



# **JTC Resource Bulletin**

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## Online Dispute Resolution and the Courts

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## Abstract

What began as a niche tool for non-binding, out-of-court dispute resolution between private parties, Online Dispute Resolution (ODR) has grown to become a distinct and particularly effective dispute resolution mechanism encompassing a broad array of artificial intelligence technologies used to resolve a growing variety of business, consumer, and even international disputes. Some courts have successfully piloted ODR for landlord-tenant, small claims, and domestic disputes, and for minor criminal cases such as traffic and code enforcement violations. ODR presents opportunities for courts to expand services while simultaneously improving customer experience and satisfaction. This Quick Response Guide provides a basic primer in Online Dispute Resolution and lays out implementation models as well as court-specific opportunities and considerations.

## Document History and Version Control

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To improve the administration of justice through technology

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## Introduction

Since its inception approximately 20 years ago, Online Dispute Resolution (ODR) has been associated primarily with e-commerce. However, it is increasingly being used in innovative applications unique to the judiciary. ODR is a new concept for courts but has become central to the discussion of the future of courts. Further, it presents opportunities for courts to expand services while simultaneously improving the customer experience and therefore, satisfaction.

In its 2016 recommendations entitled *Call to Action: Achieving Civil Justice for All*, the Conference of Chief Justices (CCJ) stated that “[n]avigating civil courts, as they operate now can be daunting” and that “those who enter the system confront a maze-like process that costs too much and takes too long.” The report goes on to lament that while technological solutions exist to mitigate cost and delay in the court system, “these changes have largely not arrived” and 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.”

To this end, US courts have begun to utilize technology to improve both processes and outcomes. Because technology has the potential to impact almost every aspect of what courts do, the challenge is to make the right technology investments. In addition to utilizing technology to improve case management, address federal disposition reporting requirements, and other administrative requirements, courts have begun deploying technology designed specifically to improve the public’s experience with court. Public-facing Court technology is no longer limited to informational webpages or online payment portals. It has evolved to include a broad suite of technologies that have the potential to dramatically expand the public’s access to the court and to improve the services courts provide and the way they function as businesses.

To better understand the potential for ODR in justice, it is important to review its history, evolution, and movement into courts. This bulletin then identifies key issues as well as opportunities and considerations for courts evaluating the possibility of incorporating ODR into their processes.

## A History of ODR

ODR emerged in the 1990s in tandem with the proliferation of e-commerce. At its inception, ODR was essentially online resolution for commerce disputes – following the

Alternative Dispute Resolution (ADR) principle of fitting “the forum to the fuss.”<sup>1</sup> The online forum was particularly well-suited to addressing the issue of distance between buyers and sellers who were often thousands of miles and many time zones apart. ODR was also appropriate for the size of the disputes: most of the issues at stake were quite small in terms of total value. A quick, easy, low-cost process was essential to the economic model.

Initial ODR platforms were meant to help two private individuals resolve a dispute and come to a fair outcome. Primarily used by large companies such as Ebay, Amazon, and others, ODR was most valuable if the system itself could guide the parties to a resolution. With customers in geographically distant areas and the potential for an ever-increasing number of disputes correlated to business growth, large companies had a strong financial incentive to resolve issues without using human mediators. Speed and reliability were essential for these small, similar, and numerous disputes.

Though each dispute was unique, all were commercial and financial in nature, between a buyer and seller, and brought about by a discrete number of relevant circumstances. In its simplest form, this process consisted of one party filing a complaint online where the other party could see and respond to it. If the two parties were unable to come to an agreement, a mediator could be assigned. Otherwise, no intermediary was necessary and the dispute could be resolved promptly and efficiently using automation.

ODR is often confused with, or seen as simply an online form of, alternative dispute resolution (ADR). ADR refers to tools and processes that allow parties to resolve their disputes outside of what is typically considered to be a courtroom and without a magistrate, judge, or other government-provided decision-maker. ADR connotes private parties agreeing to work outside of the traditional adversarial format of the courts, using mechanisms such as arbitration or mediation to resolve issues. Often ADR enlists the assistance of a neutral intermediary in the resolution process.

