

Michigan Supreme Court
State Court Administrators Office
Office of Dispute Resolution

Considerations in Implementing Court ODR Systems

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State Court Administrative Office
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INTRODUCTION

The following “considerations” regarding online dispute resolution (ODR) may be helpful in a court’s assessing its own ODR system design, implementation, and evaluation options. For purposes of this document, ODR is defined as: An online process in which the parties themselves, or with the assistance of a neutral human or machine third party, resolve their issues to the parties’ mutual satisfaction.

Under this definition, ODR is essentially E-ADR. The numerous court services currently migrating to online platforms that do not have ADR components form the basis for what can be properly called “Online Court.” Examples of these functions include: text message notification of hearings; impending bench warrant issuances; plea bargaining; government assessments (tax); and traffic citation negotiation. The fact that traditional court services are made available online does not automatically make them “ODR.” Similarly, court motions, hearings, settlement conferences, trials, etc., conducted online are also not considered “ODR,” but are components of “Online Court.”

In the years ahead, virtually all court functions will become available online and will take the shape of the Online Court. But while these functions will be managed online and result in a case “disposition,” that a disposition occurs does not necessarily mean that the “dispute” is “resolved” from the perspective of one or more parties.¹ Thus the distinction between “disposing of a case” and “resolving a dispute” may be the single most critical process design consideration.

A significant challenge in considering the merits of individual ODR system options is scarcity of independently conducted peer-reviewed published evaluations of ODR systems. Many law review articles chronicle the rise of electronic case dispositions from the early e-commerce beginnings to current online court functions, however the focus is typically on disposing of disputes, rather than gauging the extent to which parties believe their dispute is resolved. Further, the data relied upon in many articles is typically provided by either vendors or the programs themselves and is largely unscrutinized and unsubstantiated. Empirical studies conducted by social scientists remain scarce.

This scarcity of third party empirical evaluation also suggests that courts should carefully assess the published “lessons learned” and “best practices” gleaned from e-commerce disputes to determine their applicability to court cases. While e-commerce systems typically include an initial level of party-to-party negotiation, the final stage typically results in an arbitration-like award to one party with no means of judicial appeal. A “disposition” is achieved, but again, not necessarily a “dispute resolution” in the eyes of a dissatisfied seller or buyer (or both!)

It follows that absent sound research findings, this list of “considerations” is simply an early effort to compile issues either our office has encountered, or has learned of in discussing

¹ Justice system and legal practice futurist Professor Richard Susskind further underscores the distinction between court functions made available online and ODR, in *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019).

ODR with court administrators, ADR professionals, case management system (CMS) and ODR system vendors, legal assistance providers, judges, and staff of national judicial, court administration, and charitable organizations across the country.

Some ODR services will be directly administered by courts; others will be administered by private ADR providers with the input of – and connections to – courts. This document assumes that ODR processes provide access to mediators as third-party neutrals. “Mediators” are defined as trained neutral third parties who help parties find a solution to their problem that both can live with, and allows the parties to put the dispute behind them. Some courts, believing that the word “mediator” is too legalistic or formal, are opting to use the word “facilitator” to describe mediator functions. This document retains the word “mediator” as best describing the third party neutral and the process he/she is providing.

The document format is quite simple. The considerations are grouped into thematic areas and a space is available to designate whether the consideration is important. The reader can select a scoring mechanism, e.g., 1-5, plus or minus, etc., and in the next column note a “next step” or other item.

Given the rapidly evolving field of ODR, our intention is to frequently update this document based on input from ODR system administrators, users, and evaluators. The most current version will be posted here:

<https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Resources/ODRConsiderations.pdf>

We welcome receiving your comments and recommendations for improving this document, and look forward to being in touch with colleagues building and evaluating ODR services.

