

Online Dispute Resolution

A Digital Door to Justice
or Pandora's Box?
Part 2

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This three-part series takes a deep dive into the future of online dispute resolution in Colorado. Part 2 discusses ODR applications that use artificial intelligence to facilitate quick resolution of conflicts.

Part 1 of this article discussed video-conference-based mediation, a form of online dispute resolution (ODR). The next jump in sophistication when using ODR is artificial intelligence (AI)-assisted ODR, which is the focus of this Part 2.

Why Use AI-Assisted ODR?

For conventional mediations, web-based videoconferencing is an excellent solution to the logistical challenges of trying to assemble all participants in one physical location. But conventional and videoconference mediation aren't appropriate for all types of disputes. For example, the amount at stake may be insufficient to justify the cost of a human mediator, even the lower cost of a human mediator who appears via videoconference. Pro se litigants, who commonly appear in small claims, county court, and family law matters, might be reluctant to proceed without counsel at a mediation, and thus not see a conventional mediation as an option. And scheduling a mediation presents the same challenges, whether it occurs in brick and mortar or virtual conference rooms.

AI-assisted ODR offers an efficient, user-friendly dispute resolution solution for such litigants. It offers benefits such as time asymmetry, which allows parties to log in any time they are available, post their position or request, and get a response from any other party or the mediator at their convenience.

The tools discussed here are currently used extensively in Canada, and elsewhere, including in some U.S. state court systems. They are coming to Colorado too. The Colorado courts statewide Office of Dispute Resolution recently obtained a Pew Charitable Trust grant to develop



a package of ODR applications that will include AI-assisted ODR. These applications will be designed for use in smaller damages disputes (county court and small claims money judgment matters) and domestic dockets throughout the state. Thus, if you represent commercial or family law clients, you will likely find yourself handling a dispute funneled into one of these tools. And the use of these tools will likely be expanded to other types of disputes within a few years.

“Smart” Systems Guide Litigants

Several centralized, court-sponsored ODR applications are already in commercial and public use or will be onboarded in the near future. Some of the more powerful ODR tools use “artificial narrow intelligence” features, which have user interfaces that apply algorithmic progressions for “smart” question-and-answer dialogue. Like TurboTax® and other software packages, these AI-assisted tools provide easy and secure web login and ask users detailed questions about

their dispute, collecting data points about the case along the way. The “smart” part of the tool then uses this data to steer participants toward appropriate procedural tools, display pop-up information guides, and offer forms such as demand letters, response letters, and court documents. The tools even guide negotiations. When the negotiation results in a resolution, the tools assist the litigants in completing the necessary settlement agreements and court dismissal paperwork.

These ODR tools are already in use in British Columbia courts for both domestic and smaller-dollar civil disputes, as discussed below. Several jurisdictions in Australia use these tools extensively with domestic dockets and traffic matters. The tools are commonly designed for pro se litigants, to improve their access to civil justice. But when a pro se litigant sues a party represented by counsel, the represented defendant can involve his or her counsel in the online tool as they would in court.

The more powerful AI-assisted ODR tools use algorithmic data mining of all disputes in their system, completely anonymously. They gather data on offer and demand progressions, case settlement ranges, and court judgment ranges in all of the disputes that use the tool, based on the facts input by the users. They “learn” from this data to determine how typical disputes with similar fact patterns are being resolved.

The tools solicit input from each user on the range of amounts they are willing to pay or accept to resolve a dispute. The parties can change these numbers as the case progresses. The tools offer users pop-up suggestion boxes in real time, based on learned data on how other cases have been resolved, telling users whether

their numbers are consistent with resolutions of similar disputes. A “real world” version of similar AI-assisted software is AI-assisted data-aggregating and algorithmic systems, such as online car buying services. Many of these tools gather detailed information from the user about make, model, options, color, mileage, etc., then state what consumers in a given area code are paying for similar cars.

AI-assisted tools rely on user input throughout to steer the online process, first through negotiation and later through mediation with a human mediator, if the parties request it. They use familiar alternative dispute resolution (ADR) techniques by pointing litigants to information clouds educating them on the legal elements of their claim, or document-generation tools to assist them in crafting a demand letter, complaint, or other document, all while retaining the ability to “go back” to the other tools whenever the user wants. They learn from each case, whether resolved or not, to gain deeper insight into case values, likely settlements, pinch points that derail litigants, or other issues the system encounters. The software developers (and court system end-users) can then use this information to update or modify the tool’s approach to keep it current, user-friendly, and efficient.

Some ODR tools can even generate an AI-derived suggested range, the tool’s algorithmic calculation of a reasonable settlement amount, bond amount, traffic ticket fine, or property division, all without a human mediator’s intervention unless a user calls for it. The numbers suggested are, for now, merely algorithmically derived “median” numbers, and the systems clearly caution that they are intended as suggestions only.

