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## Implementing Online Dispute Resolution in MO HealthNet Appeals: Increasing Access to Remedies While Decreasing State Spending

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## NOTE

# Implementing Online Dispute Resolution in MO HealthNet Appeals: Increasing Access to Remedies While Decreasing State Spending

Jane Rose\*

### I. INTRODUCTION

The distress associated with filing a civil lawsuit can leave an individual with a range of emotions, including despondency, humiliation, frustration, loss of self-confidence, and anxiety.<sup>1</sup> Generally, an individual will only file suit if they<sup>2</sup> suffer a serious harm. Subsequently, the individual must relive the injury at each step of the litigation. Repeatedly revisiting the injury disrupts the individual's life and often leaves them feeling isolated and helpless.<sup>3</sup> Now, picture an individual having to go through the entire process without the guidance of a lawyer, which is called pro se representation.<sup>4</sup> This only adds to the individual's stress levels. Representing one's self in a traditional court system is similar to playing chess without ever learning the rules. Both games are governed by precise, complex procedures that make it very difficult for any novice to win against an expert. Consequently, pro se individuals often fail to obtain the relief they seek, rendering all of their stress and physical suffering moot.<sup>5</sup>

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1. Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, 27 J. OF AM. ACAD. PSYCHIATRY & L. 203, 204 (1999), <https://pdfs.semanticscholar.org/4731/fcf7ee03b799ecd82edff1081119cc51d485.pdf>.

2. The author has made a conscious decision to utilize the third person singular neutral "they" instead of using gendered terms in this Note. To learn more about gender inclusive language, see *Gender-Inclusive Language*, THE WRITING CTR., <https://writingcenter.unc.edu/tips-and-tools/gender-inclusive-language/> (last visited Aug. 26, 2018); see also Corinne Werder, *6 Easy Ways to be Gender Inclusive with Your Language*, GOMAG (Nov. 16, 2017), <http://gomag.com/article/6-easy-ways-gender-inclusive-language/>.

3. *Id.*

4. *Self-Representation: The Perils of Pro Se*, FINDLAW, <http://corporate.findlaw.com/litigation-disputes/self-representation-the-perils-of-pro-se.html> (last visited Aug. 26, 2018).

5. Denise S. Owens, *The Reality of Pro Se Litigation*, 82 MISS. L.J. SUPRA 147, 148-49 (2013).

Indigent individuals may be able to utilize legal aid services instead of resorting to pro se representation. However, accessibility to these services is declining.<sup>6</sup> Budget cuts at the state and federal levels are reducing funding to these services.<sup>7</sup> This restricts access to civil remedies for many potential litigants, including recipients of Missouri's Medicaid system, MO HealthNet ("MOHN"). MOHN recipients must not only overcome procedural hurdles, but they often face accessibility hurdles – such as transportation – to recover remedies.<sup>8</sup>

A possible way to offset the negative impacts of these cuts and hurdles is to implement an online dispute resolution ("ODR") system in a sub-department of the Missouri Department of Social Services' ("DSS") appeals process, such as the MO Healthnet Division's ("MHD") MOHN appeals. ODR utilizes technology to create flexible systems that can be tailored to facilitate a wide variety of resolution methods.<sup>9</sup> Because ODR is highly customizable, it could be optimized to inexpensively improve system efficiency while reducing pressure on charitable legal aid services. Should these benefits materialize, legal aid services in Missouri would be able to allocate their resources to other clients. ODR could also relieve financial stress on MOHN, which currently faces pressure to reduce expenditures. Adopting ODR could directly increase access to remedies for MOHN recipients by creating a wider variety of ways for individuals to recover remedies while simultaneously decreasing the emotional toll associated with litigation.

This Note proceeds in four parts. Part II discusses the background of MOHN as well as the additional hardships individuals with disabilities encounter during the current appeals process and concludes with an analysis of ODR and its recent developments. Part III examines ODR systems currently in use in comparable public-sector applications. Finally, Part IV suggests that both the procedural and additional hurdles individuals with disabilities face in the traditional appeals system can be mitigated by implementing an ODR system while simultaneously decreasing state spending.

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6. See Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. INT'L & COMP. L. 281, 286 (2011); see also UPDATE: *Greitens Withholds \$251 Million From Fiscal 2018 Budget, \$11 Million from UM System*, MISSOURIAN (June 30, 2017), [https://www.columbiamissourian.com/news/local/update-greitens-withholds-million-from-fiscal-budget-million-from-um/article\\_cd5a8020-5de1-11e7-8941-b7f1ea90341b.html](https://www.columbiamissourian.com/news/local/update-greitens-withholds-million-from-fiscal-budget-million-from-um/article_cd5a8020-5de1-11e7-8941-b7f1ea90341b.html) [hereinafter *Greitens Withholding Budget*]; Susan Morse, *Trump Budget Cuts \$600 Billion from Medicaid*, HEALTHCARE IT NEWS (May 23, 2017, 12:10 PM), <http://www.healthcareitnews.com/news/trump-budget-cuts-600-billion-medicaid>.

7. See *Greitens Withholding Budget*, *supra* note 6; Morse, *supra* note 6.

8. See *infra* Section II.B.

9. See *infra* Section II.C.

## II. LEGAL BACKGROUND

MOHN recipients must be impoverished to qualify for benefits.<sup>10</sup> Correspondingly, indigent individuals are more likely to represent themselves pro se than individuals within other economic brackets.<sup>11</sup> Thus, MOHN recipients are more likely to represent themselves pro se if they have an issue with coverage. Unfortunately, the current DSS appeals process requires a level of evidentiary sophistication that many pro se individuals do not possess.<sup>12</sup>

Many MOHN recipients must overcome procedural hurdles to access legal remedies. In addition, multiple subsets of MOHN patients, including individuals with disabilities, must conquer other hurdles unique to their situations. Section A examines MOHN's origins, eligibility requirements, and current appeals process. Section B reviews barriers individuals with disabilities encounter in the current system. Finally, this Part concludes with a summary of ODR in Section C.

### A. An Introduction to MOHN

During almost every political campaign speech and platform, Medicaid is at the forefront of the discussion. The Federal Medicaid program and corresponding state programs directly cover over seventy-four million Americans.<sup>13</sup> Medicaid requires enormous expenditures to achieve this level of coverage, and without the program, millions of Americans would not be able to afford simple medical procedures.

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10. In order to qualify for MOHN benefits, an individual with disabilities must not be able to gain substantial employment for more than a year "due to a physical or mental incapacity" and must have a "net income less than \$855 per month for an individual or \$1151 for a couple." *MO HealthNet (Medicaid) for People with Disabilities*, MYDSS., <https://mydss.mo.gov/healthcare/mo-healthnet-for-people-with-disabilities#eligible> (last visited Aug. 26, 2018).

11. See, e.g., Owens, *supra* note 5, at 149 ("[I]t's obvious that many Mississippians cannot afford the legal assistance they need.").

12. See *Benefit Hearings*, MO. DEPT. OF SOC. SERVS., <https://dss.mo.gov/dls/hearings/state-benefit-hearings.htm> (last visited Aug. 26, 2018).

13. *March 2018 Medicaid and CHIP Enrollment Data Highlights*, DEP'T OF HEALTH & HUM. SERVS., <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> (last visited Aug. 26, 2018).