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CONSIDERATIONS

Leadership and court staff

	<i>Importance</i>	<i>Notes/Next Steps</i>
Support from the top (judges, county officials, etc.)		
Develop a clear vision of what the ODR system will look like		
Robust governance: sufficiently senior officials oversee the work		
System for ongoing review		
Identify how the system will be integrated into current (or planned) workflow and case management system functions ²		
Identify a “point person” for communicating with the vendor, judges, court administrator, neutrals, etc.		
Engage staff in the platform design process, encouraging eliminating unnecessary steps used in analogue case management		
Implement a means for staff to identify obstacles, training needs, potential improvements and report problems		
Determine who has oversight over system administrators, mediators, and court staff and identify responsibilities		

² The National Center for State Courts suggests that ODR implementation is an excellent time to review current court processes with the goal of not just putting current processes online, but rather streamlining operations for the benefit of users and court staff. See: Flango & Clarke, *Reimagining Courts: A Design for the Twenty-First Century* (Philadelphia: Temple University Press, 2015).

Prospective users and stakeholders

	<i>Importance</i>	<i>Notes/Next Steps</i>
Judges, court administrators, and other staff		
Pre-filing citizen disputants		
Post-filing litigants		
Legal service organizations		
Advocates		
Lawyers and bar associations		
Independent private mediators; mediation agencies; non-profit dispute resolution agencies		
Former, current, and future ADR funders		
Local funding unit		
Law school clinics/court self-help centers		
Evaluators		
Interest groups: creditors, landlord/tenant; housing; etc.		
Human services providers		
Prosecutor/city attorney offices		
State court administrative office		

Goals

	<i>Importance</i>	<i>Notes/Next Steps</i>
Case disposition ³		
Resolving disputes to the mutual satisfaction of the parties. ⁴		
Reducing case disposition time		
Reducing costs to the court		
Reducing costs to the parties ⁵		
Increasing user satisfaction rates		
Increasing convenience to the parties		
Increasing court staff job satisfaction		
Case types or issues to be addressed		
Case type specific goals, e.g., reduced evictions (L/T cases); increased parenting time (domestic cases). Small claims: increased collectability of judgments; reduced time to collection of judgments; and increased collection of percentage of collection of judgment.		

³ “Case disposition,” in court terminology, refers to a court’s final determination of a case. Dispositions include trial verdict, summary disposition, settlement, withdrawal, consent judgment, voluntary withdrawal, etc. A judicial “disposition” means that a case is closed in the court; it does not mean that a dispute was resolved. Many disputes between parties continue on long after their case was disposed.

⁴ “Dispute resolution” focuses on the parties’ perceptions as to whether they believe their problem was solved or concluded from any number of perspectives, including emotionally, financially, physically, etc. This is sometimes referred to as achieving a “win-win” or “mutually satisfactory” outcome.

⁵ “Access to justice” considerations might also include: decreasing time parties need to take off from work; avoiding costs associated with going to court such as transportation, parking, child care; and providing a means of resolving matters outside of traditional business hours.

Implementing authority and legal implications

	<i>Importance</i>	<i>Notes/Next Steps</i>
State statutes		
State and local court rules and administrative orders		
Case law		
Union contract		
Supreme court administrative office policies and procedures		
State bar ethics provisions regarding unlicensed practice of law; mediation as not being the practice of law; mediator's authority to draft agreements and court forms. Limited scope representation to represent clients solely for the purpose of mediation.		

Administration

	<i>Importance</i>	<i>Notes/Next Steps</i>
Define system administration. "Administration" can include having general oversight of the operation of the system; including having input into the design of the system; accessing a variety of system functions; the ability to observe the status of cases; the ability to assign mediators; and other functions designed to manage the case online		
Court administers system developed internally by the government IT department		
Court administers system developed by an outside vendor		
Court contracts with an external ADR agency that develops or procures an ODR system		
An external court agency, e.g., a state administrative office of the courts develops or procures an ODR system and either manages it itself or subcontracts with local dispute resolution centers. Local trial courts have no administrative role in managing the ODR system.		

