



JTC Resource Bulletin

ODR for Courts

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Abstract

Online Dispute Resolution (ODR) encompasses a broad array of technologies used to resolve a growing variety of business and consumer disputes throughout the world. It has grown to become a distinct and particularly effective dispute resolution mechanism. Courts have implemented ODR for low-dollar personal injury claims, landlord-tenant, small claims, and minor traffic and code enforcement violations. ODR presents opportunities for courts to expand services while simultaneously reducing costs and improving customer experience and satisfaction. This Resource Bulletin provides a basic primer in Online Dispute Resolution and describes several implementation models, as well as court-specific opportunities and considerations. A companion publication – *Case Studies in ODR for Courts: A view from the front lines* – describes ODR implementations in a variety of court settings.

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Introduction

For more than 20 years, Online Dispute Resolution (ODR) has been used effectively to resolve individual-to-individual e-commerce disputes. Increasingly, it is being used in innovative applications unique to the judiciary. While ODR is a new concept for courts, it is not a theory or a “bleeding-edge” technology. It is a proven tool with a documentable record of success over a sustained period of time: billions of disputes have been resolved outside of court using ODR. Significant opportunities exist for courts to leverage ODR to expand services while simultaneously reducing costs and improving the public’s experience and therefore, satisfaction. For those reasons, it is becoming central to the discussion of the future of courts.

In its 2016 recommendations entitled *Call to Action: Achieving Civil Justice for All*, the Conference of Chief Justices (CCJ) observes that navigating civil courts can be daunting and “those who enter the system confront a maze-like process that costs too much and takes too long.” The report notes that services should improve in step with changing needs and the development of new technologies, but goes on to lament that “courts lack any of the user-friendly support we rely on in other sectors.” Recommendation 13 of the CCJ report implores courts to “take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.”

As such, “on-demand court assistance” must go beyond basic informational webpages or online payment portals. A more public-facing use of technology, ODR takes the benefits of technology much further. While courts are using technology effectively to improve case management and administrative processes and to address federal disposition reporting requirements, ODR has the potential to dramatically expand the public’s access to justice and improve their experience with justice processes.

This Resource Bulletin identifies key issues, opportunities, considerations, and recommendations for courts evaluating ODR. A separate JTC publication – *Case Studies in ODR and the Courts: A View from the Front Lines* - provides case studies of court-specific ODR either fully implemented or under development.

Applying technology to resolution processes

Simply defined, ODR is a digital space where parties can convene to work out a resolution to their dispute or case. Originally limited to non-binding, out-of-court dispute resolution between private parties, ODR is now used in the public sector to resolve traffic violations or code enforcement, landlord/tenant, small claims, small-dollar personal injury claims, separation/divorce, and tax assessment appeals cases, etc.

ODR leverages technology to provide the same customer-centric “anytime/anywhere” access the Internet provides for online banking, shopping, dating, healthcare, genealogy, and other activities. It not only enables people to communicate about disputes at a distance, but 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. Use of technology can increasingly expedite as well as shape communication, negotiation, and ultimately, resolution.

ODR's digital space can be presented to users in the form of a website or application (app), and can utilize a variety of information and communication technologies ranging from simple chat service or videoconferencing to cognitive computing. Leveraging a wide range of technology-enabled processes, ODR delivers much more than just a digital space. ODR can be used to do any or all of the following:

- triage problems
- provide legal information in plain English
- de-escalate conflict between parties
- structure negotiations
- suggest solutions
- trigger essential reminders
- negotiate
- facilitate
- mediate
- adjudicate

In some instances, ODR can even help enforce agreements.

ODR is not a specific software package, it is a thoughtful and intentional use of technology to facilitate problem resolution. The goal is not to replace courts with computers, but rather to strategically apply technology to certain dispute resolution processes to make them more accessible, efficient, convenient, and cost effective. Any online case processing application that leads to resolution may be loosely described as ODR (focusing narrowly on the "online" aspect versus "dispute resolution").

Technology can be used to automate some or all of the steps in a resolution process. It creates an additional path into the courts, expanding access to justice. While ODR is not appropriate for all case types, it is a powerful tool for those that are more transactional in nature, are less complex, and that occur in high volume. Court resources are costly and the value added by human intervention in those case types is limited. Well-designed ODR leverages technology to efficiently resolve high-volume/low-complexity cases. This can free up human resources to address low-volume/higher-complexity disputes.

More complicated cases naturally demand more human involvement, but complex cases are usually a very small percentage of a court's caseload. Cases that must ultimately be decided in a courtroom should not be a priority to attempt to address online. In almost all case types, technology can still be used in a variety of ways to improve the process. Figures 1 and 2 together demonstrate the correlation between case volume and reliance on technology, and case complexity and reliance on human intervention.

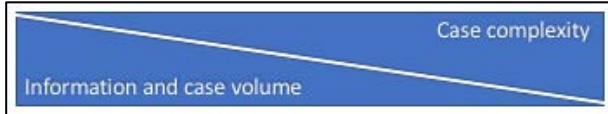


Figure 1 - Case volume / complexity continuum¹

As case complexity increases, the volume of cases decreases and the benefits of automating processes decrease proportionately.



Figure 2 - Technology / human involvement continuum

Reliance on technology naturally diminishes as more skilled, personal assistance is required.

ODR is not an “all or nothing” decision. Technology can be used to help move cases through some aspects of the resolution process, while other steps are handled by court staff. Most court-based ODR today is a hybrid of human involvement and automation. ODR technologies may be applied to problem triage and self-help, mediation and arbitration, and/or adjudication. Some systems may also provide post-adjudication enforcement.² Information gathering and communication technologies can facilitate all stages of a resolution process. Access to justice improves when any stage of the resolution process is available online.

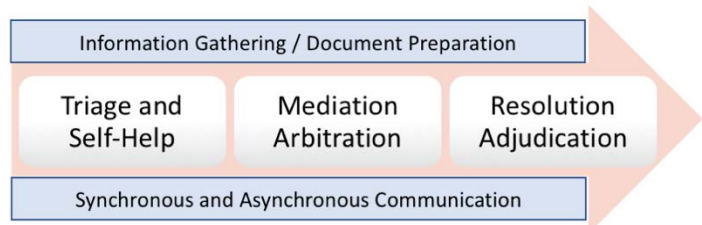


Figure 3 - ODR Process Stages

Problem triage and diagnosis

According to a recent study³, 48 states offer websites with legal forms and self-help content. However, getting to the *right* information may require users to frame their questions in a legal context. When there are multiple approaches to resolving a dispute, forms and instructions do little to help individuals understand the implications of various paths to resolving the dispute⁴. Legal self-help websites can often be text-heavy and filled with jargon unfamiliar to all but lawyers.

In contrast, a good ODR triage process can help people determine if they have a legal issue, diagnose the problem, and provide focused, relevant information about their legal rights and obligations. Since not all disputes and complaints

¹ Figures 1-3 are based in part on ‘The ODR spectrum’ published in Thomson Reuters ‘The Impact of ODR Technology on Dispute Resolution in the UK – 2016’

² ODR systems can be focused specifically on facilitating post adjudication enforcement, as in child support and parenting time apps, or can incorporate Blockchain or similar technologies include enforcement capabilities.

³ Kourlis, Rebecca Love and Riyaz Samnani, Court Compass: Mapping the Future of User Access Through Technology. Institute for the Advancement of the American Legal System, University of Denver. May 2017.

⁴ Staudt, Ronald W, *Access to Justice for the Self-Represented Litigant: An interdisciplinary Investigation by Designers and Lawyers* (with P. Hannaford). 52 Syracuse L. Rev. 1017 (2002).

involve legal issues, a good triage tool within an ODR system can also help prevent unmeritorious complaints.

Problem triage does not require exhaustive information or extensive documentation of the dispute. The first step in a well-designed ODR process is to gather essential information - only enough information to accurately diagnose the situation. In many instances, Personal Identifying Information (required to create a user profile, for example) should not be collected until after the triage phase, allowing individuals to assess their situation and consider options before identifying themselves. Collecting only essential information and documents reduces the time burden on parties and limits the volume of information the court will need to log, store, and retain. ODR should not require or collect information for all cases that is only relevant in a small number of cases.

- British Columbia’s Civil Resolution Tribunal (CRT) system has demonstrated that often parties in a dispute simply need information, not legal action.⁵

Mediation / Arbitration

ODR can facilitate party-to-party negotiations through synchronous or asynchronous communications, either with or without the assistance of a neutral third party. ODR systems like British Columbia’s CRT can provide a structured environment for parties to communicate about their dispute and attempt to resolve it themselves. If parties cannot agree without assistance, some form of automated or human mediation and/or arbitration is the next step.

Studies show the public has a strong desire to negotiate and to reach a collaborative agreement to their disputes.⁶ As with the so-called “Ikea Effect,” people place greater value on things they build themselves. People are more likely to be satisfied with a consensual agreement, and they’re also more likely to adhere to it.⁷ When ODR is provided by or through the courts, it carries the authority of the court, giving parties greater confidence in the process and the outcome.

Resolution / Adjudication

The goal of an ODR process is resolution, not necessarily a case and disposition. That resolution may come in the form of an agreement the parties reach on their

⁵ In the first year, more than 10,000 individuals started “explorations” using strata Solution Explorer. About 600 ended up as actual claims, which means that approximately 94% were able to resolve their issue without formal CRT intervention.

⁶ British Columbia Ministry of Justice. “Online Civil Justice Services Survey 2015.” Confidence interval of +/- 2.9%, 19 times out of 20) [BC Stats].

⁷ See Shestowsky, Donna. “[The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante.](#)” *Iowa Law Review*, vol. 99, no. 2, ser. 637, Jan. 2014.

own after direct negotiation, a settlement reached with the help of a facilitator, an outcome suggested by an algorithm, or in some other form.