## 1. The Origins of Medicaid and the Creation of MOHN

The federal government enacted the Medicaid program in the Social Security Amendments of 1965.<sup>14</sup> Federal Medicaid pays for a specified percentage of state expenditures in state Medicaid programs and imposes minimal requirements.<sup>15</sup> In essence, Medicaid is a fund-matching program where the federal government matches conforming state Medicaid expenses. All fifty states, the District of Columbia, and five territories receive Medicaid funding.<sup>16</sup> The scope of the Medicaid program varies from state to state because each state establishes its own eligibility requirements for participation.<sup>17</sup> In 2014, the Affordable Care Act (“ACA”) expanded Medicaid funding to cover more citizens, but the ACA also mandated that states accepting additional funding must broaden Medicaid eligibility and services.<sup>18</sup> Missouri is one of eighteen states that did not participate in the expansion of the Medicaid program under the ACA.<sup>19</sup>

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14. BARBARA S. KLEES ET AL., SOC. SEC. ADMIN., ANNUAL STATISTIC SUPPLEMENT 2011 56 (Nov. 1, 2011), <https://www.ssa.gov/policy/docs/statcomps/supplement/2011/medicaid.pdf>. The Social Security Amendments of 1965 created Medicaid by adding Title XIX to the Social Security Act. *See generally* The Social Security Act, 42 U.S.C. ch. 7 (2012).

15. *Financial Management*, DEP’T OF HEALTH & HUM. SERVS., <https://www.medicare.gov/medicaid/finance/> (last visited Aug. 26, 2018); *Medicaid Information*, SOC. SEC. ADMIN. <https://www.ssa.gov/disabilityresearch/wi/medicaid.htm> (last visited Aug. 26, 2018).

16. MEDICAID & CHIP PAYMENT & ACCESS COMM’N, MEDICAID AND CHIP IN TERRITORIES 1 (Feb. 2018), <https://www.macpac.gov/wp-content/uploads/2016/09/Medicaid-and-CHIP-in-the-Territories.pdf>. The five territories are American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. *Id.*

17. KLEES ET AL., *supra* note 14, at 56.

18. *Id.* at 58; *see also A 50-State Look at Medicaid Expansion*, FAMILIES USA (May 2018), <http://familiesusa.org/product/50-state-look-medicare-expansion> (last visited Aug. 26, 2018). The expansion spread eligibility to those under sixty-five who did not meet the former requisites. In effect, the expansion ensured that nonparent, non-disabled, nonminor individuals who are in poverty may now receive health care via Medicaid. KLEES, *supra* note 14, at 56, 58.

19. *A 50-State Look at Medicaid Expansion*, *supra* note 18. The other states that have rejected the expansion include: Alabama, Florida, Idaho, Kansas, Mississippi, Nebraska, North Carolina, Oklahoma, Tennessee, Texas, South Carolina, South Dakota, Utah, Virginia, Wisconsin, and Wyoming. *Id.*

Missouri's program, MOHN, is managed by MHD.<sup>20</sup> MHD is a subsidiary of DSS, which oversees all social divisions.<sup>21</sup> MHD's aim is to increase the quality of life for Missouri's vulnerable and low-income citizens through their enrollment in MOHN.<sup>22</sup>

## 2. Eligibility Requirements to Qualify for MOHN

As of 2017, MOHN provides services to over 990,000 Missourians.<sup>23</sup> Although MHD manages MOHN, prospective applicants must apply for Medicaid enrollment through another subsidiary of DSS, the Family Support Division ("FSD").<sup>24</sup> The applicant must be a Missouri resident, United States Citizen, or other qualified person and may not be a current resident of a non-medical public institution.<sup>25</sup> FSD offers two benefit categories: (1) Family Medical and (2) Benefits.<sup>26</sup> Family Medical provides coverage for children, families, and pregnant women, while Benefits provides coverage for individuals who are elderly, who are blind, or who have other disabilities.<sup>27</sup>

After an individual applies for one of the two categories, FSD then evaluates an individual's eligibility for MOHN.<sup>28</sup> Missouri maintains some of the most stringent requirements for eligibility in certain categories, including eligibility for working parents, seniors, and individuals with disabilities.<sup>29</sup> Each

20. *DSS Divisions*, MO DEP'T OF SOC. SERVS., <https://dss.mo.gov/dssdiv.htm> (last visited Aug. 26, 2018). The Missouri Health Improvement Act of 2007 changed the name of the division overseeing the program from the Missouri Division of Medical Services to MHD. *About the MO HealthNet Division*, MO DEP'T. OF SOC. SERVS., <https://dss.mo.gov/mhd/general/pages/about.htm> (last visited Aug. 26, 2018).

21. *DSS Divisions*, *supra* note 20. The Department of Social Services programs are divided into two divisions: Program Divisions and Support Divisions. *Id.* Program divisions include the Children's Division, Family Support Division, MO HealthNet Division, and Division of Youth Services. *Id.* The Support Divisions consist of the Division of Legal Services, Division of Finance and Administrative Services, and Missouri Medicaid Audit and Compliance Unit. *Id.* See discussion *infra* Section II.A.2.

22. *About the MO HealthNet Division*, *supra* note 20.

23. MO. BUDGET PROJECT, MEDICAID IN MISSOURI: 2017 CHARTBOOK 2, [http://www.mobudget.org/wp-content/uploads/2017/01/Medicaid\\_Chart\\_2017.pdf](http://www.mobudget.org/wp-content/uploads/2017/01/Medicaid_Chart_2017.pdf) (last visited Aug. 26, 2018).

24. *DSS Divisions*, *supra* note 20.

25. *Who is Eligible?*, MYDSS, <https://mydss.mo.gov/healthcare/mo-healthnet-for-people-with-disabilities#eligible> (last visited Aug. 26, 2018).

26. *Do I Qualify?*, MYDSS, <https://mydss.mo.gov/qualify> (last visited Aug. 26, 2018).

27. *Id.*

28. See *Medical Services - MO HealthNet*, MYDSS, <https://mydss.mo.gov/msmed> (last visited Aug. 26, 2018).

29. MO. BUDGET PROJECT, *supra* note 23, at 6. As of 2017, Missouri's parent eligibility mandates that the parent may earn no more than \$385 a month for a family of three, which is 22% of the Federal Poverty Level and, legally, the lowest level per-

category requires an individual to satisfy unique requirements to qualify for coverage. For example, for an applicant to receive benefits as a disabled individual, they must first satisfy the Social Security Administration's definition of "disability" before being considered disabled by DSS.<sup>30</sup> Then, DSS requires that such applicants be "permanently and totally disabled."<sup>31</sup> Further, DSS requires that an individual must either make less than \$10,260 a year or satisfy the medical expense exception.<sup>32</sup> The individual may not possess cash or other "non-exempt resources" worth more than \$2000.<sup>33</sup> As of May 2018, there are 154,294 persons with disabilities in the MOHN program, making individuals with disabilities the largest single category of covered individuals other than children.<sup>34</sup>

If an individual qualifies, MHD arranges coverage for the individual under MOHN by either a Fee-For-Service arrangement<sup>35</sup> or a Managed Care plan.<sup>36</sup> Under a Fee-For-Service arrangement, MOHN pays the medical fees directly to the physician.<sup>37</sup> Medicaid individuals may still appeal a denial, a

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mitted. *Id.* This rigid standard ranks Missouri as third lowest eligibility level for parents in the nation, only trailing behind Alabama and Texas. *Id.* For adults, being poor is not enough. *Id.* Without a dependent child at home, low-income adults do not qualify, absent eligibility for another category. *Id.* Both the elderly and individuals with disabilities only qualify if their income is under 85% of the Federal Poverty Level. *Id.*

30. *Who is Eligible?*, *supra* note 25. A person is considered to be disabled if "the individual's inability to be gainfully and substantially employed for one year or longer [is] due to a physical or mental incapacity." *Id.*

31. *Id.*

32. *See id.* To qualify, an individual must have a "net income less than \$855 a month for an individual or \$1151 for a couple." *Id.* If an individual's net income exceeds the limit, they may still be eligible if they met the medical expense exception. *Id.* The medical expense exception applies when the individual's net income minus their acquired medical expenses would put the individual below the respective set limitation. *Id.*

33. *Id.* The final requirement is that an applicant "owns cash, securities or other total non-exempt resources," worth less than \$2000 if single or \$4000 if married. *Id.* Exempt resources include the residence, car, household items, and other property owned by the individual. *Id.*

34. *DSS Caseload Counter*, MO. DEP'T. OF SOC. SERVS., <https://dss.mo.gov/mis/clcounter/history.htm> (last visited Aug. 26, 2018). There are 618,889 children enrolled in MOHN as of May 2018. *Id.*

35. *See* MO. DEP'T OF SOC. SERVS., FEE-FOR-SERVICE PARTICIPANT HANDBOOK 1 (2011), [https://dss.mo.gov/mhd/participants/pdf/hndbk\\_ffs.pdf](https://dss.mo.gov/mhd/participants/pdf/hndbk_ffs.pdf).

