a particularly relevant benefit during the COVID-19 pandemic), but ODR also facilitates resolution by increasing the availability of resolution processes, improving the flow and character of information, reducing conflict, and minimizing many financial and time constraints.¹³ ODR platforms can expedite as well as shape communication, negotiation, and ultimately, resolution.

Statistics show that in small claims consumer debt collection, more people are likely to “show up” to resolve issues if parties can participate when and where their individual circumstances allow. Increased appearances and participation by Defendants mean not only a reduction in defaults and an increase in access to justice, but more significantly, it means more decisions based on merits.

Judge Brendan McCullagh of West Valley City (Utah) Justice Court notes that it is counter-productive to require people who are already financially “tender” to take time away from work and/or family responsibilities to come to court. As part of Utah’s Disruptive Innovation Group, Judge McCullagh has been a key participant in the small claims redesign efforts that created Utah’s streamlined, accessible, and user-friendly ODR process.

With more than 20 months of ODR case data to evaluate, Utah can now confidently report that ODR *does* lower the default rate, one of the objectives of their initiative. There is also evidence that some defendants are now making informed decisions not to respond to a collection action.

With respect to default rates, evaluators have to keep in mind that not all defaults are the same. In most cases [prior to ODR], respondents default without ever touching the court system; today, some respondents still default, but only after getting into the system and obtaining a sense of their defenses, if any. With respect to the latter, we can say that these respondents made an informed choice that it would be more convenient and perhaps cheaper for them to default rather than contest the matter.¹⁴

In addition to the anticipated benefits, judges are reporting improvements that no one predicted: Magistrate Ergun noticed that virtual hearings seem to reduce conflict.

¹³ “[ODR for Courts.](#)” *JTC Resource Bulletin*. National Center for State Courts. November 2017.

¹⁴ Himonas, Deno. Personal email correspondence. 13 May 2020.

Hearings really seem to be less adversarial and the parties were, in some ways, more respectful... it seems like being at a distance might ... make it a little bit less confrontational. They're more relaxed in their own home environment, not the same space with everybody else. It's just less adversarial.¹⁵

ODR can also help reduce conflict. Some ODR systems are specifically designed to enhance collaboration and emphasize common ground versus differences. Family law cases, juvenile, probate, consumer debt, and housing are uniquely suited to ODR, and these are case types courts are likely to see more of as a result of COVID-19.

Virtual processes can actually improve the in-person process, as well. Through ODR, parties are often able to resolve small claims cases through direct or facilitated negotiation without a judge's involvement or a formal hearing, either virtual or in-person. When cases cannot be resolved using the ODR platform, the case goes forward to be heard by a judge. Judge McCullagh notes that parties coming before him after participating in ODR are better prepared for their hearing. Cases are more often resolved in the first hearing; fewer cases have to be continued.¹⁶

Barriers to Virtual Court Processes

There are some real barriers to virtual court processes, to be sure. But some of them are tied to rules and traditions that may no longer be relevant. For example, notarization has often been a required step in many justice processes. But the role of the notary dates to ancient Roman times when the majority of people were illiterate. To protect the interests of those who could not read agreements including their own will, a public official created written documents and held them for safekeeping. Today, the notary witnesses the signing of documents after reviewing the signer's proof of ID¹⁷ - "authentication" of the user's identity that most apps manage to do digitally. Notaries generally charge for that service, which is usually performed face-to-face in an office during business hours, creating additional barriers that negatively impact the most vulnerable court clients. With increased flexibility in court rules because of COVID-19, many courts are dispensing with notarization, wet signatures, paper filings, and other process bottlenecks, at least temporarily.

¹⁵ Ergun, Serpil. *Coronavirus and the Courts, Webinar II*. National Center for State Courts. NCSC.org/pandemic. 15 April 2020. (Presentation begins at 41:30.)

¹⁶ Himonas, Deno. As quoted in "It's Broken; Fix it: Creating an A2J Ecosystem." *International ODR Forum*. October 2019.