- Human-facilitated adjudication occurs through Washtenaw County, Michigan’s online pleading system for traffic cases. Magistrates review the charges, information provided by defendants, the driver’s record, and other records. If the case qualifies for mediation, the charge can be reduced to “impeding traffic,” a violation which will not appear on an individual’s driving record and will not negatively impact auto insurance rates. Defendants then have a limited amount of time to accept the reduced charge and pay the associated fine.

Information gathering / document preparation

Well-designed ODR can help parties narrow the focus of negotiations to key issues, build a joint narrative, and reduce some conflicts by reducing the exchange of unnecessary but potentially emotionally charged information. Technology can also be used to simplify the process of gathering information, giving system users a convenient way to meet documentation requirements.

While ODR should focus on resolution, not document preparation, ODR systems can feed into existing paper processes. Information and evidence gathered during the triage process can be used to resolve the conflict, as well as to complete any documents or feed any processes required by existing statutes and rules.

- The UK’s Claims Portal facilitates investigation, negotiation, and litigation of traffic accident and personal injury claims. Information related to injury claims can be transferred securely through the system, including medical documentation, settlement offers and counter-offers. If the parties do not reach agreement, the system can generate a Court Proceeding Packet⁸ from information provided during investigation and negotiation stages.

Communication

Communication mechanisms used in ODR range from low-tech land-line telephones to very high-tech, secure messaging. The process can be either synchronous or asynchronous for the user and the court, depending on the court’s goals and purposes for the system. In either case, communication methods should extend the court’s availability to the public. Utilization statistics support the public’s preference for extended hours of access. For example, nearly 33% of Franklin County, Ohio’s ODR system use is “after hours.”⁹

⁸ See Court Proceedings Pack for low-value personal injury road traffic accidents on justice.gov.uk.

⁹ “ODR in Franklin County Municipal Court.” Email from Alex Sanchez, Manager, Small Claims and Dispute Resolution, Franklin County (Ohio) Municipal Court, 21 Nov. 2017.

Approximately 40-45% use British Columbia's Civil Resolution Tribunal outside normal business hours.¹⁰

The virtual aspect of ODR may be more than just convenience for the public. It may actually be much more effective than the stressful and confrontational atmosphere of in-person interactions."¹¹ Clearly, individuals are likely to be more comfortable at home, and will be better informed if they can "pause" the resolution process to gather information and assess options – luxuries not available when standing in front of a judge in a traditional courtroom. Even face-to-face virtual negotiation via communication technologies like Skype or Facetime may have some of the negative impacts associated with going to court.

More sophisticated ODR can also help shape and "de-conflictualize" the communication between parties. Algorithms can be used to detect and neutralize inflammatory language in written communications, helping to de-escalate conflict. Websites and apps can use a combination of technology and human mediators to reduce conflicts in co-parenting situations.¹² By nature, self-help, negotiation, and facilitation are collaborative processes, unlike traditional court discovery processes that front-load the resolution process with adversarial exchanges of information that can escalate conflict and polarize parties.

Opportunities for courts

ODR can help courts improve both outcomes and outputs. Most notably, ODR eliminates many of the obvious physical barriers and can also mitigate many of the financial barriers that limit individuals from accessing court processes. The "level playing field" of ODR can improve fairness. Together, these benefits improve litigant satisfaction with the process. Using ODR technologies, courts can simultaneously increase case throughput while reducing costs.

Technology ... introduces new possibilities for helping ... achieve resolution. We may learn from offline approaches in designing ODR systems, but the larger challenge is to take advantage of what we can do with technology that we could not do before.¹³

For courts ready to reimagine justice processes, those new possibilities can provide dramatic improvements in measurable aspects of the justice process.

¹⁰ Interview with Shannon Salter, Chair, Civil Resolution Tribunal. 11 October 2017.

¹¹ Case, Lucinda. "The Impact of ODR Technology on Dispute Resolution in the UK." Legal Solutions UK and Ireland Blog, Thomson Reuters, 2016.

¹² Some courts are stipulating that co-parents use the [OurFamilyWizard](#) website/app or similar tools.

¹³ Rule, Colin and Ethan Katsh. "What We Know and What We Need To Know About Online Dispute Resolution," *South Carolina Law Review* 67 S.C. L. Rev. 329. Winter 2016.

Access

ODR facilitates access for individuals with a variety of physical barriers:

- Poor health
- Limited mobility
- Physical or mental disabilities
- Caregiving responsibilities for children or the elderly
- Military deployment
- Relocation
- Work-related travel
- Distance to the courthouse
- Threat of domestic violence

While minor offenses or traffic violations may only require one court appearance, simply showing up can be costly, particularly for individuals in low-paying, hourly wage jobs. Landlord-tenant disputes and family court cases often require multiple trips to court, making the burden of appearing in court even greater.

Going to court can be nearly impossible for individuals who live at a significant distance from the jurisdiction of the dispute, making it almost impossible to enforce the terms of a divorce decree, resolve a traffic citation received while traveling through an area, or address the issue of a non-paying tenant. ODR allows parties in different locations or jurisdictions to resolve disputes without the cost and complexity of trying to meet at the same time in the same place.

While many courts are now utilizing videoconferencing to mitigate some of the impacts of geographic distances, that technology does not resolve the challenge of coordinating schedules so that all parties can participate simultaneously. An online solution can provide asynchronous communication so that individuals can resolve disputes when it is most convenient for them, whether or not the court is “open.”

ODR also removes much of the anxiety individuals may experience over appearing in person to address any issue, but particularly to address uncomfortable or threatening issues like outstanding warrants, overdue fees, tickets, immigration status, domestic violence, and other legal matters. It can help individuals in almost any circumstance engage with the justice system more conveniently, inexpensively, and simply.

Efficiency

ODR can often resolve disputes more quickly than traditional legal processes. An ODR platform may be accessed anytime, anywhere, and is not reliant upon the parties and the court or a mediator convening on a shared schedule, so disputes can be moved through the system more quickly. For example, the online traffic pleading system implemented in several Michigan district courts has reduced the time to resolution for disputed cases from months to days, though all parties still

"came to the table" — the offender, law enforcement, and the judge or magistrate.

While automation in and of itself can improve efficiency, courts should streamline and simplify processes as part of an ODR initiative. Off-loading repetitive, non-value-add tasks to technology can help courts better utilize their human resources. The combination of streamlining and automation will naturally reduce the need for some human administrative interventions, giving staff more time to focus on more complex cases.

Enforcement/collection

When the dispute in question involves fines or fees, the court may be responsible for enforcement and collection. An ODR solution can assist the adjudicator in understanding a defendant's ability to pay, set an appropriate payment schedule, provide automated payment reminders, and even be integrated with an online payment mechanism. More sophisticated ODR systems may incorporate Blockchain¹⁴ or similar technologies, providing automated enforcement. ODR can help litigants comply with judgements, reducing defaults. Faster resolution and disposition also mean courts and agencies receive funds more quickly.

Fairness

Individuals who use ODR are not identified by gender, race/ethnicity, religion, socio-economic status, age, or other characteristic irrelevant to the dispute that might be casually observed through in-person interactions. As such, ODR can help address some of the issues associated with explicit or implicit bias – an issue known to impact the fairness of outcomes. Technology does not discriminate, except against those who do not have access to technology. While actively embracing the many advantages of technology, courts must also ensure vulnerable populations have avenues of access and assistance.

ODR can also “level the playing field” in many kinds of disputes. Much of the unfairness in our current justice system is tied to whether a litigant has the financial means to retain legal counsel, take time away from work to go to court, and wait years for resolution to an issue. By automatically enforcing justice process time limits, ODR can prevent one party from stalling to delay resolution in an attempt to cause the other party inconvenience or financial difficulty.

Customer satisfaction

With a nod to customer satisfaction, courts sometimes use surveys to gather feedback from court users. However, follow-on surveys are not necessarily an accurate indicator of an individual's in-court experience. An ODR system provides a platform for gathering litigant satisfaction data throughout the process.

¹⁴ Distributed Ledger Technology originally developed for Bitcoin currency. Blockchain is a continuously growing list of records (“blocks”) that are linked and secured using cryptography.

While ODR can incorporate customer satisfaction surveys into the resolution process, elaborate surveys are not the best way to gauge user experience. Courts can benefit from knowing the answer to a single question: *Would you recommend this process to someone else?* Using a scale of 0 to 10, courts can compare detractors (those who answer 0-6) to promoters (scores of 9-10). Subtracting the percentage of detractors from the percentage of promoters yields a “net promoter score” (NPS).

In the private sector, companies track their NPS to gauge customer loyalty. While courts do not need “loyal” customers, they do need to know how satisfied parties are with court processes. Asking whether court clients would encourage others to use the process can help courts measure their progress. A free-form field that encourages individuals to explain their rating can provide valuable, actionable information.

Another measure of satisfaction may be compliance with case resolution/outcomes. Courts can compare compliance outcomes by collecting pre-ODR key performance indicators on the number of cases that return to the court because of non-compliance and comparing those against return cases post-launch of ODR, for a true A-B test. If judgments are paid through the system, compliance may be easier to quantify.

Simple “button rating” web tools including “thumbs up/thumbs down” indicators, like/dislike buttons, star ratings, etc. can be built into an ODR system, helping courts quantify and understand a variety of aspects of the user experience. In more sophisticated ODR implementations, analytics can assess the tone of text exchanges and re-route/escalate cases.