36. *See Information for Providers*, MO. DEP'T. OF SOC. SERV., <https://dss.mo.gov/mhd/providers/> (last visited Aug. 26, 2018). "Services are provided in accordance with the terms and conditions of the contract between MO HealthNet and the MO HealthNet Managed Care health plans." *Id.*

37. FEE-FOR-SERVICE PARTICIPANT HANDBOOK, *supra* note 35, at 4. Fee-For-Service programs remove the eligible individual from a position of payment. *See id.* MOHN directly reimburses providers for services rendered to MOHN recipients. *Id.* The Fee-For-Service participant may be charged a copay for some services. With MOHN, "[c]opayment amounts range from [fifty] cents to [ten] dollars." *Id.* at 5.

limitation, or a termination of services.<sup>38</sup> Under a Managed Care plan, MOHN outsources health coverage to a select Managed Care Organization (“MCO”).<sup>39</sup> If there is a dispute in coverage or payment, it is the recipient’s responsibility to appeal.<sup>40</sup>

### 3. MOHN Appeals Process

Many individuals wish to appeal denials, reductions, and/or terminations of service. A Managed Care participant may file an appeal when the MCO denies a requested service or payment for a service, acts to deny, limit, or terminate a pre-approved service or fails to either make or notify the individual of an adverse decision within a specified timeframe.<sup>41</sup> This is an administrative review, and no new evidence is presented.<sup>42</sup> The initial appeal may be filed after the MCO gives a Notice of Action.<sup>43</sup> If the MCO rules against the individual, the individual may exercise their right to a “state fair hearing.”<sup>44</sup> Unlike those individuals with a Managed Care plan, Fee-For-Service recipients may request a state fair hearing immediately upon MOHN’s denial of a claim.<sup>45</sup> If the hearing is unsuccessful, the individual may contest the result in the traditional court system.<sup>46</sup>

A state fair hearing is an adjudication of an appeal, which is governed by DSS and processed by the hearing unit.<sup>47</sup> It provides an opportunity for the individual to present evidence, while an MCO appeal does not.<sup>48</sup> The individual, their attorney, or a “friend, relative, or anyone else of [their] choosing”

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Those receiving coverage through the Fee-for-Service arrangement may select any provider enrolled in the MOHN vendor program for needed services. *Id.*

38. *Id.*

39. *See Information for Providers, supra* note 36.

40. *See* MO. DEPT. OF SOC. SERVS., COMPARATIVE ANALYSIS OF QUALITY OF CARE AND ACCESS TO SERVICES IN MO HEALTHNET MANAGED CARE AND MO HEALTHNET FEE-FOR-SERVICE 9 (2009), <https://dss.mo.gov/mhd/oversight/pdf/managed-care091218.pdf>.

41. *Grievances and Appeals*, WELLCARE, <https://www.wellcare.com/Missouri/Members/Medicaid-Plans/Missouri-Care/Member-Rights-and-Policies/Grievances-and-Appeals> (last visited Aug. 26, 2018).

42. *Id.*

43. *Frequently Asked Participant Questions*, MO. DEP’T. OF SOC. SERVS. (June 4, 2013), <https://dss.mo.gov/mhd/faq/pages/faqpart.htm>.

44. *Id.*

45. FEE-FOR-SERVICE PARTICIPANT HANDBOOK, *supra* note 35, at 7.

46. *See* Nancy Cambria, *Lawyer Wins Braces for Kids – and Catches Flak*, ST. LOUIS POST-DISPATCH (Nov. 28, 2011), [http://www.stltoday.com/news/local/govt-and-politics/lawyer-wins-braces-for-kids-and-catches-flak/article\\_496e17cb-d1af-5e8c-88c9-818579224c6e.html](http://www.stltoday.com/news/local/govt-and-politics/lawyer-wins-braces-for-kids-and-catches-flak/article_496e17cb-d1af-5e8c-88c9-818579224c6e.html).

47. *Benefit Hearings, supra* note 12; MO. DEPT. OF SOC. SERVS., *supra* note 40, at 9.

48. *Compare Benefit Hearings, supra* note 12, with *Grievances and Appeals, supra* note 41.



must attend the state fair hearing.<sup>49</sup> The individual is responsible for marshaling and presenting documentary evidence and witness testimony to support their case.<sup>50</sup> The hearing unit permits the individual to utilize subpoenas to compel the disclosure of evidence.<sup>51</sup> Typically, hearings are held by teleconference, but they may be conducted in person upon request.<sup>52</sup> The individual must go to the office specified in the Notice of Hearing and use its telephone for the teleconference.<sup>53</sup> From there, the hearing officer contacts all hearing participants – including witnesses – by phone.<sup>54</sup> If the witness does not pick up and does not call back within the allotted time frame, then the witness will be excluded from testifying.<sup>55</sup> The hearing will not be postponed if the witness is unprepared.<sup>56</sup> After the hearing officer evaluates the case, a written decision is mailed to the individual seeking appeal.<sup>57</sup> Medicaid recipients typically have “little-to-no financial cushion” to support themselves while appealing health care services; however, they may have to pay the full expense of the service if they lose.<sup>58</sup>

Although the state fair hearing process provides the individual an opportunity to prove their claims, the process is often too complex for a pro se litigant to navigate.<sup>59</sup> The sophistication of evidentiary procedure, the lack of guidance, and the intricacies of procedural posture all contribute to the difficulty pro se litigants face.<sup>60</sup> Furthermore, the current process for Managed Care plan holders includes multiple steps, which can be appealed all the way to the circuit court and which can be complicated for a pro se litigant to master.<sup>61</sup>

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49. *Benefit Hearings*, *supra* note 12.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. MO. DEP'T. OF SOC. SERVS., HEARINGS INFORMATION 1, <https://dss.mo.gov/fsd/formsmanual/pdf/im4hearings.pdf> (last visited Aug. 26, 2018).

58. See Peter Kinder, *DSS Failing Far Too Many Missourians*, SPRINGFIELD NEWS LEADER (Oct. 5, 2014, 11:00 PM), <http://www.news-leader.com/story/opinion/contributors/2014/10/05/dds-failing-far-many-missourians/16750577>.

59. See Owens, *supra* note 5, at 149 (citing that failure to present necessary evidence, procedural errors, and ineffective arguments are some of the largest problems for pro se individuals).