Early on, ODR was categorized as a form of ADR used “for disputes arising from an online, e-commerce transaction, or disputes arising from an issue not involving the Internet, called an ‘offline dispute.’”<sup>2</sup> However, it is now its own distinct category of dispute resolution mechanism encompassing a broad array of artificial intelligence capabilities used to resolve a variety of dispute types.

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<sup>1</sup> Sander, F. E. A. and Goldberg, S. B. (1994), [Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure](#). *Negotiation Journal*, Harvard Law School. 10: 49–68.

<sup>2</sup> American Bar Association. [What Is Online Dispute Resolution? A Guide for Consumers](#). Washington, D.C.: 2002. AmericanBar.org. Mar. 2002. Web. 30 Nov. 2016. ATL/859424.1

## ODR today

Simply defined, ODR is a digital space where the appropriate 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 has grown to encompass minor criminal cases such as traffic violations or code enforcement violations, online mediation, and binding resolution of disputes of many types including landlord-tenant, small claims, and domestic disputes.

ODR differs from general dispute resolution in that it involves artificial intelligence deployed online. It not only enables people to interact and communicate about disputes at a distance, but also facilitates resolution by improving the flow and character of information and reducing conflict, as well as minimizing financial and time costs through the creative use of technology. The technology not only facilitates the timely exchange of information, it can increasingly shape online written communication to avoid escalating situations by blocking foul language, “flaming,” and other communication patterns that escalate conflict. Although ODR includes communication tools, it is a distinct category, separate from traditional communication tools accessed from online platforms such as video or telephonic conferencing.

ODR 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. eBay alone resolves more than 60 million disputes annually using ODR, and more than 90% of those disputes are resolved without a third-party mediator.<sup>3</sup>

## Court-specific ODR implementations

The expansion of ODR to courts is still in the early stages with numerous pilots underway in the United States and abroad.<sup>4</sup> There are online proceedings for small claims actions and disputes between neighbors in British Columbia, small claims in the United Kingdom, divorces in the Netherlands, and similar applications in several other countries, as well. Examples of ODR implementations in U.S. small claims and traffic

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<sup>3</sup> Petreikyte, Gintare. "ODR Platforms: EBay Resolution Center." *The 15th ODR Conference, 23-24 May 2016, The Hague*. HiiL Innovating Justice with the National Centre for Technology and Dispute Resolution at the University of Massachusetts Amherst., 14 Apr. 2016. Web. 05 Dec. 2016.

<sup>4</sup> 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. The report can be accessed at <http://www.onlineresolution.com/hiiL.pdf>.

courts help illustrate how ODR is being used today in the context of courts and highlights the possibilities that lie ahead.

### Small claims

Small claims cases lend themselves to ODR in that they generally do not involve attorneys on either side. In one example, an ODR platform in a high-volume Ohio municipal court is being utilized to handle small claims cases.<sup>5</sup> Defendants are invited to the free, online platform when they receive a summons and can opt to seek resolution several different ways. Litigants always have a right to their day in court even if they first 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.

### Traffic and parking disputes

In some courts, informal hearings and other proceedings in which 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. A study of six Michigan courts by the University of Michigan Online Court Project on the impact of traffic ODR showed that while the number of total cases increased, in-person cases dropped overall. Interestingly, collections came in sooner and cases closed faster as well.

### Landlord-tenant disputes

Utah and New York are in the process of implementing ODR using statewide portals to address landlord-tenant and small claims disputes.