How long people stay in the ODR system can be an indicator of either success or failure. Courts should track and analyze the number of people that “bounce” off the site immediately, as well as those that see an issue through to resolution (including resolution before a formal case is filed) or start a process but fail to progress, which could signal a too-complex process. Using a website “heat map” or “click map,” courts can analyze where users are clicking (or failing to click) and make important adjustments.

With an established baseline¹⁵ for comparison, courts can set appropriate goals for the percentage of disputes resolved within certain timeframes and take corrective action when statistics point to problem areas in the process.

Integration Options

There is no single “correct” way to implement ODR. Court managers can use both flexibility and creativity to design ODR processes that stand alone, preface a court

¹⁵ See [CourTools.org](https://www.courttools.org) for suggested performance measures.

process, or are partially or fully integrated with the courts and their information systems. In some public-private partnerships, ODR can be a marketplace for legal and adjudication services.¹⁶ Private entities may offer ODR as an alternative to the courts. Ideally, ODR would not introduce a system “silo,” but would be implemented as part of a broader, court-wide plan.

Partial integration

An ODR system may rely on the case management system for certain information and integration of updated information. A case management system with limited options for integration was a challenge for Washtenaw County, Michigan’s 14A District Court. A nightly data exchange currently facilitates their ODR process. The court anticipates integrating the ODR module directly with a case management system in 2018.

Full Integration

In full integration, ODR is integrated seamlessly into the court’s processes and includes phases for notification of availability of ODR, problem self-diagnosis, negotiation, potential court review, adjudication, and recording of final settlements. This approach defines ODR not as an alternative to traditional court proceedings, but as a “high-tech upgrade” of existing court dispute processes. The 2016 HiiL Trend Report specifies full integration as the preferred method for ODR.

- British Columbia’s Civil Resolution Tribunal is a fully-integrated system.
- When implemented, Utah’s small claims court will be fully-integrated ODR.

Pretrial / Standalone

Some ODR implementations seek to help parties resolve a dispute instead of filing a legal action. In some instances, early triage and dispute resolution tools “front end” a formal judicial process.

- Franklin County, Ohio Municipal Court provides professional mediation services through ODR with the goal of helping parties resolve disputes without court proceedings. If parties are unable to agree, a party can proceed with formal action in the traditional court setting, but the information input into the ODR system is not captured and utilized to generate a formal case filing.¹⁷
- British Columbia’s Civil Resolution Tribunal front-ends the formal Tribunal process with a “Solution Explorer” that provides information, guidance, and self-help resources before users create profiles and launch a claim.

¹⁶ "ODR and the Courts: The Promise of 100% Access to Justice?" HiiL Trend Report IV (2016): HiiL, 2016. Web. 30 Nov. 2016.

¹⁷ For a look at the Franklin County Municipal Court ODR, see <https://www.courtinnovations.com/ohfcmc>.

To date, about 94% of users who started an “Exploration” ultimately resolved their issue without making a formal CRT claim. Unresolved cases are escalated to a higher level of negotiation and facilitation, and can ultimately be adjudicated by a Tribunal member through the online platform, if parties cannot come to agreement.

- The UK’s Claims Portal facilitates resolution and financial settlements in personal injury disputes and generates the paperwork required for filing a formal court action in instances where the claimant is not satisfied with the proposed settlement.

ODR as a marketplace for legal services

While ODR is often a competitor to traditional legal assistance, it can also be a platform to provide better, more understandable access to traditional legal services.

- The Dutch Rechtwijzer system helps users triage issues and select specific, unbundled services offered by public and private legal service providers that have been certified as qualified by the Legal Aid Board (Raad voor Rechtsbijstand).

Extra-judicial

Some ODR providers offer resolution services to the public without any direct connection to the courts. In this implementation, the ODR system is a substitute to the courts and settlements are not recorded with the court or generally enforceable actions.

- Individuals who have been injured in a car accident in New York first file a claim with the insurance company. If the insurance company either fails to respond promptly or denies the claim, consumers can utilize the ADR/New York No-Fault Insurance website to request and receive arbitration. Arbitration is one of several options available to consumers, including taking the insurance company to court.

Case types

The use of ODR is expanding rapidly in court settings, with dozens of implementations and pilot projects underway in the United States and abroad.¹⁸ The following are examples of case types being resolved through ODR.

¹⁸ A recent report by HiIL entitled *ODR and the Courts: The Promise of 100% Access to Justice* contains numerous examples of ODR in the international community. See <http://www.onlineresolution.com/hiil.pdf>.

Small claims

Small claims cases generally do not involve attorneys on either side, making these disputes an ideal entry point for ODR in a jurisdiction.

- Franklin County, Ohio is using ODR to resolve a variety of small claims case types, including City of Columbus tax cases.¹⁹ Defendants are invited to the free, online platform when they receive a summons and can opt to seek resolution a variety of ways. Litigants always have a right to their day in court even if they first use ODR to explore other options. ODR does not supplant the hearing, but instead serves as a supplementary process that may result in resolution. In many instances, it eliminates the need for traditional proceedings.
- British Columbia's Civil Resolution Tribunal started handling small claims cases up to CAN\$5,000 in June (2017). That threshold will increase gradually over time until the CRT becomes the dispute mechanism for all small claims cases up to CAN\$25,000.

Traffic and parking

Informal hearings and other proceedings where individuals contest small civil infractions or lesser misdemeanors can consume half or more of a limited-jurisdiction court's docket. ODR for such violations does not replace the option for an in-person hearing, but can complement it.

- More than 20 individual courts in Michigan are now using ODR to resolve a variety of traffic and civil infractions.

Property

Property disputes include landlord-tenant, tenant-tenant, tenant-homeowner's association, and others. They may center on issues of maintenance and repair, pets, misuse of property, non-payment of rent, eviction, etc.

- British Columbia's Residential Tenancy Branch uses ODR for landlord-tenant disputes. The website also includes tools to help users meet important deadlines (for example, the timeframe for a landlord to return a deposit) and calculators to help determine the fairness of a rent increase.

Shared-ownership communities like condominium and co-op properties may have specific regulations that impact the nature of disputes and how they are resolved.

¹⁹ More information on the Franklin County (Ohio) Municipal Court ODR program can be found at <https://www.courtinnovations.com/ohfcmc>.

- British Columbia’s online Civil Resolution Tribunal is the dispute resolution process for strata (condominium) disputes.

Tax assessment appeals

The process for appealing a tax assessment varies by jurisdiction, but generally requires an individual to prove the value of a home, car, boat, or other asset. Individuals submit photos, appraisals, documentation of recent sales of similar properties, and other information that could easily be provided digitally.

Integrating an ODR system with a dynamic mapping system gives filers the opportunity to identify properties they think bolster their case and review recent sales. The dynamic mapping system is more accurate than online real estate listing sites and gives the filer insight into the data the county is using to establish the property’s value. Helping taxpayers understand the true value of their property can help resolve some cases before they are actually filed.

- The Ohio Board of Tax Appeals (BTA) has been using ODR since late 2014. The system is convenient for taxpayers, agents, and attorneys, who can file an appeal online, access electronic case files, negotiate settlements, and take actions on cases. The system also improves the process for Ohio BTA staff, improving efficiency and service to citizens.

Family

Low-conflict, low-complexity family court cases are particularly well-suited to ODR because of the clear benefit to children and the parents who care for them. ODR can be used for uncontested divorces, many contested divorces, and some related matters like child support and parenting if parties have a basic willingness to negotiate and no history of domestic violence. A significant proportion of cases could potentially be resolved with minimal intervention or with no human intervention. Seriously contested cases may require significant human involvement, but may still be able to be resolved online in a synchronous mode.

Handling custody and child support matters from home is more convenient and less stressful for both parents and children. Online resources are also beneficial in some high-conflict situations, providing access to justice processes without requiring individuals to be in public spaces where security risks are greater.

- Michigan launched the MiChildSupport website in April of 2017, giving divorced parents access to a child support calculator that was previously only available to court staff. The site also facilitates child support payments as well as new applications for child support.
- MyLawBC can be used to help avoid foreclosure, make a separation (divorce) plan, create a will, prepare power of attorney, handle end of life healthcare choices, and assess risk and develop a personal safety plan in domestic abuse situations. The website combines self-help guided

pathways that users can access anonymously with contact information for lawyer referrals, notaries public, victim advocates, and pro bono legal aid.

- Ottawa County, Michigan’s Family Court Compliance ODR provides automated notifications, reminders, a secure communication mechanism for case managers and parents, and tools for managing “show cause” hearings. The system has reduced in-person hearings by 27% and arrest warrants by 36% in the first year.

Considerations

Courts must weigh a variety of legal, technical, practical, and ethical considerations as they evaluate the potential for ODR in their jurisdictions. Those considerations range from technology essentials (customizable off-the-shelf or in-house cloud-based products that meet the court’s requirements for integration and security) to implications to the court’s mandate to provide access to justice and procedural fairness. Considerations for courts include, but are not limited to, the following:

Business needs

Courts have business needs based on a host of business processes relating to records, calendars, and courtroom proceedings, as well as personnel, finances, technology, and facilities.²⁰ Courts will approach ODR differently based on their unique business challenges.

Reducing judicial caseloads or addressing budget cuts may be one court’s priority, while another court may be focused on improving access to justice for unserved and under-served segments of the community. Thankfully, the benefits of ODR are not exclusive to a specific challenge. ODR can simultaneously resolve multiple, unrelated issues. Stakeholder involvement is key to leveraging ODR to meet the broadest scope of business requirements.

Cost

Any technology initiative carries some direct cost, but many jurisdictions are finding those costs to be surprisingly low and manageable. In some instances, courts may opt to share the cost with users, partner agencies, and/or stakeholders. In others, ODR may be funded by stakeholders other than the court.²¹ ODR also provides opportunities for private/public partnerships.