60. See *id.*

61. See MO. DEP'T. OF SOC. SERVS., *supra* note 57, at 1.

### B. Hurdles Individuals with Disabilities Navigate to Access Remedies

An individual's constitutional right to counsel is guaranteed only in criminal cases.<sup>62</sup> Consequently, many legal aid services have sprung up nationwide to provide legal counsel to indigent individuals in civil matters at free or discounted rates.<sup>63</sup> Missouri has four legal aid services that receive state and federal funds.<sup>64</sup> Yet, there is far more demand for legal representation than those services can provide.<sup>65</sup> As a result, legal aid services turn away between fifty to eighty percent of qualified applicants.<sup>66</sup>

When rejected, many individuals resort to pro se representation due to the expensive nature of hiring private counsel.<sup>67</sup> Even without an attorney, filing a civil case still costs money.<sup>68</sup> Although an individual may petition for reduced filing fees, fewer than six percent of parties in civil cases do so.<sup>69</sup> Individuals with valid claims are frequently unable to advance them due to inadequate procedural knowledge.<sup>70</sup> Pro se litigants are less likely to succeed on their claims than litigants represented by a bar licensed attorney.<sup>71</sup>

Vulnerable subgroups of people, such as the disabled community, face even greater obstacles in accessing the legal system. Some are likely to face additional barriers to simply appear at a hearing. For example, a wheelchair user may face transportation issues, or a person with hearing impairments may

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62. Alan Jay Stein, *The Indigent's "Right" to Counsel in Civil Cases*, 43 *FORDHAM L. REV.* 989, 989 (1975).

63. See, e.g., *About Us*, MO. LEGAL SERVS., <https://www.lsmo.org/node/729/about-us> (last visited Aug. 26, 2018).

64. *Existing Pro Bono Programs in Missouri*, MO. COURTS, <https://www.courts.mo.gov/page.jsp?id=43918> (last visited Aug. 26, 2018). The names of the legal aid services in Missouri are: Legal Services of Eastern Missouri, Legal Aid of Western Missouri, Legal Services of Southern Missouri, and Mid-Missouri Legal Services. *Id.*

65. See A.B.A., *MISSOURI NEEDS STRONG FUNDING OF THE LEGAL SERVICES CORPORATION*, <https://www.americanbar.org/content/dam/aba/events/aba-day/Missouri.authcheckdam.pdf> (last visited Aug. 26, 2018).

66. *Id.*

67. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 *LOY. L.A. L. REV.* 869, 882–83 (2009); Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 *N.Y.U. J. LEGIS. & PUB. POL'Y* 759, 763–64 (2012).

68. Anne Dannerbeck Janku, *Poverty and Legal Problems: Examining Equal Access to Justice in Missouri*, *NAT'L CTR. FOR ST. CTS.* 11 (2013), <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202013/06212013-Poverty-and-legal-problems-Examining-Equal-Access-to-Justice-in-Missouri.ashx>.

69. See *id.* at 11–12.

70. Rhode, *supra* note 67, at 884.

71. *Id.*

encounter communication problems in a meeting organized over teleconference.<sup>72</sup> Other states have instituted a variety of alternative measures to improve the accessibility of legal assistance to the disabled community,<sup>73</sup> but Missouri has not.

### C. Evolution of ODR

One alternative to the formal adjudication process is Alternative Dispute Resolution (“ADR”). ADR consists of resolution systems unbound by traditional courtroom procedures, such as arbitration, negotiation, and mediation. Each process can be tailored to fit most litigants’ needs. ADR traditionally required parties to confront each other in person, face-to-face. Over time, however, ADR has become an online process, known as ODR. The new process originally gained traction in the late 1990s in commercial settings, but it has since expanded to the public sector.<sup>74</sup> One main driver behind ODR’s growth in popularity is its wide variety of benefits.<sup>75</sup> Section One will discuss a few of ODR’s benefits, including its inexpensiveness, flexibility, accessibility, and capability of mitigating power imbalances. Section Two will then juxtapose ODR’s benefits with its minor critiques.

#### 1. Benefits of ODR

As technology has evolved, ODR has evolved along with it. The following sections illustrate the reasons why ODR has grown in popularity since its creation, which include its inexpensive nature, flexibility, ease of access, and potential to overcome power imbalances among parties.

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72. See Ortoleva, *supra* note 6, at 305–07. See generally Alex B. Long, *Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism*, 47 U.C. DAVIS L. REV. 1753 (2014).

73. See, e.g., Anna Stolley Persky, *Michigan Program Allows People to Resolve Legal Issues Online*, A.B.A. (Dec. 2016), [http://www.abajournal.com/magazine/article/home\\_court\\_advantage/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=tech\\_monthly](http://www.abajournal.com/magazine/article/home_court_advantage/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly). See also Wolf, *supra* note 67, at 73–78.

74. See Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 186 (2010) [hereinafter Schmitz, *Drive-Thru*].

75. Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. TOL. L. REV. 193, 202–12 (2006).

### a. Inexpensive Resolutions

Using the Internet, ODR enables a cheaper dispute resolution process than traditional methods.<sup>76</sup> In the past twenty years, the Internet has become ubiquitous.<sup>77</sup> The vast majority of individuals of all ages, races, and income levels can access the Internet by computer or mobile phone.<sup>78</sup> Various systems have also been developed to make the Internet accessible to individuals with disabilities.<sup>79</sup> ODR utilizes an already accessible platform and eliminates travel costs and rental expenses that accompany the use of a physical venue.<sup>80</sup> The digital venue allows parties to directly exchange information, collect documents, and engage in discussion for joint sessions and virtual caucuses.<sup>81</sup> Several features of ODR, such as open file sharing, make many filing costs unnecessary and thus directly reduce expenditures by all parties involved.<sup>82</sup> Various systems facilitate resolutions with a computerized algorithm, eliminating the costs of third-party arbitrators or mediators.<sup>83</sup> Even if the system utilizes a human third party, ODR still expedites procedures to allow for a larger number of disputes to be handled at lower costs.<sup>84</sup> In summation, ODR utilizes technological advances in order to resolve disputes at discounted rates.

### b. Customized to Fit Any Dispute

ODR is not bound by tradition but rather it allows for flexibility in developing systems and software.<sup>85</sup> Various nontraditional ODR formats have emerged, including facilitated negotiation, arbitration, mediation, algorithm

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76. Schmitz, *Drive-Thru*, *supra* note 74, 200–01.

77. Wolf, *supra* note 67, at 770.

78. *Id.*

79. See *Accessibility Principles*, THE WORLD WIDE WEB CONSORTIUM, <https://www.w3.org/WAI/intro/people-use-web/principles#standards> (last visited Aug. 26, 2018).

80. Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. MARSHALL J. COMPUTER & INFO. L. 81, 85 (2009).

81. Wolf, *supra* note 67, at 777–78.

82. *Id.*

83. Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 330–31 (2016).

84. *Id.* at 330; see also Wolf, *supra* note 67, at 778.

85. See Katsh & Rule, *supra* note 83, at 330 (“[T]echnology is moving us further and further away from the models and values of ADR that emerged in the 1970s and that are still prevalent today.”).

programs to identify common interest,<sup>86</sup> and even precursory platforms to re-dress claims before proceeding to other methods.<sup>87</sup> ODR allows users to creatively design specialized systems that efficiently resolve the vast majority of disputes.<sup>88</sup>

#### c. Easier Access to Remedies

The forum provided by ODR overcomes geographical barriers by permitting litigants to be in the same virtual location, thereby facilitating communication.<sup>89</sup> ODR directly increases access to individuals who may be dissuaded from bringing claims because of physical barriers, such as members of the disabled community.<sup>90</sup> For instance, the customizable nature of ODR enables the system to be tailored to increase ease of accessibility for individuals with visual impairments by accommodating a linear text reader.