Platform attributes and functions⁶

	<i>Importance</i>	<i>Notes/Next Steps</i>
Type of services offered: party to party email negotiations; negotiations with a mediator; blind bid; binding/non-binding arbitration; expert evaluation; algorithmic settlement, etc.		
Geographical and jurisdictional service areas, e.g., city, county, state, etc.		
Pre- and post-filing availability		
Once filed, court-ordered or voluntary use		
Court-specific form generation, electronic signatures, and e-filing capability		
ADA compliant/differently-abled access		
Integration with the court's case management system or stand alone		
Cloud-hosted, secure, protections against unauthorized access and data loss		
Data restrictions: prohibition on sale and non-authorized use; on releasing person-identifiable data; vulnerability testing; proof of system security check available		
Data transfer from vendor's platform to administrator's case management or other system		
Mobile-friendly with intuitive format that minimizes clicks, pre-populates data and avoids duplication		
Spellcheck		
Guided pathways for different case or dispute types		
Secure mechanism to upload/download documents and photographs		
"Help" button; means of asking questions and reporting problems with the service; human assistance is available		
Financial gateway for collecting fees and other payments that is PCI DSS ⁷ compliant		
Text and email notifications of new correspondences and actions		

⁶ While independent evaluation has not yet confirmed what functions are critical and which are desirable in an ODR system, the following items are routinely identified as possible ODR design components.

⁷ See <https://www.pcisecuritystandards.org/>

Means of making administrators and mediators aware of existing protection orders		
Ability to provide user-feedback		
Acknowledgement of terms of service/consent to mediate		
Exchange, reject, and accept offers and counter-offers		
Site is easy to find and use		
Available 24/7, 365 days a year		
Guides and options specific to the case type		
Confidentiality management by users, mediators, administrators, vendor, etc.		
Affirmation that the person entering data/negotiating is the person identified by another party or in court pleadings		
Notice that mediation can occur exclusively online, or, if available, through online video platforms or face-to-face		
Guidance on additional options for resolution including going to court, getting legal or financial assistance		
Notice of options to retain counsel and counsel participation in the process		
Directions for using the system/tutorials		
Statement regarding the implications of electronically signing an agreement, e.g., lack of appeal, binding nature or agreement, etc.		
Literacy and language accessibility, translation available		
Platform provides legal assistance or links to legal assistance		
Free, low cost, fee waivers		
Additional considerations ⁸		

⁸ Note: Additional access-related data elements outlined in recommendations for the British ODR system include: age; disability; employment status; English as a foreign language; gender reassignment; highest level of education (proxy for literacy); permanent address; pregnancy and maternity; race; religion; sex; sexual orientation; and fear or distress connected with the case. See: Byrom, N (2019) *Digital Justice: HMCTS data strategy and delivering access to justice*.

Mediators

	<i>Importance</i>	<i>Notes/Next Steps</i>
Use of existing mediation providers, or recruit and train new mediators		
Use, design, and management of mediator roster		
Compensation of mediators, roster application, removal process, appeal		
If the mediators are court staff, how is their neutrality protected and impartiality conveyed to disputants, particularly if a party is another unit of the same local government?		
Training in online communications vs. face-to-face mediation		
Training on use of the system		
Evaluation of mediators		
Determine which ethical standards will apply, e.g., ABA (civil), AFCC (domestic), state/local		

Non-court dispute resolution service staff

	<i>Importance</i>	<i>Notes/Next Steps</i>
Create a clear written protocol detailing the service provider's functions and responsibilities		
Identify a "point person" for communicating with the court (and vendor, if appropriate)		
Engage staff in the platform design process, encouraging eliminating unnecessary steps used in analogue case management		
Encourage staff to identify obstacles, potential improvements, and training needs		

Costs, fees, and funding sources

	<i>Importance</i>	<i>Notes/Next Steps</i>
Statutory, court rule, policy authority for assessing fees to users		
Fee assessment to users, e.g., free or a “convenience fee,” and its basis; indigency waivers		
Cost, to courts or ODR system providers, of platform design, implementation, user testing, training, marketing evaluation, e.g., fee per case, fee per level of service, per volume of cases, etc.		
Vendor cost of change orders and future enhancements		
Identify funding sources: general operating budget, foundations, grants, special assessment (convenience fee)		

Confidentiality

	<i>Importance</i>	<i>Notes/Next Steps</i>
Statutory, court rule, and policy limitations		
Access to mediator and parties’ communications		
Clear statement regarding confidentiality and exceptions		
Vendor confidentiality (use of the data for system enhancement, evaluation, marketing, etc.)		