Scope

A variety of factors will determine the scope of an ODR initiative. Courts must identify disputes to be handled through ODR, and whether ODR will be

²⁰ Steelman, David C. Court Business Process Enhancement Manual - An Aid to Process Improvement and Process Reengineering for Judges, Court Managers, And Court Information Technology Directors. Joint Technology Committee – Technology Reengineering Subcommittee. May 2003.

²¹ For example, the UK’s ClaimsPortal was funded by insurance company and legal provider stakeholders.

mandatory or optional. Some legal associations have proposed limiting certain ODR initiatives to self-represented litigants. If ODR will be utilized by both represented and self-represented litigants, courts must determine how to ensure there is not an imbalance of power. For example, if the plaintiff is a debt collector with representation, the system would need to ensure the defendant knows his/her rights and how the relevant burden of proof works.

Not all cases are suitable for online dispute resolution. For those that are not, certain processes or parts of the case might still be handled online. In situations where cases are too complex to be fully resolved online, ODR can offer valuable process improvements.

Privacy and security

Courts will need to thoughtfully define who owns ODR system data, how it will be protected, how it can be used, and how and where audit trails are maintained. Important considerations include the court's responsibility in maintaining records if peer-to-peer negotiation ensues in software provided or licensed by the court, information that should be private, and information that should be available to whom, when, and how. Courts are responsible for final agreements, judgments, and any officially filed documents as part of the court record. Negotiation and private communication between parties are not part of the court record, and therefore not retained and not discoverable.

Data

ODR is a digital process; data that drives the process can be captured and analyzed to refine and improve the process. Case resolution outcomes including time to reach agreement, compliance, and user satisfaction levels are benchmarks for which courts continue to be responsible.

Courts have not traditionally been data-driven organizations. It may be a culture shift for courts to intentionally publish data that could potentially expose inefficiencies, prejudices, or injustices. However, courts must be able to quantify success to make evidence-based decisions about processes and services. That will require courts to collect data about their processes, as well as their users. The High Performance Court Framework²² can help courts create administrative and managerial capacity to support a performance improvement quality cycle.

Transparency

Courts must determine how the system will help drive fair and transparent resolutions. Parties need to know how the process will work before they begin, who manages the process, who will have access to the data, and how much it will cost at each stage of the process. Processes and algorithms that impact

²² See Ostrom, Brian and Roger Hanson. *Achieving High Performance: A Framework for Courts*. National Center for State Courts, Research Division. April 2010.

decisions should be available for scrutiny. Some court ODR systems provide a public dashboard for querying prior decisions.²³

Digital divide

Concerns about limited technology access in certain populations have prompted some court leaders to justify delays in fully leveraging technology including ODR. However, studies confirm that Americans have almost universally adopted technology: 93% of Americans age 18-49 use the Internet.²⁴ US consumers rely on cloud-based offerings for an enormous variety of essential daily activities from shopping²⁵ and banking, to healthcare, education, dating, and more. Nearly half use mobile devices to access those resources.²⁶

Utilization varies somewhat by income, but even among the lowest income populations, Internet use nears 80%. The percentage of Americans using the Internet today is so high that researchers today specifically study Internet “non-adopters.” Conversely, justice advocacy groups estimate that only about 20% of low-income Americans can access the civil court system, and the statistics aren’t much better for other income brackets.²⁷ Ironically, this means that a much higher percentage of the population has access to information technology than has access to justice through the courts.

With the enormous potential for improving the public’s access to justice, courts may still forgo ODR options because not all sectors of the public have easy access to the Internet. Nearly 50% of adults with household income less than \$30,000 do not own a computer or have broadband Internet access at home²⁸. Broadband availability is still limited in some rural areas, as well.

Though the digital divide is real, it is shrinking. The proliferation of smartphones over the last few years has narrowed the divide significantly. Internet access is primarily an issue if websites can only be used from desktop or laptop computers. Pew Center research has identified a class of “smartphone-dependent” Internet users: those with “few options for online access other than their cell phone.”²⁹ As of November 2016, more than three quarters of U.S. adults

²³ For examples, see the ClaimsPortal [Executive Dashboard](#) or the Residential Tenancy Branch [Search Decisions](#).

²⁴ Anderson, Monica, and Andrew Perrin. “13% Of Americans Don’t Use the Internet. Who Are They?” *FactTank: News in the Numbers*, Pew Research Center, 7 Sept. 2016, www.pewresearch.org.

²⁵ Smith, Aaron, and Monica Anderson. “Online Shopping and Purchasing Preferences.” *Internet, Science & Tech*, Pew Research Center, 19 Dec. 2016, www.pewinternet.org

²⁶ [Mobile Fact Sheet](#).” *Internet and Technology*, Pew Research Center, 12 Jan. 2017, www.pewinternet.org/fact-sheet/mobile/.

²⁷ “Closing the Justice Gap.” *Brennan Center for Justice*, New York University School of Law, 28 Aug. 2017, www.brennancenter.org/.

²⁸ Anderson, Monica. “Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption.” *FactTank: News in the Numbers*, Pew Research Center, 22 Mar. 2017, www.pewresearch.org/fact-tank/2017/03/22/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.

²⁹ Smith, Aaron. “U.S. Smartphone Use in 2015.”

owned a smart phone, up from 46% in November of 2012. Smart phone ownership increased from 70% to 77% between May and November of 2016 alone.³⁰

In spite of access challenges, jurisdictions that have provided paper alternatives to online processes are finding that users are simply not interested.³¹ Individuals who do not have Internet access at home may have access through a family member or at a public library or local Wi-Fi hotspot at a fast food restaurant or store.

It may be that in the future public libraries, providing access to public computers, will become more central to dispute resolution than courts...³²

Librarians, social workers, teachers, and advocates for the homeless and victims of domestic violence are important stakeholder representatives in an ODR initiative. They may become the new professionals in ODR.

Definition of success

A successful ODR project should positively impact both outcomes and output. Measuring both is key to accurately assessing the impact. Simultaneously tracking ODR cases against traditional case processing would provide powerful comparisons in instances where ODR is an “opt in” process. To facilitate comparisons of public opinion before and after ODR in either an “opt out” or single-path process, courts must capture sufficient “pre-ODR” customer satisfaction statistics.

Courts must ensure their evaluation framework is not an artificial measure. A decrease in case filings may simply mean the claims process is too lengthy, complex, or costly, not that the need has been met or lessened. Quantifying the number of problems identified and resolved *before* they become cases is a better measure of success than the number of cases that complete an ODR-based process. Court managers may struggle to conceptualize a goal that improves outcomes for citizens but ultimately stops “short of the courthouse doors” by facilitating the resolution of issues *before* they become cases. As Shannon Salter, Chair of British Columbia’s Civil Resolution Tribunal (CRT), emphasizes, “Not ending up in CRT is success.”³³

³⁰ “[Mobile Fact Sheet.](#)” *Internet and Technology*, Pew Research Center, 12 Jan. 2017, www.pewinternet.org/fact-sheet/mobile/.

³¹ Anticipating a need for a non-technical alternative for populations with limited access to technology, British Columbia’s CRT created a parallel paper forms process. However, only 20 paper applications were filed in 2016. For January-November of 2017, the number was 13.

³² Menkel-Meadow, Carrie. “Hybrid and Mixed Dispute Resolution Processes: Integrities of Process Pluralism.” *Comparative Dispute Resolution Research Handbook*. Edward Elgar Publishing. Forthcoming in 2018.

³³ Salter, Shannon. “Joint Technology Committee - ODR Focus Group Meeting.” 15 Aug. 2017, Vancouver, British Columbia.

Courts must also find ways to assess the public’s experience with ODR – whether it facilitated access that otherwise would not have been possible, made the process more understandable, reduced stress, etc. Measures of success traditionally fall into one or more of three categories – legal outcomes, procedural satisfaction, or expanded access. Relevant measures of success in these areas will be different for court clients and partner agencies.

Legal outcomes

Measures of the effectiveness of ODR on legal outcomes include time to disposition, cost per case to both litigants and courts, settlement rates, default rates, and both financial and non-financial impacts on clients and communities.³⁴ ODR can also improve court outputs, increasing the volume of cases resolved and decreasing case backlogs.

Some ODR initiatives are showing dramatic results in reducing the time to resolution and resulting costs for courts while simultaneously improving results for both court clients and partner agencies. In Washtenaw County, Michigan 14A District Court, the number of days to case closure dropped by 65% for cases resolved using ODR, while the default rate on fines dropped from approximately 22% to less than 1% for cases handled through ODR.³⁵

Off-loading some portion of straight-forward cases to automated processes can also free up personnel to provide greater personal assistance in more complex cases. After implementing ODR, Washtenaw County 14A District Court also experienced a significant decrease in the number of days to case closure for cases handled through traditional processes.

Procedural satisfaction

Citizens have high expectations of courts, and their satisfaction with court procedures impacts their perception of the court’s legitimacy as well as their willingness to accept legal outcomes.³⁶ Valid measures of procedural satisfaction can include whether individuals felt they were treated respectfully, felt heard, understood the instructions and implications of the process, believed the process was fair and impartial, and whether the technology worked well.

³⁴ For more information about measuring success in legal outcomes, see *CourTools – Trial Court Performance Measures – Measure 1: Access and Fairness*.

³⁵ In presentation by Robert Ciolek, Court Administrator for Washtenaw County’s 14A District Court at Court Technology Conference 2017, Salt Lake City, Utah. 12 September 2017.

³⁶ Burke, Kevin, and Steve Leben. “*Procedural Fairness: A Key Ingredient in Public Satisfaction.*” *Court Review*. American Judges Association. 2007.