Furthermore, ODR transcends traditional time constraints by enabling scheduling flexibility and by creating options for real-time dialogue or asynchronous communication.<sup>91</sup> This flexibility better accommodates parties who do not have the time or financial means to arrange travel or childcare.<sup>92</sup> It grants individuals who require more time to process information the additional time they need to understand the presentation of information and to craft responses.<sup>93</sup> The digital platform allows parties to multitask and file or work on multiple claims simultaneously.<sup>94</sup>

#### d. Overcomes Power Imbalances

Traditional adjudication fosters power imbalances between parties, which result directly from differences in experience, knowledge, and socio-economic status.<sup>95</sup> ADR reduces the disparity, but ODR equalizes the playing field even more. ODR allows – and even encourages – asynchronous communication,

86. Katsh & Rule, *supra* note 83, at 330–31; Kumar, *supra* note 80, at 83.

87. See Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, 34 WINDSOR Y.B. ACCESS TO JUST. 112, 120 (2017). The Civil Resolution Tribunal uses four stages. *Id.*

88. See Schmitz, *Drive-Thru*, *supra* note 74, at 186–93 (discussing potential features of ODR).

89. Schmitz, *Drive-Thru*, *supra* note 74, at 182 n.16.

90. See Kumar, *supra* note 80, at 85 (noting ODR reduces costs by eliminating physical venues).

91. Schmitz, *Drive-Thru*, *supra* note 74, at 181–82.

92. See *id.* at 200 (“ODR allows parties to communicate from anywhere using their own or other Internet access at times convenient for their schedules. This allows consumers to forego having travel, miss work, ‘dress up,’ or arrange for child care to attend [in person] hearings and meetings.”).

93. Kumar, *supra* note 80, at 86.

94. See Wolf, *supra* note 67, at 778.

95. Schmitz, *Drive-Thru*, *supra* note 74, at 202.

which allows parties time to review offers and facilitate better negotiation.<sup>96</sup> Individuals can contemplate consequences before accepting a superficially attractive offer. The extra time grants unsophisticated parties the opportunity to generate well-thought-out responses. The various types of ODR systems available can empower pro se litigants to bring and succeed in their claims without being bogged down by formal procedural rules.<sup>97</sup>

## 2. Critiques of ODR Processes

ODR does, however, have some downsides. Critics are skeptical of the online exchange of personal, private information and the risk of hacking.<sup>98</sup> Some in the legal community fear the courts are being replaced with “robojustice.”<sup>99</sup> ODR does not require face-to-face communication, and as a result, there is an increased risk of miscommunication because individuals are less likely to pick up on nonverbal cues.<sup>100</sup> This may entice individuals to make statements they would typically refrain from making in a more formal setting.<sup>101</sup> While the digital platform enables some individuals to overcome power imbalances and stand up for themselves, it may also lead to “cyber-bullying” or the use of foul language.<sup>102</sup> Because of the lack of social and physical proximity, online negotiations may foster more hostile and aggressive behavior.<sup>103</sup>

## III. RECENT DEVELOPMENTS

Despite the drawbacks, ODR has flourished in the private sector since the late 1990s.<sup>104</sup> Within the last years, ODR has also made strides in the public sector both domestically and internationally. This Part analyzes ODR’s own manifest destiny into American courtrooms. Section A examines Matterhorn, a system currently used in the Michigan state court system. Section B reviews international systems with an emphasis on Canada’s Civil Resolution Tribunal.

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96. Kumar, *supra* note 80, at 86; Schmitz, *Drive-Thru*, *supra* note 74, at 183.

97. See Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 724–33 (2017) (describing varieties of ODR).

98. See *id.* at 750–51.

99. Salter, *supra* note 87, at 125. Implementing robojustice is not necessarily bad. It would guarantee claims would be adjudicated objectively by removing innate human biases. Regardless, not all forms of ODR are solely conducted by machine, but rather, many types are facilitated by humans with legal backgrounds.

100. Kumar, *supra* note 80, at 89.

101. Amy J. Schmitz, *Remedy Realities in Business to Consumer Contracting*, 58 ARIZ. L. REV. 213, 243–44 (2016).

102. *Id.*

103. Amy J. Schmitz, *Introducing the “New Handshake” to Expand Remedies and Revive Responsibility in Ecommerce*, 26 ST. THOMAS L. REV. 522, 542 (2014).

104. See Schmitz, *Drive-Thru*, *supra* note 74, at 180–83.

*A. Matterhorn: Making a Difference for Pro Se Litigants in Michigan's State Court System*

A powerful illustration of successful ODR implementation in the public sector is found in Michigan.<sup>105</sup> The Matterhorn program allows citizens to request a review online instead of through an in-person hearing, thus allowing court employees to efficiently spread out work throughout the day rather than address a flood of people at one time.<sup>106</sup> Beginning in 2014, Michigan state courts began utilizing ODR software.<sup>107</sup> By 2016, Matterhorn was implemented in seventeen courts to resolve various legal disputes.<sup>108</sup> As of November 2017, Matterhorn offers solutions systems in six sectors: traffic tickets, suspended licenses, warrants, amnesty, small claims, and family court solutions.<sup>109</sup> The nature of the dispute determines the particular characteristics of the process.<sup>110</sup> In some courts, Matterhorn provides a platform for individuals and the courts to communicate through written statements for prosecutors or judges to review.<sup>111</sup>

Matterhorn empowers individuals to contest a slew of legal issues from the comfort of their homes whenever they elect.<sup>112</sup> This flexibility better accommodates citizens who are unable to leave work or arrange child care.<sup>113</sup> It also alleviates the fears associated with appearing in court pro se.<sup>114</sup> Overall, Matterhorn has increased accessibility to the court system for Michiganders.<sup>115</sup>

Additionally, Matterhorn has directly increased efficiency while it has simultaneously decreased expenses in the court system.<sup>116</sup> For example, in order to combat a reduction in personnel, the 29th District Court of Michigan decided to implement Matterhorn.<sup>117</sup> A staff member in this district reported that Matterhorn reduced stress levels amongst the staff, and that the district was

105. See Stolley Persky, *supra* note 73.

106. See *Case Study: 29th District Court – City of Wayne, Michigan*, MATTERHORN, [https://getmatterhorn.com/static/29\\_Case\\_Study\\_Web.pdf](https://getmatterhorn.com/static/29_Case_Study_Web.pdf) (last visited Aug. 26, 2018) [hereinafter *29th District*] (statements of Linda Gable).

107. Stolley Persky, *supra* note 73. At inception, the Matterhorn program was “part of a pilot program approved by the Michigan Supreme Court . . . . [T]he online dispute resolution platform fit right into the supreme court’s ‘strategic objectives’ of efficiency, accessibility and innovation.” *Id.*

108. *Id.*

109. *Online Dispute Resolution for Courts*, MATTERHORN, <https://getmatterhorn.com/online-dispute-resolution-for-courts/> (last visited Aug. 26, 2018).

110. Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165, 197 (2017).

111. Stolley Persky, *supra* note 73.

112. *Id.*

113. See *29th District*, *supra* note 106 (statement by The Customer).

114. Rabinovich-Einy & Katsh, *supra* note 110, at 198.

115. Stolley Persky, *supra* note 73.

116. *29th District*, *supra* note 106.

117. *Id.*

able to increase accessibility to remedies for its citizens without increasing personnel, as “Matterhorn gave [the district] the ability to do more with less.”<sup>118</sup>

### *B. International ODR Systems*

ODR is not limited to the United States. Many other countries utilize ODR systems in the public sector, including Canada, Mexico,<sup>119</sup> and several European countries.<sup>120</sup> This Section focuses on Canada’s Civil Resolution Tribunal (“CRT”) because it is the first and only ODR system that has completely superseded a government’s resolution process in the public sector.<sup>121</sup> CRT offers users a guided pathway through various dispute resolution methods.<sup>122</sup> The service can be accessed from a computer or a cellphone at any hour.<sup>123</sup> CRT was implemented in 2012, and by 2016 it had become the mandatory forum for contesting condominium property claims in British Columbia.<sup>124</sup>

Canada recognizes its public is “overwhelmingly unfamiliar . . . and uncomfortable” with hearings and traditional adjudication and acknowledges that the discomfort associated with traditional adjudication can be damaging to a person’s mind, body, and bank account.<sup>125</sup> CRT creates a forum to mitigate the aforementioned discomfort and to resolve disputes in a timely and effective manner within four stages.<sup>126</sup>

The first stage is the “Solution Explorer,” which provides a guided issue diagnosis to help the individual evaluate their claims and possible solutions.<sup>127</sup> The format is similar to a questionnaire, but it also offers legal resources to evaluate potential legal solutions.<sup>128</sup> The Solution Explorer then generates a summary of the claims and recommends subsequent steps.<sup>129</sup> Once completed, if the individual wants to pursue the claims, they may proceed to the next step

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118. *Id.* (statement of Linda Gable).