Protections

	<i>Importance</i>	<i>Notes/Next Steps</i>
Court staff, system administrators, and mediators have criminal history background checks		
Conduct domestic violence and power/control screening minimally in family law cases		
Hidden party contact information		
Means for easy and safe closure of the case without identifying domestic violence as the reason for closure		
Domestic violence hotline and other emergency referral information available		
Disclosures regarding the service's not providing legal advice to avoid unlicensed practice of law		

Vendor selection

	<i>Importance</i>	<i>Notes/Next Steps</i>
Identify local funding unit request for proposals requirements		
Obtain IT, mediator, court, and legal department advice in developing the request for proposals		
Assess the vendors' current ability to provide service for desired case types and ability to provide a product that matches the prototype demonstrated as the basis for the proposed platform		
Ability to provide prompt help to system administrators, mediators, and users		
Contract provisions: confidentiality; data ownership; access; subcontracting; timelines; testing; training; evaluation; costs of enhancements, communication plan; indemnification; ADR provisions; subscription fee/payment; etc.		

Data collection and evaluation

Note: Currently, there are no national consensus-based data standards for either ADR or ODR. The American Bar Association Dispute Resolution Section’s Court Committee’s Research Subcommittee expects to publish recommended data standards by mid-2020. Basic data elements courts routinely mentioned in the ADR field include the following.

	<i>Importance</i>	<i>Notes/Next Steps</i>
Petitioner/respondent name and contact information		
Self-represented or represented		
Party demographic information that may be required by funders		
Case type ⁹		
Value of claim		
Costs/fee waivers		
Outcome: fully settled; partially settled; no agreement		
Pre-filing use; court ordered, or voluntary		
Date by which ADR must be completed		
Name of ADR provider		
Perceptions of fairness/user satisfaction measured by surveys		
30 to 90-day follow-up to determine if agreements were upheld		

⁹ National Center for State Court publications suggest that courts, in moving toward triaging cases filed in court, more assess “issues” than “case type.” For example, it’s likely that online, it is less important that a party distinguish between a “contract” case and a “landlord/tenant” case as long as the system administrator can help identify what the issues are that require resolution. See: *Reimagining Courts: A Design for the Twenty-First Century*.

Marketing plan

	<i>Importance</i>	<i>Notes/Next Steps</i>
Advising litigants (and the public, if the system is available pre-filing) about the system's availability, e.g., animations and short videos on websites introducing the service		
System URL provided in court notices and on court, legal services, bar associations, and government agencies' websites		
Court and ADR provider have complementary marketing plans		
Supreme Court, other courts and service providers' media plans (press releases, public service announcements, annual reports, newsletters, etc.)		
Budget for marketing		

RECENT ODR PUBLICATIONS

“Digital Justice: HMCS Data Strategy and Delivering Access to Justice: Report and Recommendations.” Dr. Natalie Byrom, Director of Research, The Legal Education Foundation. October, 2019. Article: <https://research.thelegaleducationfoundation.org/research-learning/funded-research/digital-justice-hmcs-data-strategy-and-delivering-access-to-justice-report-and-recommendations>

This document outlines access to justice considerations in the ODR context and presents an array of evaluation data points that may be used depending on an ODR system’s goals.