Expanded access

ODR can expand access by helping eliminate a wide variety of obstacles that prevent individuals from understanding and exercising their rights.³⁷ Financial barriers are an obvious challenge, but access issues also include physical barriers as well as barriers of language and literacy. People with family responsibilities, work-travel requirements, limited mobility, health issues, challenges related to language or literacy, immigration status, those who live in remote areas, and members of the armed forces who are deployed can engage with the justice system more conveniently, inexpensively, and simply through ODR.

Accessibility issues also include the high cost of traditional litigation, a barrier that even free or reduced-cost legal aid cannot address. Over and above attorney fees, courts must consider all costs that impact litigants: filing fees, lost wages from missing work for court hearings, transportation costs, child care expenses, and other direct costs to litigants or their families.

Because ODR seeks to resolve issues before they become formal cases, it can be challenging to find an appropriate basis for comparison. Case volumes may increase or decrease because of the deployment of these tools. Increased volume could indicate more people are accessing redress. Fewer case filings also indicate increased access to dispute resolution processes. The efficiency of the tools should make dealing with any increased volume less time consuming than dealing with the old volume.

ODR Maturity

A variety of factors influence a court's readiness to undertake an ODR initiative. Some factors will be outside the court's control. Awareness of where obstacles lie can help court managers enhance and leverage strengths, finding pathways where progress is possible.

The following table captures some of the strengths of courts succeeding with ODR, and identifies some of the characteristics that have created challenges and caused setbacks. Enthusiastic, dynamic leadership seems to be a key element that has helped some courts succeed in spite of obvious challenges or gaps in foundational preparations. A visionary leader can positively influence court culture and work collaboratively to establish practices that improve processes and the potential for success with ODR.

³⁷ "About the Office." *Justice.gov*, The United States Department of Justice, 8 Aug. 2017, www.justice.gov/atj/about-office.

	Stakeholders and Partners	Leadership and Governance	Culture	Statutes and Rules	Processes	Technology	Funding
Strengths to leverage	<p>Public engaged in process development and improvement.</p> <p>Established partnerships.</p> <p>Contract and relationship management expertise.</p> <p>Flexible procurement and partnering strategies.</p> <p>Collaborative relationship with local Bar association.</p>	<p>Lead by strong champions with decision-making authority.</p> <p>Cross-functional support.</p> <p>Energized, visionary, tech-savvy.</p> <p>Collaborative.</p> <p>Includes succession plan.</p> <p>Sustainability.</p>	<p>Customer-focused.</p> <p>Open.</p> <p>Innovative.</p> <p>Accepting of failures in the pursuit of improvement.</p>	<p>Flexibility in piloting new approaches.</p>	<p>Evidence-based practices.</p> <p>Impacts analyzed rigorously and regularly using accurate, relevant metrics; processes continually refined.</p>	<p>High level of digital agility; incorporates new technologies quickly.</p> <p>Uses technology effectively to enhance operational effectiveness and deliver better, more cost-effective services.</p> <p>High expectation for access to online processes.</p>	<p>Sustainable revenue streams.</p>
Potential barriers	<p>Resistant to or suspicious of partnering.</p> <p>Unwilling to utilize commercial options.</p> <p>Agency silos.</p> <p>Political rivalries.</p> <p>“We know what the public wants.”</p> <p>Adversarial relationship with local Bar Association.</p>	<p>No clear leader, or leader who lacks authority to act.</p> <p>No succession plan.</p>	<p>Court-centric focus.</p> <p>Suspicious.</p> <p>Defensive.</p> <p>Risk averse.</p> <p>Silo mentality.</p>	<p>Known obstacles with limited options for addressing them.</p>	<p>Complex, manual processes that have changed little over the years.</p> <p>Policy, process, or technology barriers to collecting and analyzing data.</p>	<p>Limited use of technology.</p> <p>Suspicious of or actively opposes use of technology.</p> <p>Digital divide.</p>	<p>No funding.</p> <p>No flexibility to adjust utilization of current budget.</p>

While technology is often perceived as the most daunting aspect of an ODR project, human factors can have a far more significant impact. Subtle (or dramatic) differences in Stakeholders and Partners or Leadership and Governance can have a significant impact on the success or failure of an ODR attempt. Taken together, these factors influence the court's Culture.

Stakeholders and Partners

Stakeholder interests in ODR vary widely. The measure of success for some stakeholders in an ODR initiative may be to make it safer for domestic violence victims to deal with court processes, while for other stakeholders, it may be to reduce costs or keep their own jobs from changing. In spite of the range of potential motivations and perspectives, buy-in from all stakeholder groups is important.

The Public

Historically, courts have shown limited interest in changing court processes to make them easier for individuals to navigate. Courts aren't actually asking litigants what they want, either. Almost all studies to date of how people perceive and evaluate justice procedures consist of "laboratory studies of laypeople (typically undergraduate research participants) who evaluate options for resolving hypothetical disputes."³⁸ Contrast that with the prevalence of usability testing and user experience (UX) design in almost every other industry.

The public will likely be the most enthusiastic stakeholder group. Making some court functions available online ultimately provides better access to a much larger portion of society. Courts are recognizing that ODR could be hugely beneficial to their jurisdictions and the people they serve.

Staff

Organizations with well-designed ODR pathways will have much less need for staff to assist the public in navigating court process. As processes are streamlined and digitized, some court functions will naturally shift to other parts of the organization, or may go away. While the number of staff needed in some roles will diminish, the number in other roles will increase. Any diminishing of the need for current staff skills may generate resistance. Ideally, ODR initiatives will free up staff to provide more "value-add" assistance.

Highly skilled staff will be needed to leverage technology to communicate complex legal information and ideas in understandable, useable ways. While the total number of clerks decreased following Utah's digitization efforts,

³⁸ Shestowsky, Donna. "The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante." *Iowa Law Review*, vol. 99, no. 2, ser. 637, Jan. 2014.

clerks in Utah’s paperless courts today are more educated and capable, and are better-paid than their non-digital predecessors.³⁹ To fully benefit from process improvements, Courts will need to find innovative ways to help existing staff transition into new roles, while recruiting to fill gaps.

Courts that are behind the technology curve may be further delayed by technology-resistant incumbents who have held key roles for decades. The skillsets required to stamp and file documents are not the skills and mindset required to re-engineer processes and use technology to assess issues, provide pathways to resolution, and serve up focused, useful, actionable information. Courts will need Facilitators, Knowledge Engineers, Content Specialists, and Developers. Staff capabilities required for ODR include the following:

- Creativity
- Cultural sensitivity
- UX (user experience) design
- Ability to use technology to gather, analyze, and share information
- A laser-like focus on customer service and continuous improvement
- Ability to distill complex information to a basic reading level

ODR may also necessitate the creation of new, more flexible staff positions. Court staff that support a 24/7 ODR process may be able to do their jobs remotely and on a much more flexible work schedule. British Columbia’s Civil Resolution Tribunal operates in a small facility “footprint,” with 65-70% of its employees working from home most or all of the time. These positions offer flexibility that has drawn an extremely well-qualified cadre of staff. Recruiting is easier, turnover is low, and job satisfaction is high.

Highly qualified individuals who want or need to work non-traditional hours may be willing to accept less competitive wages in exchange for flexibility. In courts where compensation is under-market, this can be a significant benefit to both the court and its employees. Flex-time roles can prove to be a notable hiring advantage and can also reduce some court costs associated with physical facilities. Employees working from home don’t need parking spots or desks, or to clear security checkpoints.

There may be special considerations for states where court staff are unionized. Building and maintaining strong working relationships with union representatives is key. In some instances, it may be necessary to build a distinctly different (potentially parallel) process to facilitate the adoption of ODR without violating fair labor practices.

³⁹ Bergal, Jenni. “[Courts Plunge into the Digital Age.](#)” *Digital Courthouses Go Paperless*, Pew Charitable Trusts, 8 Dec. 2014.

An additional consideration is that ODR could potentially indirectly reduce individual incomes. For example, in jurisdictions where law enforcement officers receive overtime pay to attend court, ODR would ideally eliminate some of the need for in-person court appearances, thus reducing that agency's costs for overtime pay, but also limiting officers' potential income. In markets where compensation is not competitive with surrounding industries, this may be an emotional issue. Ultimately, this should be addressed as a compensation issue, not an ODR issue.

The Bar

Legal scholars have long recognized the potential for ODR to reduce the need for some traditional legal services. Conversely, ODR may also bring new opportunities for lawyers, especially in states that adopt limited scope representation (unbundling) rules.

Resistance by the Bar may well be a contributor in the courts' historically tepid response to ODR. As budget constraints, consumer expectations, and modernization efforts drive courts to develop and deploy ODR, citizens will be empowered to resolve some legal issues without the assistance of legal counsel. Courts should not be surprised by Bar efforts to protect the livelihoods of their lawyers. However, this should not influence the course of ODR efforts.

For lawyers and public servants whose careers are in the courts, ODR may well be regarded as threatening. This should not deter us from evolving techniques that better meet the needs of Internet-based societies. It is not the purpose of the courts to provide lawyers with a livelihood.⁴⁰

Courts may intentionally begin by implementing ODR to address conflicts like small dollar consumer complaints or misdemeanor traffic violations that don't generally involve lawyers, thus avoiding resistance that could delay or derail a project. As courts become more familiar with and skilled in ODR, they will be better prepared to take on more complex legal processes like divorce and higher value claims, and the resistance to those initiatives may generate in the legal community.