119. In Mexico, the government utilizes the ODR platform “Concilianet” to resolve disputes between merchants and customers. Amy J. Schmitz, *Building Trust in E-commerce Through Online Dispute Resolution*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 12 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2684177](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2684177).

120. *Id.*

121. Salter, *supra* note 87, at 114.

122. *Id.* at 114. These methods include negotiation, mediation facilitating, and even adjudication. *Id.* at 113.

123. *Id.* at 114.

124. *Id.* at 122.

125. *Id.*

126. *Id.* at 120.

127. Rabinovich-Einy & Katsh, *supra* note 110, at 191.

128. *Id.*

129. Salter, *supra* note 87, at 120.



in the resolution process.<sup>130</sup> CRT keeps track of all answers the individual has provided and transfers the information to the next stage.<sup>131</sup>

Following Solution Explorer, there is a negotiation phase where both parties may directly interact through an automated ODR system.<sup>132</sup> If the parties cannot reach a resolution, CRT moves on to the third stage: facilitation.<sup>133</sup> An expert guides the facilitation phase and helps individuals reach an agreement on a variety of online platforms, such as email, fax, text, and video conferencing.<sup>134</sup> When an agreement is reached, the facilitator may convert the agreement into a binding order enforceable in traditional courts.<sup>135</sup> If facilitation is unsuccessful, the remaining disputes are transferred to a member of CRT's tribunal who will make a binding adjudication based on the arguments and evidence submitted in the online system.<sup>136</sup> The entire process is expected to take around ninety days, and payment varies depending on how many steps of the process were utilized.<sup>137</sup>

#### IV. DISCUSSION

ODR is becoming more popular in the public sector worldwide. Missouri should join this growing trend and use ODR to reduce appeal-related expenditures in its DSS appeals process. DSS and its subsidiaries are at risk of losing additional funding.<sup>138</sup> Missouri could integrate ODR into its current appeals process, starting with the MOHN appeals process. In the future, the system could be adapted to resolve all DSS state fair hearings. Software such as Matterhorn and CRT illustrate how ODR can drastically improve dispute systems. These systems have effectively relieved overwhelming caseloads by helping process more cases at a faster rate.<sup>139</sup> They permit government employees to use their time more efficiently and work on multiple cases simultaneously.<sup>140</sup> ODR also reduces the abandonment of cases because it is more timely and more

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130. Rabinovich-Einy & Katsh, *supra* note 110, at 191.

131. Salter, *supra* note 87, at 120.

132. Rabinovich-Einy & Katsh, *supra* note 110, at 191.

133. Salter, *supra* note 87, at 120.

134. *Id.*

135. *Id.* at 121.

136. *Id.*

137. *Id.*

138. See David A. Lieb & Summer Ballentine, *Missouri Governor Signs Budget, Cuts \$250M in Spending*, U.S. NEWS (June 30, 2017, 8:37 PM), <https://www.us-news.com/news/best-states/missouri/articles/2017-06-30/missouri-governor-signs-budget-cuts-250m-in-spending>; see also Jordan Smith, *Donald Trump Plans to Eliminate Legal Aid Funding That Supports Survivors of Domestic Violence*, THE INTERCEPT, (Mar. 20, 2017), <https://theintercept.com/2017/03/20/donald-trump-plans-to-eliminate-legal-aid-funding-that-supports-survivors-of-domestic-violence/>.

139. See Salter, *supra* note 87, at 121; Rabinovich-Einy & Katsh, *supra* note 110, at 189.

140. See Stolley Persky, *supra* note 73 (statement of Linda Gable).

cost effective for individuals.<sup>141</sup> Essentially, ODR systems allow the government to get more bang for its buck.

ODR would not only benefit the government but also its constituents. If an ODR system was implemented, it would positively affect the lives of all MOHN recipients, including individuals with disabilities. Due to its flexible nature, convenient venue, and affordable cost, the advantages of ODR would effectively eliminate barriers individuals with disabilities face when appealing a claim.

### A. Current Budget Cuts Effecting Missouri

Currently, the Missouri state government and the federal government are each seeking to manage their respective budgets.<sup>142</sup> The federal Medicaid budget is expected to be significantly reduced.<sup>143</sup> President Trump's 2018 budget includes a \$610 billion decrease to Medicaid over the next ten years and forces states to choose a state-based, per-capita program<sup>144</sup> or a block grant<sup>145</sup> in lieu of the current fund matching scheme.<sup>146</sup> Similarly, the Missouri state budget has dealt financial cuts to MOHN's funding.<sup>147</sup> In June 2017, Governor Eric Greitens announced a \$60 million cut that had previously been allocated to alleviate Medicaid's mid-year cost increases and also indicated that \$30 million will be withheld from DSS.<sup>148</sup> Governor Greitens asserted the department

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141. See Salter, *supra* note 87, at 118–21.

142. See Smith, *supra* note 138; see generally MO. OFF. OF ADMIN., THE MISSOURI BUDGET FISCAL YEAR 2018 SUMMARY (2018), [https://oa.mo.gov/sites/default/files/FY\\_2018\\_Budget\\_Summary\\_Abridged.pdf](https://oa.mo.gov/sites/default/files/FY_2018_Budget_Summary_Abridged.pdf).

143. See Morse, *supra* note 6. “President Donald Trump’s budget, ‘A New Foundation for American Greatness,’ cuts more than \$600 billion to Medicaid over the next [ten] years by eliminating Medicaid as an entitlement and changing it to a state-based per-capita grant program, eliminating all but the neediest from the benefit.” *Id.*

144. Under a per-capita program, the federal government will give the states a fixed monetary amount per Medicaid participant, irrespective of the participants actual health care expenses. See Gretchen Jacobson et al., *What Could a Medicaid Per Capita Mean for Low Income People on Medicare?*, KAISER FAM. FOUND. (Mar. 24, 2017), <https://www.kff.org/medicare/issue-brief/what-could-a-medicare-per-capita-cap-mean-for-low-income-people-on-medicare/>. There would also be no cap to the number of individuals who in enroll in a state program. *Id.* Each individual would receive the same amount regardless of their health condition. *Id.*

145. “Under a Medicaid block grant, the federal government would provide states a fixed amount that would not vary by the number of Medicaid enrollees.” *Id.*

146. OFF. OF MGMT. & BUDGET, BUDGET OF THE U. S. GOV’T: A NEW FOUNDATION FOR AMERICAN GREATNESS FISCAL YEAR 2018 9–10 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/budget.pdf>; see also Morse, *supra* note 6.