¹⁷ *What is a Notary Public?* National Notary Association. www.nationalnotary.org

The hearing officer is asking the person at the first hearing under oath if the information that they provided is true. ... the whole situation has caused us to rethink notarization and say, “Really, why do we need all this notarization? Why do all these documents have to be notarized?” Because ... Just because they always have...¹⁸

An obstacle in the past has been the perception that somehow “in person” processes are superior, particularly for those who have disabilities, need language translation, or simply do not comprehend court documents and processes. For those demographics specifically, ODR’s asynchronous communications are a welcome option. Courtrooms are inconvenient and stressful for participants, and they limit parties’ ability to take court processes at their own pace. When parties are in court before a judge, they can’t “pause” to consider options, gather information, or better understand the implications.

Utah believes asynchronous communications have been particularly beneficial to the most vulnerable. The power is in offering an online process that is more convenient to the majority, while addressing very real issues that may occasionally require alternatives. When there are important reasons to revert to a traditional, in-court process (e.g., mental illness, domestic relations/abuse cases where a controlling partner may be monitoring online activity, or when someone does not have access to technology or needs other court assistance), the judge can grant an exception.¹⁹

Can't afford to take time off of work for a small claims matter? Not a problem. You can communicate digitally at your convenience. Suffer from a physical or mental disability that makes going to court a severe challenge? Not a problem. You can communicate digitally from a convenient and safe space. Have a language barrier that makes it difficult for you to respond quickly, even with the assistance of an interpreter? Not a problem. You can take the time to think through and craft a message with the assistance of friends, family members, and on-line translation services. We believe that asynchronous communication is why so very few are electing to opt out of ODR.²⁰

Some judges also express concern that virtual hearings and ODR somehow diminish the significance of judges/justices and the courts. Judge McCullagh suggests the opposite:

¹⁸ Ergun, Serpil. *Coronavirus and the Courts, Webinar II*. National Center for State Courts. NCSC.org/pandemic. 15 April 2020. (Presentation begins at 41:30.)

¹⁹ Since ODR launched in September of 2018, only 13 out of 3,000 plaintiffs and 23 out of 2,050 defendants have opted out of ODR.

²⁰ Himonas, Deno. Personal email correspondence. 15 May 2020.

It is not that court is not important, it's that court is REALLY important, and a limited resource. There is only so much judge time... If you have an ODR process that helps moves cases out of the original pipeline, you can help the parties help themselves, saving judicial resources for actual disputes that need in-court attention. If people are going to be able to reach resolution without hitting the building, let them.²¹

Courts are conservative institutions; time-honored traditions are a point of pride in the legal profession. Judge McCullagh notes that judges are typically risk-averse, another reason why changes are hard to make in court processes. According to Chief Justice McCormack, “None of this is comfortable for us. For lawyers, judges. ... This is not comfortable for us to have to learn quickly like we are having to do right now. It's not in our DNA. That's a bit of a barrier, I think, for all of us...” But what is clear to all of these judicial officials is that there is no “going back.” COVID-19 was the “tipping point:”

...that magic moment when an idea, trend, or social behavior crosses a threshold, tips, and spreads like wildfire.²²

Going Forward

When the dangers of the COVID-19 virus have passed and people can gather in person again, courts anticipate a surge of filings and a need to rapidly expand capacity for hearings in matters that have been stayed or deferred. This surge will come in uncertain budgetary times for the courts. ODR can “scale” to meet surges in demand in ways that in-person processes cannot. Virtual hearings can continue, even if judges and court staff conduct them from the courthouse. Parties can be encouraged to participate remotely whenever possible, reducing foot traffic into the courthouse that could potentially expose both court staff and the public to the coronavirus.

It's never too early to start planning for how we're going to deal with the avalanche of cases when things normalize... We're expecting to see a huge surge and filings in divorce and DV filings. People who have lost income or lost jobs need to change child support, people who have lost parenting time, and they want to address those things.²³

²¹ McCullagh, Brendan. Personal interview. 20 March 2020.