Partner Agencies

When courts collect fines and fees on behalf of other agencies, ODR can facilitate faster collection and decrease the likelihood that a party defaults. In those situations, partner agencies are likely to enthusiastically support the use of ODR. However, ODR may inadvertently undercut an agency's revenue stream. If ODR is available pre-filing, disputes may be resolved at that stage;

⁴⁰ Suskind, Richard. Foreword to "[Online Dispute Resolution: Theory and Practice](#)." Eleven International Publishing, The Hague, Netherlands, n.d.

the court would not realize either revenues or expenses associated with case filing and other civil process fees. Courts should factor in a broader macro analysis to consider the long-term economic benefits to litigants and the community, with these benefits potentially offsetting loss of fee revenue to stakeholder agencies.⁴¹

Leadership and Governance

Jurisdictions that are succeeding with ODR initiatives point to a strong champion leading the effort. That leader must not only be capable and well-respected, but also authorized to act. This is particularly important within the judiciary.

In the Michigan initiative, a Michigan Supreme Court Justice encouraged and facilitated conversations between the vendor and the courts. The justice recognized the potential for ODR technology and supported the initiative. County court IT staff report the justice's leadership and approach were key to their project's ultimate success. The opportunity was offered, not required, and the first court that was approached declined to participate. Today, more than 20 Michigan courts have implemented ODR for a variety of case types including traffic, parking, warrants, past due fines, and family court compliance.

Good governance can smooth the pathway to success with an ODR initiative. Poor or nonexistent governance will make the path more complicated and difficult, and in extreme instances, ensure that the project fails and the status quo prevails. When multiple departments, functional areas, and partner agencies consistently work together to ensure the effective use of information technology to further the organization's goals, governance is functioning well.

In the absence of effective governance, visionary leadership may be sufficient to launch and sustain an ODR initiative of limited scope. As those initiatives begin to succeed, momentum will build and may be a catalyst for more effective governance. Succession planning should include developing capacity within the organization to maintain momentum if/when key individuals retire, are reassigned, or leave the organization.

Culture

The people who serve, staff, and use the courts are all part of the Court's culture. That culture is one of the most significant factors influencing the potential for ODR in a jurisdiction. Innovations linked to ODR can touch on virtually any aspect of a court's processes – and in fact, should influence and change many of those processes. Some courts that are succeeding with ODR demonstrate a

⁴¹ For example, see the [economic impact study of the Phoenix Muni CAP program](#), which stands as a model for this kind of larger, more far-reaching perspective.

culture of collaboration, innovation, and empowerment. ODR appears to bring increased energy and enthusiasm to their organizations.⁴²

Collaboration Courts are notorious for functioning in “silos” of information and activity. To succeed with ODR, courts must foster collaboration among departments, agencies, and other branches of government. An interdisciplinary approach to process development will ensure ODR benefits all stakeholders. A brief, daily huddle meeting or “scrum” can facilitate effective information sharing and “Plan-Do-Check-Act” improvement efforts.

Innovation Fear of failure stifles creativity and limits the potential for real innovation. Waterfall-style project management, procurement, and development are common in government organizations including courts, but will not facilitate the kind of iterative, “fail fast and learn” adjustments required to rapidly change and fine-tune processes and systems. In contrast, Agile development is cyclical: Prototype. User Test. Adjust. Implement. Repeat.

Empowerment Innovation thrives on individual initiative and occurs more naturally in “flatter” organizations than in hierarchal and rule-based organizations. Ideally, the power to act should reside as close as possible to those who “live” the processes. Court staff must be encouraged to identify bottlenecks and shortcomings in the processes they administer, and be empowered to make adjustments. Employee-initiated recommendations for process improvements should be regularly evaluated, and as appropriate, implemented.

Statutes and Rules

Rules and statutes that inadvertently constrain the use of technology may need to be updated, but technology-specific statutes and rules should not be too prescriptive. Narrowly written rules will likely have to be revisited repeatedly as technologies evolve, de facto “standards” emerge and are replaced. For example, courts might specify that electronic files be submitted in a lossless format instead of specifying *which* lossless format.⁴³

⁴² Personal observations of this paper’s editor. Individuals representing organizations involved in the development of this paper have generously and enthusiastically shared both knowledge of and passion for ODR. There is a growing ODR community where those who are involved with ODR mentor and encourage others undertaking similar efforts.

⁴³ File format was one factor leading to a sanction in a 2013 patent infringement lawsuit in Maryland. See Austin, Doug. “[Court Rules Production Must Be TIFFs with Bates Numbers – EDiscovery Case Law.](#)” *EDiscovery Daily Blog*, Cloudnine, 12 Mar. 2013.

Traditional court processes also include built-in delays meant to accommodate the exchange of paper documents via mail (or historically, by rider on horseback). While mandated delays no longer make sense in some court processes, they remain codified in court rules and statutes. Changes may be required. As part of their digital transformation, Utah's Judicial Council adopted a rule change mandating electronic case filing starting in 2013.⁴⁴ Washington state adopted rules as far back as 2004 to ensure that "[u]se of technology in the justice system . . . serve[s] to promote equal access to justice and to promote the opportunity for equal participation in the justice system for all."⁴⁵

Changes to statutes and rules are likely to come more quickly with the advocacy of a well-respected project champion. Even so, rule and statute changes are often multi-year initiatives. In situations where ODR cannot be implemented due to existing rules and statutes, it may be possible to begin implementation using waivers or other temporary mechanisms. In the spirit of "It's better to ask forgiveness than wait for permission," one approach may be to assume anything is permitted that is not expressly prohibited. Courts may also utilize temporary rules and procedures adopted specifically for a pilot project, with an evaluation component to determine the potential for permanent changes.

Processes

Courts are not known for simplicity and efficiency. Worse still, many court processes are traditionally adversarial, facilitating or escalating conflicts.

The procedure at courts tends to turn disagreements into a positional battle, enhancing conflict rather than contributing to solutions. This adversarial procedure may still be a superior method for fact-finding in murder cases or large-scale product liability matters. It certainly is a costly one.⁴⁶

The ODR perspective can be valuable in process re-engineering. Traditional court processes hinge on location and schedule, with a judge as the ultimate destination and highly skilled, highly compensated counsel to assist all along the way. ODR decouples the process from the courthouse, schedule, judge, and lawyer, reducing the number and complexity of steps to resolution. Adjudication is the last step of a traditional dispute resolution process; with ODR, it is the last failure.

⁴⁴ Bergal, Jenni. "Courts Plunge into the Digital Age." *Digital Courthouses Go Paperless*, Pew Charitable Trusts, 8 Dec. 2014.

⁴⁵ Zorza, Richard, and Donald J. Horowitz. "The Washington State Access to Justice Technology Principles: A Perspective for Justice System Professionals." *Library ECollection*, National Center for State Courts, 28 Sept. 2006.

⁴⁶ Barendrecht, Maurits, Jin Ho Verdonschot, Frances Singleton-Clift, Jamie Poeteray, Gintare Petreikyte, and Filippa Braarud. "ODR and the Courts: The Promise of 100% Access to Justice? Online Dispute Resolution 2016." *HiiL Trend Report IV*, The Hague, Netherlands, 2016.

Court personnel must be able to envision a different process for accomplishing the court's purposes, and be empowered to make meaningful changes. Court personnel must also become converted to the concept of continual improvement. Process re-engineering is never "done." Sophisticated ODR implementations leverage data from actions and outcomes to continuously improve processes. Court managers currently involved in ODR advise courts not to undertake an ODR initiative until they are prepared to change fundamental court business practices.

Technology

By definition, ODR is an online process; technology is at the core. The 2015 report "Reforming Our Justice System: A Report on Progress and Promise"⁴⁷ lends both legitimacy and urgency to court technology initiatives, including ODR:

Technology can reform civil justice precisely because it is, almost by definition, efficient, affordable and accessible. Its use should be universal.

While most courts are utilizing technology in a variety of ways, true transformational changes have yet to be realized. ODR offers efficiency, affordability, accessibility, and more. Even so, courts do not need to be at the forefront of technology to implement ODR. If a court's case management system cannot support integration, for example, a separate automated process might be developed to facilitate the necessary transfer of data.

Whether the court develops a solution in-house, selects and customizes an off-the-shelf solution, or hires a firm to build custom software, courts must factor in capacity for support over the lifetime of the solution and ensure the platform can ultimately integrate with the court's case management system or other technologies and applications. It should also be flexible so it can address existing rules, processes, and workflows, as well as be easily adapted to address any changes. Avoid platforms with limited configurability and costly customization.

Analytics from some existing ODR solutions reveal that system users are heavily mobile-dependent and likely to access ODR via smartphones. Mobile-dependent populations may also have limited literacy – a skill essential to utilizing an ODR system no matter where the individual accesses the Internet. Courts should ensure that ODR web content is mobile-optimized and user friendly. Software must adjust to the platform from which it is accessed (laptop, tablet, smartphone, etc.) and go through rigorous user testing.

⁴⁷ [Reforming Our Civil Justice System: A Report on Progress & Promise](#). American College of Trial Lawyers Task Force on Discovery and Civil Justice and IAALS. April 2015

Funding

Budget is an important and complex aspect of ODR readiness. One of the major downfalls of the groundbreaking Rechtwijzer 2.0 divorce website in the Netherlands was the failure of the project to transition successfully from start-up funding to self-sustaining revenues⁴⁸.

Additional financial resources are helpful but may not be essential to a technology initiative like ODR. With clear goals, carefully planning, and intentional spending, courts may be able to make transformational changes within existing budgets. Washtenaw County, Michigan's 14A District Court absorbs the ODR vendor's per-transaction fee and does not currently pass that cost along to partner agencies or the public.