147. Lieb & Ballentine, *supra* note 138.

148. Greitens *Withholding Budget*, *supra* note 6.

will offset these cuts by identifying certain “efficiencies” that will allow it to do more with less funding.<sup>149</sup>

Legal aid services are in a similar situation. Legal Services Corporation is a federally-run entity that partially funds Missouri’s legal aid services, which, as mentioned above, provides civil legal services for qualifying low-income individuals.<sup>150</sup> Under the proposed 2018 federal budget, Legal Services Corporation may completely lose federal funding.<sup>151</sup> Accessing remedies is presently an issue in Missouri, and qualified citizens are routinely turned away due to a lack of legal aid service funding.<sup>152</sup> As of 2016, around 900,000 Missourians lived below the poverty line, but there were only 100 legal aid attorneys statewide to represent their civil legal needs.<sup>153</sup> Now, the proposed federal budget suggests that already inadequate funding may decrease even further.<sup>154</sup> Without finding alternative ways to provide funding, low-income Missourians may lose both health care and access to legal aid services.<sup>155</sup>

### *B. ODR: A Solution to MOHN’s Problems*

To avoid cutting critical health care and legal coverage for Missourians, Missouri should implement ODR software in the MOHN appeal process. If DSS required MCOs to use ODR from the very beginning of the dispute, the need for individuals to resort to a state fair hearing could be reduced. Starting ODR earlier in the process would circumvent the time individuals spend filing a claim to only then appeal it multiple times. The initial cost of introducing an ODR system may seem hefty, however, implementing ODR at the beginning of the MOHN appeal process is a time-and-cost-effective, long-term solution to budget cuts because of its increased efficiency.<sup>156</sup>

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149. *Id.*

150. Smith, *supra* note 138; *see also supra* Section II.B.

151. Smith, *supra* note 138. *See generally* Christine Simmons, *Legal Services Corp. Faces Shrinking Budget as Demand for Legal Assistance Grows*, MO. LAWS. WKLY. (Feb. 3, 2012), <http://molawyersmedia.com/2012/02/03/legal-services-corp-faces-shrinking-budget-as-demand-for-legal-assistance-grows/>.

152. *See* MISSOURI NEEDS STRONG FUNDING OF THE LEGAL SERVICES CORPORATION, *supra* note 65, at 1.

153. *Id.*

154. *See* Smith, *supra* note 138.

155. *See* MISSOURI NEEDS STRONG FUNDING OF THE LEGAL SERVICES CORPORATION, *supra* note 65.

156. *See* JOINT TECH. COMM., JTC RESOURCE BULLETIN: ODR FOR COURTS 8, 14 (2017), <http://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>.

### 1. A Means to Address Budget Cuts

Implementing ODR software in the MOHN appeals process would provide a viable solution to problems posed by DSS budget cuts and could eventually be incorporated into all DSS hearings.<sup>157</sup> ODR could be a direct solution to Governor Greitens' directions to do more with less.<sup>158</sup> Because of its asynchronous nature, ODR would allow the hearing unit to process a larger caseload, as government employees could work on several disputes simultaneously. Analogously, after Michigan courts implemented Matterhorn, a study of three courts and 17,000 cases showed that the courts experienced a seventy-four percent reduction in the average amount of days it took to resolve a case.<sup>159</sup> An ODR system would enable fewer employees to adjudicate more claims. It would eliminate inefficient, time-consuming work and reduce the number of employees required to coordinate across multiple locations. Consequently, employees' effort and time could be reallocated to other meaningful tasks.

The customizability of an ODR system would also enable DSS to include features that are specifically designed to help pro se litigants better organize their case. Guiding individuals through structuring their case would allow government employees to research relevant materials and more efficiently process claims, especially when compared to sifting through an inexperienced party's disjointed presentation. For example, Matterhorn has such a feature, and consequently, office efficiency has increased.<sup>160</sup> DSS could benefit from this faster, higher-quality processing.

### 2. A Means to Increase Accessibility

Besides reducing costs for the government, implementing an ODR system in lieu of telephone hearings would allow more Medicaid recipients to request and succeed in appeals. The digital nature of ODR transcends traditional barriers that discourage individuals with a range of disabilities from even participating in the appeals process. It empowers pro se litigants to chart a course through the foreign waters of procedural process. Implementing ODR in the MOHN appeals process would encourage those who feel as though they have less power and resources to fully participate rather than abandon their complaints.

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157. See *Information About Hearings*, MO. DEP'T. SOC. SERVS., <https://dss.mo.gov/dls/hearings/> (last visited Aug. 26, 2018). *Id.* A hearing may be available for a dispute arising from any of the DSS programs, including FSD, MOHN, and Children's division. *Id.* Hearings are also available for disputes involving the Department of Health and Senior Service, Food Stamp Benefits, Blind Pension, and child support. *Id.*

158. See *Greitens Withholding Budget*, *supra* note 6.

159. Stolley Persky, *supra* note 73.

160. *29th District*, *supra* note 106.

## a. Enhances Access for All Physical Capabilities

Around sixteen percent of MOHN enrollees are individuals with disabilities.<sup>161</sup> In the current system, a hearing is conducted either via telephone or in-person.<sup>162</sup> At first glance, it may appear that a telephone hearing would be more accommodating for a person with disabilities; however, the individual must go into a designated local office on a particular date and time to use its phone for the hearing.<sup>163</sup> Many may not be able to participate because of a lack of transportation to the hearing office. This is an unnecessary obstacle for the physically-impaired, especially when the average hearing is not even conducted face-to-face. The hearing unit provides accommodations for these types of needs, but it needs to be notified as soon as the individual receives notice of the hearing.<sup>164</sup>

Furthermore, a telephone hearing is an inconvenient format for any person who does not utilize verbal language. Once again, the hearing unit will make arrangements for an interpreter if necessary, however, MOHN could implement an ODR system to circumvent these issues.<sup>165</sup> Such a system would empower individuals to file their statements on their own schedule. By moving the hearing online, many individuals with disabilities could fully participate in the hearing, could elect when to file information, and could choose the location to work from while doing so.

## b. Accommodates Pro Se Individuals

The state fair hearing permits self-representation or representation by *any* selected person for a MOHN appeal.<sup>166</sup> At that point, the individual is already enrolled in MOHN, and, by definition, the individual is of a lower socio-economic status. This, coupled with the increasing difficulty to receive legal aid, means the majority of Medicaid recipients will likely represent themselves pro se. As stated in a previous section,<sup>167</sup> pro se representation tends to return less satisfactory results because the individual is unfamiliar with the procedural posture.<sup>168</sup> Like a trial, a hearing can be quite complex, requiring the individual to provide evidence, submit documents, and in some cases, request subpoenas.<sup>169</sup> These complexities make it difficult for pro se individuals to adequately present a case, and thus many claims brought pro se are dismissed.

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161. MO. BUDGET PROJECT, *supra* note 23.

162. *Benefit Hearings*, *supra* note 12.

163. *Id.*

164. *Id.*

165. *Id.*

166. See discussion *supra* Section II.A.3.

167. See *supra* Section II.B.

168. Rhode, *supra* note 67, at 883–84.

169. *Benefit Hearings*, *supra* note 12.

As legal aid is becoming more difficult to access, ODR could be utilized to assist pro se individuals to effectively navigate the MOHN appeals process. The stresses of presenting evidence could be eased, as the ODR system could be tailored to guide the individual and explain the type of documents needed, how to get witness testimony, and, if needed, how to file a subpoena. Instead of scheduling hearings that are ultimately dismissed because lack of guidance, DSS could implement an ODR system to simplify the MOHN appeals process and subsequently eliminate wasteful or unproductive hearings.

c. ODR's Effect: A Hypothetical<sup>170</sup>

Consider the following scenario, which illustrates how the prospective benefits of ODR outweigh the potential risks of implementing it in the MOHN appeal process. Juliet, twenty-eight, is a native Missourian who has systemic lupus erythematosus, an autoimmune disease where the body attacks its own healthy tissue. Juliet's symptoms come and go, leaving her constantly apprehensive about an impending flare up. Because of the severity of her lupus and her inability to work, Juliet qualifies for MOHN and has a plan with one of the insurance providers for Managed Care.