Navigating System Limitations

Even the most sophisticated tools have their limitations. They cannot know whether a user is technologically proficient or legally astute. And AI cannot read or deliver emotional cues. AI-assisted ODR tools simply lack the emotional acuity professionally trained human mediators use all the time to understand and deal with human emotions and work through emotional responses. For example, try raising your voice or yelling at Amazon Echo when it delivers

the wrong search result. It will neither recoil in horror nor ask, in a wounded tone, “why are you angry?” Instead, it might deliver its standard eerily calm response, “Hmm . . . not sure about that.”

But that may change in the not-too-distant future. The folks who created Alexa, Siri, and “Hey Google” are currently spending billions of dollars

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to develop next-generation AI tools that will not only understand and relate to, but also *display*, a wide array of human emotions. These new features will inevitably find their way into ODR tools. (We’ll pause now to collectively shudder at the notion that friendly online assistants will soon display emotional acuity.)

Another limitation of AI-assisted ODR tools is their tendency to deviate to the mean. These tools use data aggregation and algorithmic cues to develop “steps” in their processes. They

simply aggregate data and spit out what they conclude is the most likely or most relevant result. AI systems cannot discern shades of gray in disputes, nor can they evaluate the fairest, best, or most sustainable solution for a specific dispute. This is in contrast to a human mediator, who can guide and shape a mediation using a variety of methods that work best for particular parties at each stage of a specific case. Many conventionally mediated cases hide the key to their resolution in the very shades of gray that current generation AI tools cannot see as clearly as trained human mediators.

Of course, even with these limitations, the tools can work effectively to guide parties to a resolution, moving volumes of cases to an effective conclusion without trial, especially those with discrete but ongoing family law issues, such as temporary changes in parenting time agreements. They also work well in cases that lend themselves to a “deviation to the mean” solution, such as smaller dollar commercial or consumer disputes.

Off-Ramps

AI systems designers understand the limits of AI with respect to ODR tools and have built in flexibility to remedy the shortcomings mentioned above. They counterbalance the machine-based shortcomings with multiple “off-ramps” allowing litigants to access a human mediator, either online by videoconference or in person, at any point.

Pop-up information guides are another off-ramp innovation. Litigants who need assistance navigating a tool, or who have questions about how to present a claim, can click on pop-up buttons that open small information balloons explaining, for example, what the jurisdictional limits of the court are, how to structure a demand letter (including a link to a sample fillable demand letter), or other information needed to keep moving a dispute toward a resolution.

The off-ramps also allow litigants to leave the settlement mode altogether and present the dispute as an online claim, which will then be placed on the court docket and litigated (in some cases, while remaining within the online tool) by a court magistrate. If online litigation doesn’t appeal to the parties, either party may

bail out of the online process altogether and go old-school to a brick-and-mortar courthouse with their dispute. A single party can elect this; agreement is not required. And even the tools with built-in decisional authority allow for conventional court appeal of any results.

Unbundled Legal Assistance

AI-assisted ODR may help clients save thousands of dollars in litigation costs. Counseling against these tools may be counterproductive for both attorneys and clients.

The more practitioners understand AI-assisted ODR, the better positioned we are to offer clients unbundled legal assistance with their disputes. Practitioners who add this knowledge to the range of legal services they offer may attract and keep more clients. Further, access to justice has become a critical and growing priority for Colorado courts, and attorneys are being called on to be part of the solution. Knowing how to use AI-assisted ODR, and how to help clients access and use these tools, is a way to help clients resolve their disputes efficiently and to streamline the practice of law by reserving litigation for cases that cannot be resolved otherwise.

Use the Right Tool for the Job

AI-assisted ODR is a powerful dispute resolution tool, but attorneys, judges, and other dispute resolution professionals must evaluate its propriety for use on a case-by-case basis. For example, as with conventional mediation, power imbalance issues may impact the decision to use these tools. And AI-based ODR tools don't work well for parties who have technology limitations or who have difficulty clearly describing their dispute in terms that fit within the algorithm's boxes. Finally, these tools aren't yet suited for complex, high-stakes cases; cases requiring extensive discovery; or cases with complex legal issues, such as serious personal injury, professional negligence, complex, commercial, or multiparty litigation. And the tools likely would not work well for contested dissolution proceedings involving complicated property division, maintenance issues, or pension claims.

The current generation of AI-assisted ODR tools do not pick up on nuance, and the con-

troversies mentioned above are drowning in nuance. They turn on the ability of the attorneys and decision makers to discriminate among very close shades of gray, which AI is unable to comprehend or act on. But where AI-assisted

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The British Columbia Experience

As stated above, AI-assisted ODR solutions are in use right now in court systems in Canada and Australia.¹ British Columbia's Civil Resolution Tribunal (CRT) is a good example.²

The CRT is used to resolve smaller, simple disputes, such as consumer money disputes, basic landlord-tenant disputes, and employment and pay disputes. It offers more than ADR; while it has negotiation and mediation portals, it also provides a decision portal for rulings on a dispute by human magistrates.

British Columbia is a massive province with few large cities and many smaller towns, villages, and settlements scattered throughout. Many towns and villages are more than a full-day's drive from each other. It used to be that a disputant in one of the more remote towns or settlements who, for example, made a purchase from a Victoria or Vancouver business was essentially left without a remedy if a dispute arose—it would be impractical, if not impossible, for the purchaser to spend days driving to court, filing the dispute, and then returning a few months later to try it.