Court budgets may be impacted by the political climate, global economy, crime rate, and overall case filings. A budget shortfall is an opportunity to re-imagine court services. Rather than react to budget reductions by implementing short-term spending cuts, Utah's Judicial Council elected to change the way the courts do business and to organize its operation around the optimal use of available funding.⁴⁹ Utah's AOC made the conversion to digital using existing IT funding. The new paperless court requires fewer staff, which helps the AOC deliver better service at a lower overall cost. Utah is expanding on their recession-driven digital foundation to launch ODR, having already conquered issues tied to wet signatures and hardcopy documents.

In the United Kingdom, the prospect of a 40% reduction in funding prompted a thorough and thoughtful analysis of the utilization of court facilities and services. That analysis led to the closure and sale of 140 under-utilized court facilities in 2011, with another 86 scheduled for sale in 2016-2017. Funds generated by the sale of physical structures are earmarked for judicial modernization, including ODR.⁵⁰

While there are costs associated with any technology initiative, there are also costs associated with doing nothing. Courts cannot maintain their current scale of operation with diminishing funding, or address an increasing scale with current funding. Instead of framing an ODR initiative in terms of cost, one approach is to focus on savings. In any cost/benefit analysis, include the value proposition for citizens. Ensure the numbers make sense. Resources should be allocated in proportion to the issues ODR is meant to address. Apply ODR first to the court's highest volume case types.

⁴⁸ Smith, Roger. "Classical Lessons from the Rechtwijzer: a Conversation with Professor Barendrecht." *Law, Technology and Access to Justice*, Legal Education Foundation, 22 June 2017.

⁴⁹ Suskin, Lee. "A Case Study: Reengineering Utah's Courts Through the Lens of the Principles For Judicial Administration." *NCSC.org*, National Center for State Courts, 27 Feb. 2012.

⁵⁰ Bowcott, Owen. "Ministry of Justice to Close 86 Courts in England and Wales." *The Guardian*, Guardian News and Media, 11 Feb. 2016.

Grants or one-time funding can help launch a project, but ongoing revenue streams and/or cost savings are essential to long-term success. Scalable funding can ensure an ODR program's long-term viability. An increasing interest in the program would simultaneously provide an increase in revenues to sustain it. Per transaction/filing fees for ODR should be lower than the costs of traditional "in person" transactions.

Recommendations

As with any technology project, basic best practices in project management and technology utilization apply. There are additional best practices unique to ODR that warrant discussion. The following recommendations come from court personnel who have "lived" an ODR implementation.

Focus on the public.

Public opinion polls and academic studies demonstrate clearly that the public wants courts to use technology to make court processes not only more efficient, but more understandable, fair, and accessible.⁵¹ An ODR initiative must begin with a commitment to view the court experience from the public's perspective. No matter whether the litigant is an adoptee, soon-to-be divorcé, victim, witness, or someone accused of major or minor wrong-doing, courts today are inconvenient, confusing, and stressful places.

Technology can deliver information in ways that will address the needs of the range of potential users. For example, to assist those with limited literacy or language barriers, information can be provided simply and clearly through multiple media: audio, video, and images, as well as text.

ODR is, by definition, a customer-facing application of technology. Resolving disputes involves court processes and personnel who are peripheral to the dispute. It may be a significant culture shift for court personnel to focus primarily on court clients and their needs and preferences.

Involve users in design and testing.

Court customers will experience some benefits from having online access to any court dispute resolution process. However, to glean the greatest benefit, ODR should be co-designed and rigorously user-tested by the public it seeks to serve. Courts must involve the public as key stakeholder participants. In a social media-driven economy, well-designed, user-friendly websites and apps are their own best advertisement.

⁵¹ For example, see the 2016 *The State of State Courts*, NCSC's annual public opinion survey.

- Public-facing information systems need more than token public input. Involve advocates for the indigent, domestic abuse victims, the elderly, and representatives from multi-cultural organizations.
- Prototyping and multiple rounds of testing with the public are essential. Consider A/B testing to simultaneously compare two different versions of the same process.
- Test with individuals representing all potential audiences. Reach out to those populations through social media and classified advertisement websites like Craigslist.
- Lawyers and court staff are not good proxy for the public.

Start with problem triage / self-help tools.

The purpose of ODR is to resolve conflicts, not move cases through a system. Providing sophisticated diagnostic tools to help users triage and resolve their own issues is beneficial to both courts and the public. Encourage parties to explore resolution options before creating a case. Increasing disputes resolved prior to case filing will reduce the number of cases filed and may artificially skew case processing statistics.

Make ODR an “opt out” process; limit scenarios for opting out.

To effectively neutralize power imbalances inherent in some traditional dispute resolution processes like divorce and small claims, ODR must be *the* process, not an alternative to a process. “Opt in” ODR assumes all parties are reasonably interested in a just resolution. If that were actually the case, there would be little need for the justice system. “Opt out” ODR provides a mechanism for dealing with exceptional situations. In the words of one ODR pioneer, “If you want to doom your ODR pilot, make it ‘opt in.’ ”

When both parties are required to participate in an ODR process, it is much less likely that one party can use the justice system to harass. Courts can also use ODR technologies in creative ways to empower unrepresented and underrepresented groups. This may be the single most important “best practice” in ODR.

- For less conflictual processes like pleading a traffic ticket, “Opt in” processes are adequate as long as all parties eligible to use the process are directed to it. The differences between ODR and traditional options should be clearly and succinctly identified.
- Court websites with multiple pathways for problem resolution can undermine ODR efforts. Use Google and other search mechanisms to locate and view your court’s web resources (all of them – not just ODR) from the user perspective.

- Reduce text “clutter” to ensure users see essential information.

Provide escalation and/or enforcement mechanisms.

Many times, parties will comply with ODR-generated agreements without any further encouragement or enforcement. For less congenial situations, there must be the option of an enforcement mechanism to encourage parties to come to agreement and then adhere to it. The enforcement mechanism would ideally take a different form than the original path.

Offer “live” help.

By design, ODR should channel capable parties to online resources that effectively facilitate dispute resolution. At the same time, ODR systems should offer assistance using a variety of technical and non-technical methods, including some form of “live” help to meet the needs of those with disabilities, language barriers, technology access issues, or truly unique cases.

- Assistance can be provided via email, chat, phone, or in person.
- Well-designed ODR should not generate a steady stream of requests for help. A high percentage of users accessing live help indicates a problem with the system or process (not the users).
- Observing where and why users access live assistance is key to iterative improvement in both the process and the technology used to administer it.
- ODR users should be able to successfully resolve targeted high-volume case types without assistance, freeing up clerk resources to focus on the small percentage of users with unique needs.
- Contact links should not be “buried” to discourage utilization.

Limit complexity for the first project.

Limit complexity in the first ODR initiative, then leverage the knowledge gained in that effort, tackling more complicated processes/case types. Experiment on a case type with a growing backlog, or one that is primarily transactional – like traffic citations.

Forget the forms.

Court personnel and lawyers may think about disputes in terms of which court and which form, but the court’s customers will not. Use decision trees and Google-like machine learning to anticipate questions and lead users to the correct path. Gather information about the dispute as individuals progress through decision trees. ODR can land the dispute in the correct court on the right “form” (if forms are still required) using automation.

Create calculators.

Calculators can help individuals diagnose issues and determine what, if any, action they should take. Personal injury and tax assessment appeal calculators can help a potential litigant be realistic about possible resolutions and costs for pursuing those resolutions. The first step in Ohio's Board of Tax Appeals ODR process is a calculator called "Is it worth appealing?"⁵² Child support calculators can help partners determine budget and tax implications based on their income and circumstances, helping set appropriate expectations and potentially reducing conflict. Understanding how the support amount will be determined can help reduce conflict.⁵³ Michigan's [MiChildSupport](https://micase.state.mi.us/)⁵⁴ includes a child support calculator. Adjudicators can also benefit from calculators to help assess a defendant's ability to pay fines/fees to more fairly assign income-appropriate financial penalties.

Keep it *really* simple.

The more complex a process, the higher the likelihood that individuals will fail to complete it. Court process experts recommend that processes be limited to no more than six or seven steps that can be completed in a relatively short period of time. The proscribed time-period will vary by case type, jurisdiction, and other circumstances, but individual courts should set a "visionary" standard and strive to meet it.

- Eliminate any redundancy in information-gathering steps.
- Don't ask for the same information twice.
- Don't require information that is not essential to the problem resolution process.

Use an Agile development process.

ODR is best implemented using Agile or iterative development cycles. What is initially released can be delivered more quickly, but will not include all the features intended over the long term. Each iterative release may enhance functionality and/or the interface to better meet user needs. Users are involved throughout the process and will likely experience some aspect of the system that does not immediately meet their needs or expectations.

Manage expectations.

Adjustments to the user interface are an indication the court is listening and responding to user feedback, not that the system was poorly designed. Public

⁵² See the Ohio Board of Tax Appeals website at <https://ohio-bta.modria.com/resources/ohio-bta-diagnosis/strongcase.html>

⁵³ Reducing Conflict Over Child Support, Ohio State University. <https://ohioline.osu.edu/factsheet/FLM-FS-12-99-R10>

⁵⁴ See State of Michigan Department of Health and Human Services MiChildSupport at <https://micase.state.mi.us/>.

relations and change management efforts can help ensure court managers, system users, and the public all have appropriate expectations.

Implement in phases.

A phased implementation has obvious benefits for technology development, allowing the implementation team to learn from and respond to any issues that arise from a pilot before rolling out to a broader audience. But an even more important benefit to this approach is that a small and successful implementation builds positive momentum. Awareness and acceptance in the stakeholder community can reduce or eliminate resistance based on unfamiliarity.

British Columbia's Civil Resolution Tribunal launched its strata (condominium) dispute resolution process in 2016. One year later, the Tribunal assumed jurisdiction of small claims up to \$5,000. Built in to the original legislation is a slow and steady increase in the monetary threshold of claims the Tribunal will handle. Over time, the Tribunal will become the mandatory forum for claims up to \$25,000.