One day, Juliet is in public and begins coughing up blood. A bystander calls an ambulance, and Juliet goes to the hospital. The ride cost \$2691.50.<sup>171</sup> The insurance company refuses to pay for the service because there is no indication that another means of transportation would endanger her health.<sup>172</sup> Juliet appeals the denial within sixty days. Thirty days after that, her insurance company denies the appeal. Still exhausted and now stressed about her finances, Juliet requests a state fair hearing. The anxiety of the impending hearing exacerbates the symptoms of Juliet's lupus. During the hearing, Juliet sits in pain while on the conference call. She can barely get through her testimony and cannot get through presenting her evidence. The hearing unit denies her appeal. She contemplates filing an appeal in the circuit court because she has no idea how she is going to afford the ambulance; however, she cannot afford an attorney or the court-filing fee.

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170. This Section includes a hypothetical that the author created to demonstrate some of the difficulties individuals with disabilities may face using the traditional MOHN appeals process and how those difficulties may be alleviated with the adoption of an ODR process.

171. This is the amount it cost a man for a two-mile ambulance ride in 2017. Christine DiGangi, *This Man's 2 Mile Ambulance Ride Cost \$2,700. Is That Normal?*, CREDIT.COM (Apr. 18, 2017), <http://blog.credit.com/2017/04/my-2-mile-ambulance-ride-cost-2700-is-that-normal-169987/>.

172. CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE COVERAGE OF AMBULANCE SERVICES 5, <https://www.medicare.gov/Pubs/pdf/11021-Medicare-Coverage-of-Ambulance-Services.pdf> (last visited Aug. 26, 2018) ("You can get emergency ambulance transportation when you've had a sudden medical emergency, and your health is in serious danger because you can't be safely transported by other means, like by car or taxi.").

Now, let us revisit the same scenario but add ODR to the story. Juliet is directed to the ODR platform where she can appeal her denied service. Within the next couple of days, she capitalizes on a moment where her lupus is sedated and fills out the appropriate information. Half-way through writing her statement she has a lupus flare, so she does not work on her appeal for a day. She is so fatigued that she cannot leave bed, so she works on her appeal from there. She is able to upload a statement from her doctor that explains how riding in another mode of transportation could have damaged her lungs. Juliet submits the application directly to the hearing unit. Her lupus does not flare because of stress and anxiety. Her claim is approved. The online platform permitted Juliet to overcome barriers and successfully appeal her claim. Because of ODR's ability to accommodate pro se individuals and individuals with disabilities, it has the capability to increase access to remedies for some of Missouri's most vulnerable citizens, like Juliet.

#### *D. ODR Proposal for MOHN Appeals Process*<sup>173</sup>

Missouri should create an inclusive MOHN appeals process that provides access to remedies to Missourians, like hypothetical Juliet above, by implementing an ODR system with features tailored to accommodate pro se individuals with disabilities. This Section explores this potential by proposing a possible ODR system for adoption by DSS in the MOHN appeals process. Although this proposal focuses on MOHN, later ODR variations could be tailored to accommodate any DSS hearing. For legitimacy reasons, DSS should be the organization to implement the ODR program because it has authority over the hearings. DSS' adoption of an ODR system would be the quickest way for the program to gain credibility amongst Missourians and within the legal profession.

The first Section contains considerations for the features of an online hearing system ("OHS"). The next Section offers a structure of the process.

##### 1. Features to be Adopted

Similar to CRT, the developed OHS should use a straightforward and simple platform. Individuals utilizing OHS may not have access to a computer, so emphasis should be placed on producing an equally accessible mobile format. It is likely that individuals will not have a legal background; thus, if legal terms must be used, there should be a clear breakdown of what each term means. Instructions should be clear and explicit to give the user precise guidance. The program should avoid pictures and video, but, if necessary, the program should provide a text-equivalent that can be used for synthesized speech,

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173. This Section proposes an ODR system designed by the author to be implemented in MOHN appeals processes. The author drew inspiration from the Matterhorn and CRT systems to create the online hearing system proposed in this Note.





should direct, describe, and recommend the types of documents and evidence that may successfully support the claim. The platform should allow individuals to take a picture of a hard copy of the document on their cell phone or upload documents digitally. After uploading each file, OHS should permit the individual to explain why the document is important to their claim. Because MOHN claims pertain to medical issues, there should be a secure section devoted to safeguarding the individual's medical records. Another page should guide the user to upload other pertinent files, such as proof of income or expenses.

The current MOHN appeals process empowers individuals to submit witness testimony and request subpoenas; however, OHS would make the process easier and more efficient. If an OHS system was implemented, the individual could elect to submit witness testimony by uploading a notarized statement. The OHS system could also solicit a witness for a statement via email with the case number and directions on how to submit such statement.<sup>179</sup> If the individual wished to request a subpoena, they would be able to fill out a request form with a statement justifying its pertinence. Post-request, OHS would direct the user to a section that enables the party to transcribe their own testimony. They could then submit the file to DSS.

After the file had been submitted, OHS would automatically organize and assign the appeal to a DSS employee based on that employee's current case-load. When the assigned employee received the notification, they could begin to review the file. The request for a subpoena would be the first thing reviewed. If the request was granted, the appeal would freeze – pending the document's arrival to the individual. After reviewing the subpoenaed information, they would upload, comment on the document, and then resubmit. The appeal would then be unfrozen and further reviewed. If the subpoena was not granted, the file would continue to be examined without delay.

OHS would arrange the evidence and information in the individual's file in a standardized format so that the DSS employee could efficiently process the appeal. The employee would then evaluate the claim. The results could be sent through OHS to the individual through a memorandum and, if relevant, the MCO. If the appeal was decided in the individual's favor, the result would inform the individual of the success of the claim and, if applicable, to contact the MCO on the next business day. If the appeal was denied, the result would explain why and inform the individual about the process of appealing to the next stage.

The second phase should be binding to prompt swift judgment on matters that are typically time sensitive. Applying finality in two stages would streamline the process by cutting back time spent on appeals that may just be appealed again. OHS should begin this phase by permitting the individual to access their

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179. The author proposes there should also be some sort of witness identity verification in place. For example, the OHS system should require the witness to provide their date of birth and social security number to eliminate the risk of fraudulent witnesses.

previous filings. From there, they could edit their statements, upload more documents, or edit their evidence before resubmitting the file. The file would then be transferred back to the same employee who processed their appeal previously, who then may make comments on each section of the individual's file. The employee may also submit their own arguments. Once the hearing unit finished its review, the file would be closed for revision. Then, the file would transfer back to the individual so they may be aware of the arguments suggested by the hearing unit. Lastly, the file would transfer to a different employee within the hearing unit for adjudication. The ruling of that employee would be final.

## V. CONCLUSION

This proposed OHS system demonstrates how an ODR system can be tailored to benefit all parties in a potential claim. Throughout the entire process, the appealing individual is in control of presenting their case. The individual may do it on their own time, within their own home, using their own words, and in a guided fashion to help facilitate the success of their appeal. The individual may file and argue claims that they would have not otherwise been able to pursue. DSS and the hearing unit would better evaluate the appeals they receive, as the information would be provided in a clear, organized manner. The reduction of time and effort in appealing the same claim over and over again would benefit both sides of the process.

As both the federal and state governments are pursuing serious budget cuts to Medicaid, it is becoming increasingly urgent to find ways to cut costs without cutting coverage for the most vulnerable Missourians. As a solution, Missouri should implement an ODR system to expedite the current state fair hearing process. Because ODR can be tailored to the dispute at hand, it provides a long-term solution to the problems accompanying DSS budget cuts, and it simultaneously empowers MOHN recipients as they appeal their claims through a guided appeal resolution system.