The power of AI-assisted ODR in such situations is clear. Disputants who face geographic or time obstacles, or those who cannot find or afford an attorney to handle their smaller disputes, are now only a click away from “court.” They can log onto online systems with familiar-looking user interfaces, answer some questions, upload relevant scanned documents, and handle the process of negotiating, mediating, and resolving their disputes, on their own. A traffic ticket recipient can log on and navigate her way through negotiating a plea agreement and pay the fine online using a credit card, thus avoiding the loss of time spent in court waiting for a turn in front of the judge. Canada has spent hundreds of billions of dollars in recent years on public-private partnerships to extend speedy broadband and 4G LTE wireless coverage throughout their far-flung provinces, which greatly facilitates systems such as the CRT.

Further, litigants can use these tools on their own schedules. And if they don't have a computer or lack bandwidth at home, they can access a local library's internet service, desktops, and scanners.

The CRT employs private mediators (called “facilitators” in the British Columbia system) who contract with the courts to be placed in a queue to handle CRT disputes according to their availability. Facilitators can thus maintain their in-person practices while using the online systems to turn slack time into productive time by jumping in when it is convenient.

The CRT system sends facilitators a notice, usually by text or email, that they have been assigned a dispute. They can then log into the system, navigate to the dispute via the texted link, and instantly see all the documents, the status of prior negotiations, and the logjam that prompted their assignment. They can then speak with the parties via web chat, text, or email. They can also use the tool to schedule a videoconference or telephone conference to keep the process moving to a resolution, or even conduct an online mediation if desired.

The CRT system offers easy access to off-ramps (called “pull-outs”) with information about applicable law, procedures, limitations, and other issues, so users can best assemble their documents and data to maximize their dispute resolution experience.

The goal in Colorado is to deploy a tool at least as robust as CRT. The intent is to take pressure off Colorado county courts that presently handle smaller cases but will be managing more complex disputes following the recent increase in jurisdictional limits, and to relieve pressure on overworked family law courts.

AI-Assisted ODR in Australia

Australia has begun to develop ODR for property division, custody and visitation agreements and disputes, and other family law matters that often ensnarl litigants in protracted, costly litigation. While most of its tools are still in pilot phase or development, there are also nonprofit “community organizations” developing ODR tools in the family law arena focused on resolving parenting, property division, and financial issues. One such nonprofit-based tool is being developed by “Relationships Australia,” a non-court-affiliated nonprofit group that has provided family law advisory services in Queensland for 60 years.³

As these Australian state court (and nonprofit) systems roll out, the plan is that litigants

will be able to log into portals in the Australian provincial courts and access ODR tools to craft separation agreements, financial and property settlements, custody and visitation plans, modification stipulations, and orders.

The tools will guide the litigants through each step, formulating the issue at stake, identifying the parties’ desired outcomes, and offering pop-ups to highlight legal requirements. The tools will then place negotiated agreements before a human magistrate for review and ruling. Like the British Columbia CRT system, the Australian provincial courts’ tools will provide pull-outs for parties to get before a magistrate or mediator, either conventionally or online, if they hit a roadblock in negotiations.

One privately operated ODR site in Australia, “Immediation,”⁴ has been developed by Melbourne, Australia-based barrister Laura Kelly. It is designed primarily for resolution of commercial disputes and can be used by lawyers and nonlawyers alike. The tool is a hybrid AI-assisted ODR and videoconference mediation platform that allows users to create a dispute, invite the other party to participate, and access “experts” (the site’s term for its contracted attorney/mediator specialists) to either guide negotiations or provide specialized early neutral evaluations, then continue with the online process to a full videoconference mediation if needed. Online arbitration is also available, with decisions enforceable via contract.

Immediation is currently in use but is still in the beta phase. It is a fee-based system and not connected with any court system. The company promises full confidentiality in the process, and (as the name implies) offers companies and disputants the possibility of quick dispositions (in as little as 30 days) if the dispute lends itself to such quick determination.

As similar systems (both court-based and perhaps private fee-based) come to Colorado, attorneys will likely appreciate these tools. Far from taking their business away, practitioners, especially family law attorneys, may find that the tools allow clients, on their own, to quickly resolve many smaller issues that pop up. The clients gain by having lower cost assistance while attorneys avoid client calls for minor

issues that are often not billable. Therefore, practitioners can better manage their practices.

The Secret Weapon

AI-assisted ODR is coming to Colorado. When it gets here, it will be here to stay. Used properly, these ODR tools will offer a powerful way to deliver justice effectively and efficiently to more people.

And therein lies a hidden secret: ODR tools will *not* make attorneys or mediators obsolete, but may well liberate us to focus on what we do best. By learning what AI-assisted ODR tools have to offer, practitioners can render a service that clients will surely remember when a need for dispute resolution arises in the future. CL



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NOTES

1. Other countries using these tools include the United Kingdom and New Zealand.
2. <https://civilresolutionbc.ca>.
3. <https://www.raq.org.au/services/online-dispute-resolution>.
4. <https://www.immediation.com>.