Consider flextime and/or offsite staff roles.

One of the major advantages of ODR for users is its anytime/anywhere Internet presence. This can be a benefit for courts, as well. Because ODR is not a 9-5 "storefront," it will require a different staffing model. Some personnel may need to work non-traditional hours; some may work from home or satellite locations.

- Working non-traditional hours and in non-traditional settings can help staff better understand and serve ODR clients, many of whom will be accessing the system in non-traditional hours and settings.
- Court organizations doing ODR are finding it a competitive hiring advantage to offer flex-time/off-site work, coupled with government employment benefits and the opportunity to make a difference.

Empower staff.

In addition to the potential need to adapt to flexible work hours and remote workers, courts must make a fundamental shift in management expectations. ODR facilitators can help identify and resolve process bottlenecks if court managers "unbind" them from archaic rules and cumbersome hierarchy.

...it's important to remember that best practice is, by definition, past practice. Using best practices is common, and often appropriate, in simple contexts. Difficulties arise, however, if staff members are discouraged from bucking the process even when it's not working anymore. Since

hindsight no longer leads to foresight after a shift in context, a corresponding change in management style may be called for.⁵⁵

Leverage Contract/Vendor Relationships

“Build or buy” is a common conversation in both public and private sector technology initiatives. In most instances, buying a customizable off-the-shelf (COTS) product is a better business decision than building from scratch. A host of issues are associated with internal “one off” development efforts including documentation, user training, and resources for ongoing development and long-term support.

Court managers can leverage contract management and vendor relationship skills to effectively manage court technology projects, including ODR. The market for COTS software is robust and competitive, making high quality software accessible to organizations with limited technology expertise. Strategically outsourcing labor can augment gaps in staff skill-sets.

Measure success.

Courts that are regularly measuring performance can incorporate additional metrics to capture ODR processes and customer opinions. Courts that are not already measuring can begin with CourTools or similar performance measures. Table 1 – Outcomes and Measures/Data Sources provides sample outcomes, suggested data sources, and methods of displaying data.

⁵⁵ Snowden, David J., and Mary E. Boone. “A Leader's Framework for Decision Making.” *Harvard Business Review*, Harvard Business School Publishing Corporation, 7 Dec. 2015, hbr.org/2007/11/a-leaders-framework-for-decision-making.

Table 1 – Sample of Desired Outcomes and Measures/Data Sources

Desired Outcomes	Measure/data source	Expressed as
ODR helps people who could not otherwise get to court.	Online survey at the conclusion of the ODR experience, question with binary (yes/no) or scaled responses.	Of all people who used ODR, X% said they would not have been able to come to court in person.
ODR helped close cases faster.	Days to case closure for case type X from filing date to disposition through ODR compared to traditional process.	Number of days from filing to disposition in ODR versus traditional process.
Fewer people default or fail to comply with a judgment when they resolve their matter through ODR.	Disposition, status, issuance of FTC warrants, or other fields that would indicate non-compliance.	Percentage of cases with a disposition of default that used ODR versus cases that did not use ODR.
ODR cuts judicial and staff time spent processing routine cases.	Internal workload assessment.	Difference in minutes in time spent, by role, by case type.
ODR reduces the backlog of cases or proceedings.	Count of scheduled proceedings (informal and formal hearings, civil hearing before the court, etc.)	Reduction in backlog over time or pre-post implementation comparison.
ODR is helpful to all constituents.	Compare demographic factors and outcomes of those who use ODR and those who use in-person court services for similar case types.	Identify similarities or differences in segments of the population who use the ODR versus in-person options.
ODR helps my court serve different constituents in their preferred modality.	Ask in-person visitors and ODR users whether they received service in their preferred modality.	Quantify public's preferred court experience.
ODR diverts a small/large proportion of cases from the court's docket.	Count and proportion of cases diverted over a time period. Count and Proportion of cases in which ODR was initiated but which returned to an in-person hearing over a time period.	Count and proportion of in-person hearings avoided with ODR.

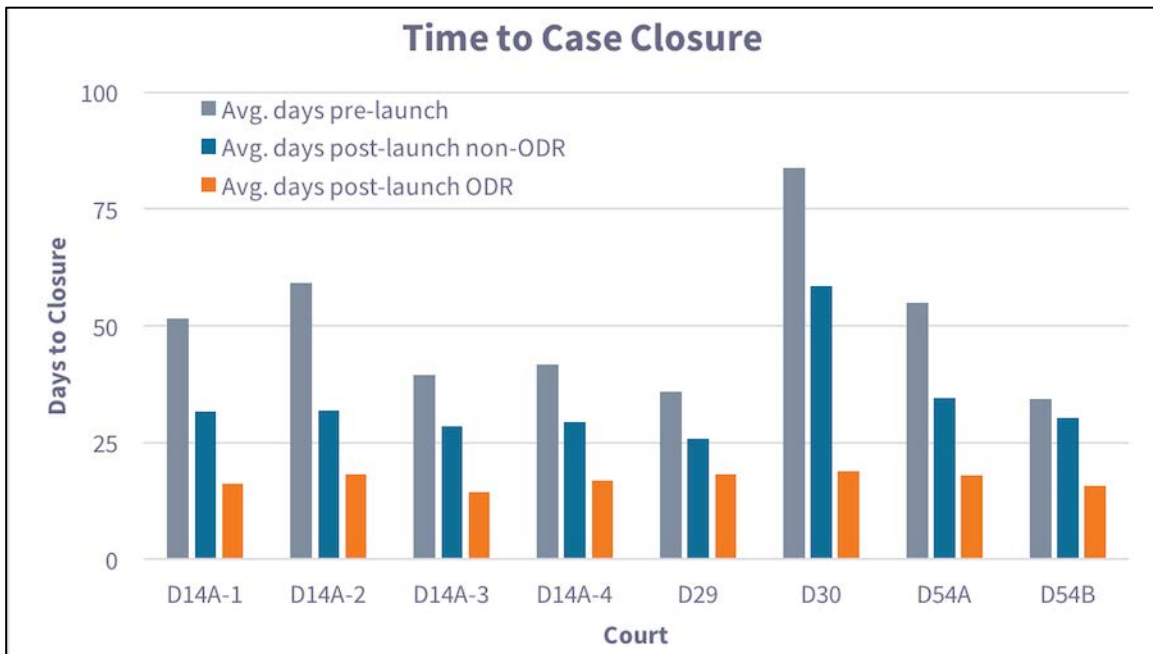


Figure 4 - Sample Time to Case Closure Comparison chart

Make ODR transformational.

Courts can use ODR technologies in limited ways to incrementally improve and modernize current processes, saving money and increasing efficiency while

improving convenience and access for the court's customers. Beginning within the framework of existing processes may provide an entry point leading to more expansive uses.

However, incremental gains may lessen "pain points" sufficiently to constrain innovation. Ideally, courts will leverage ODR to re-engineer processes. ODR can be transformational, helping courts address some of their most challenging issues and improving access to justice for isolated and vulnerable populations.

- Every court can benefit from utilizing ODR technologies and approaches, no matter their current level of technology adoption, case processing times, or e-filing status.
- Courts may initially apply ODR to their most automated, streamlined process, or may "leap-frog" paper process dependencies.

Conclusion

ODR shows tremendous potential for helping correct imbalances in access to justice. While statistics are somewhat limited, early indications are that ODR is making justice more accessible. For example, users of Franklin County, Ohio's Small Claims mediation ODR represent approximately equal percentages of low-to-moderate income and middle-to-upper income users based on US census data correlated to user location. British Columbia's Civil Resolution Tribunal is serving individuals from all parts of the province, including places where there are no courthouses.

Costly, sophisticated technologies can be employed to quantify deficiencies in court processes. However, impressive technology is not required to discover how court processes impact the public. Limited budgets are not a valid reason for delay: virtually all of the most successful examples of ODR in courts today were born of financial constraint.

The CRT's Shannon Salter recommends that court managers begin with a clipboard and pen, if necessary. Step out into the foyer of the courthouse and start talking to court patrons. Ask what is difficult or confusing. Look at existing systems and processes. Test-drive another jurisdiction's ODR process. Appendix A provides a list and links to a variety of court ODR websites.

Some may be dismissive of calls to utilize ODR citing the complexity and importance of the court's cases. However, courts that have piloted ODR are providing encouraging statistics demonstrating significant and sustainable benefits that align well with court mandates.

For more information about the use of ODR in Courts, contact technology@ncsc.org.

Appendix A: ODR systems in use in Courts

US Courts

Franklin County, Ohio Municipal Court Online Dispute Resolution
<https://www.courtinnovations.com/odr/OHFCMC/home>

Washtenaw County, Michigan 14A District Court Online Mediation
<https://www.courtinnovations.com/cii/MID14A>

Grand Rapids, Michigan 61st District Court Online Case Review
<https://www.courtinnovations.com/cii/MID61>

Ohio Board of Tax Appeals
<https://ohio-bta.modria.com/resources/ohio-bta-diagnosis/strongcase.html>

Courts in other countries

British Columbia Civil Resolution Tribunal
<https://civilresolutionbc.ca/>

United Kingdom Claims Portal
<https://www.claimsportal.org.uk/>

MyLawBC – My problem. My Solution.
<http://mylawbc.com/>

British Columbia Residential Tenancy Solution Explorer
<http://www.housing.gov.bc.ca/RTB/WebTools/SolutionExplorer.html>

Netherlands Rechtwijzer
<https://rechtwijzer.nl/>

Extra-judicial ODR

American Arbitration Association – New York No Fault Insurance
<https://aaa-nynf.modria.com/>