²² Gladwell, Malcolm. *The Tipping Point - How Little Things Can Make a Big Different*. Little, Brown. 2014.

²³ Ergun, Serpil. *Coronavirus and the Courts, Webinar II*. National Center for State Courts. NCSC.org/pandemic. 15 April 2020. (Presentation begins at 41:30.)

In post-pandemic planning, courts will need cost-effective, efficient ways to meet the anticipated surge in demand. This is an ideal time for courts to implement ODR, permanently adopt virtual hearings for some case types, expand self-help resources on court websites, and further leverage a host of digital tools, making transformational changes to meet needs and expectations of a 21st century population.

I think it's an opportunity for courts to modernize in a hurry. It's going to ensure to the benefit of self-represented parties who don't have to take off time from work or school or find childcare or find transportation or pay for parking and then come down to court for multiple hearings, which are really often redundant. I think it's an excellent way for us to be more efficient, to show more respect for people's time, and inspire confidence in the justice system.²⁴

Conclusion

Courts are the *original* 'Alternative' form of dispute resolution, according to Judge McCullagh. "Before courts, it was a sword. Whoever was better with the sword won." For obvious reasons, "[trial by combat is] a completely inappropriate remedy for modern society."²⁵ Yet courts today have relied on some methods and processes that might also be deemed "completely inappropriate for modern society." The failure to fully embrace 21st century technologies and business practices may have been keeping US courts in the proverbial Middle Ages.

Now, out of necessity in response to an unprecedented pandemic, courts are boldly embracing changes that are bringing more court processes into line with available technologies and public expectations.

[Courts] have to meet people where they are; we have to look outward to meet their needs... almost every process that is done can be replicated online: people pay bills, and they bank, they consult with their doctors, they buy real estate, they date. Now they're even getting married [online]. It's what they expect today and honestly, when you think about it, Justice delivery isn't so different.²⁶

Data gathered during these unforeseen "pilot projects" in virtual court processes reflect notable and encouraging improvement in some key performance indicators: failure to

²⁴ Ergun, Serpil. *Coronavirus and the Courts, Webinar II*. National Center for State Courts. NCSC.org/pandemic. 15 April 2020.

²⁵ Adam Winkler, as quoted by Christina Sterbenz in "Trial By Combat May Still Be Legal In America." *Business Insider*. 12 November 2013. Web.

²⁶ Ergun, Serpil. *Coronavirus and the Courts, Webinar II*. National Center for State Courts. NCSC.org/pandemic. 15 April 2020.

appear rates, for example, dropped from 20% to .3% in criminal cases in New Jersey superior courts following the introduction of virtual hearings. Appearance rates for criminal warrant hearings in some parts of North Dakota are up from about 80% pre-pandemic to nearly 100% today. Michigan's failure-to-appear rate dropped from 10.7% to 0.5% in year-over-year comparison for April.²⁷

We're going to learn so much. We're going to need to be able to take a whole lot of it with us. And we are going to be lucky to take a whole lot of it with us.²⁸

These changes would have been unthinkable only months ago. As a result of the coronavirus, courts have been rapidly and iteratively adapting processes in ways that echo innovative software development: implement, adjust, "fail-forward."

Where courts lead, lawyers will follow. Courts are the driver and should not waste the moment.... Now is when their leadership counts.²⁹

Other recent JTC publications available at ncsc.org/jtc:

- Introduction to AI for Courts (2020)
- Getting Started with a Chatbot (2020)
- Cybersecurity Basics for Courts (2019)
- Teleservices for Courts (2019)

For more information, contact NCSC at technology@ncsc.org

²⁷ "Will remote hearings improve appearance rates?" @theCenter, National Center for State Courts. NCSC.org. 13 May 2020.

²⁸ McCormack, Bridget Mary. *Coronavirus and the Courts, Webinar I*. National Center for State Courts. NCSC.org/pandemic. 7 April 2020.

²⁹ Ergun, Serpil. Personal email correspondence. 16 May 2020.