“Pouring a Little Psychological Cold Water on ODR (Online Dispute Resolution).” Jean R. Sternlight. Journal of Dispute Resolution (forthcoming). This article raises—from a psychological perspective—concerns about trusting computers to resolve problems. The author asserts that given that human psychology lies at the core of many civil disputes, ODR hardware and software need to take into account human psychology and that we must be imaginative in deciding whether and how to incorporate technology into dispute resolution. Abstract: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446140

“Designing and Implementing a State Court ODR System: From Disappointment to Celebration, Professor David Allen Larson, 77 Journal of Dispute Resolution 2019. This insightful article chronicle’s the author’s role in a failed program implementation, which makes the “lessons learned” all the more meaningful. Note: most of the systems cited as being “ODR” are actually traffic citation plea bargaining services that do not involve third party neutrals. Article: <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1838&context=jdr>

“e-Nudging Justice: The Role of Digital Choice Architecture in Online Courts,” Journal of Dispute Resolution, No. 2 Volume 2019, p. 127, Ayelet Sela. While this article does not clearly distinguish between “resolving disputes” and “disposing of cases” in discussing e-commerce and court online negotiation services, it persuasively outlines considerations for building the online court of the future. The discussion about the effect of fonts, color, visual complexity, and site personalization, among other site architectural considerations in an ODR system, are particularly insightful. Article: <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1840&context=jdr>

“Online Courts and the Future of Justice,” Professor Richard Susskind, Oxford University Press, 2019. Professor Susskind’s view of online courts of the future as addressing key inequalities in the current court system, chiefly in access to legal information, access to lawyers, and cost, among other factors. His “vision and hope is that online courts can bridge this gulf between people knowing the law and enforcing their entitlements.” Susskind clearly differentiates between ODR systems that provide alternative dispute resolution, and all other court functions that are simply made available online. Highly recommended for anyone interested in envisioning the courts of the next decade and beyond.

WEBSITES

Hosted by the National Center for Technology and Dispute Resolution, this site maintains a compendium of international information on all things technology ranging from Cyberweek offerings, to new books, academic programs, conferences, and ADR in general with newsletters dating back to 2014.

<http://odr.info>

The NCSC has recently taken a strong leap into ODR with its partnering with the Pew Charitable Trusts to assess ODR implementation in a number of courts throughout the country. Expect to see NCSC-coordinated evaluations and other announcements here.

<https://www.ncsc.org/Topics/Technology/Online-Dispute-Resolution/ODR.aspx>

The “Joint Technology Committee, comprised of representatives from the National Center for State Courts, Conference of State Court Administrators, and National Association for Court Management, has issued a resource bulletin focusing on ODR. Its 2017 paper is a good primer on the topic of ODR. While the document does not distinguish between ODR and Online Courts in its examples, its breadth of design considerations, ranging from case triage at the beginning of a case to evaluation of the system, can apply to virtually all technological solutions employed to make court events available online. The “Sample of Desired Outcomes and Measures/Data Sources” appearing at Appendix 1 is very helpful in thinking about how to evaluate an ODR service.

<https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>

Resolution Systems Institute (RSI) is a major source of ADR and ODR information for courts. Its set of “considerations” offers additional narrative explanation and elaboration of many of the considerations identified in this document.

<https://www.aboutrsi.org/special-topics/online-dispute-resolution#ODR-Considerations>

LIMITATIONS OF AND UPDATES TO THIS DOCUMENT

This document reflects the current perspectives of the authors who each have approximately 30 years of experience working in the field of court-connected ADR and who are primarily responsible for implementing “MI-Resolve,” an ODR system that provides mediation through a network of community dispute resolution centers throughout the State of Michigan. Additional information about MI-Resolve can be found here:

<https://courts.michigan.gov/administration/scao/officesprograms/odr/pages/mi-resolve-news.aspx>

While every effort has been made to assure the accuracy of resources cited and to take into account the most current published resources pertaining to ODR, given the rapidly developing resources available, we regret the omission of resources that may also be helpful and welcome comments and recommendations of items to include in future updates, which will be periodically posted here:

<https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Resources/ODRConsiderations.pdf>

We would also like to acknowledge the contributions of Gabrielle Simon-Lake in editing, formatting, and updating this document.

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