While ODR is primarily focused on resolving the dispute, courts should consider how the process could improve the court's overall performance. Case resolution outcomes including time to reach, compliance, and so forth are benchmarks for which courts continue to be responsible. ODR technology can bring parties together, fostering communication and quick, efficient process execution, helping courts improve benchmark performance while expanding capacity. In Michigan, ODR has yielded significant improvements. "A study of three courts and 17,000 cases revealed a 74

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<sup>5</sup> More information on the Franklin County, Ohio, Municipal Court ODR program can be found at <https://www.courtinnovations.com/ohfcmc>.

percent reduction in average days to case resolution” and one county reduced case turnover from 1-2 months to little more than one week.<sup>6</sup>

## Implementation Models

In its report on ODR, the HiiL Group describes four models of ODR integration with the courts: full integration, pretrial ODR, ODR as a competitor to the courts, and ODR platforms as a marketplace for legal and adjudication services.<sup>7</sup>

### Full Integration

In full integration, the ODR process is seamlessly integrated 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 HiiL report specifies full integration as the preferred method for ODR.

### Pretrial ODR

In this model of ODR integration, individuals with disputes are invited to participate in ODR to negotiate a settlement prior to initiating any court proceedings. Should the parties not be able to negotiate a settlement, a party could bring the action to the court through traditional filing mechanisms. Franklin County, Ohio’s Small Claims Court is an example of Pretrial ODR.<sup>8</sup>

### ODR as a competitor to the courts

A third model of ODR integration is where an ODR provider offers resolution services to the public without any direct connection to the courts. In this method, the ODR system is a substitute to the courts and settlements would not be recorded with the court or generally enforceable actions.

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<sup>6</sup> Persky, Anna Stolley. "Michigan Program Allows People to Resolve Legal Issues Online." *ABA Journal*. American Bar Association, 1 Dec. 2016. Web. 01 Dec. 2016.

<sup>7</sup> "ODR and the Courts: The Promise of 100% Access to Justice?" HiiL Trend Report IV (2016): HiiL, 2016. Web. 30 Nov. 2016.

<sup>8</sup> For a look at the Franklin County Municipal Court ODR, see <https://www.courtinnovations.com/ohfcmc>.

## ODR platforms as a marketplace for legal and adjudication services

In the final model, platforms are established that direct users to services, including ODR provider services. At the platform site, users could triage their complaints to determine the appropriate service providers based upon their need.

## Opportunities

The variety and extent of benefits from utilizing ODR vary significantly by type. Some of the most often-touted advantages of ODR over traditional court proceedings include faster case resolution, reduced costs to participants and jurisdictions, and increases in overall accessibility. As a result of these advantages, ODR also leads to higher overall customer satisfaction as well as greater satisfaction with outcomes.

### Efficiency

ODR can often resolve disputes more quickly than traditional legal processes. Because 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, a dispute can be moved through the system more quickly. For example, the online traffic dispute 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.

A 2015 National Center for State Courts and State Justice Institute collaborative report noted that "cost and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes."<sup>9</sup> According to the report, only small claims cases came anywhere near to meeting case disposition timeframe standards.

According to the World Justice Project *Rule of Law Index 2014*,<sup>10</sup> the U.S. court system is seen as independent and free of undue influence, but burdened by expensive or unavailable civil legal assistance and perceived as more available to those in higher socioeconomic echelons. The ability to resolve certain disputes online has the potential to alleviate this deficiency to some degree.

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<sup>9</sup> Hannaford-Agor, Paula, J.D., Scott Graves, and Shelley Spacek Miller. "The Landscape of Civil Litigation in State Courts." nscs.org, National Center for State Courts and State Justice Institute, 1 October 2015. Web. 30 Nov. 2016.

<sup>10</sup> "WJP Rule of Law Index 2016." *WJP Rule of Law Index 2016*. World Justice Project, 2016. Web. 30 Nov. 2016.

### Diagnostic capabilities

ODR tools can be applied to a wide range of proceedings, giving parties more flexibility in the type of resolutions they can seek. The tools also offer the potential for automated diagnostics and guidance (what type of case do I have and where do I file it?). Automated pathway assignment could significantly reduce administrative requirements, and provides an ideal platform for educating parties so they are better informed when they make use of the courts and legal process.

### Better access through flexibility

ODR allows parties in different locations or jurisdictions to avoid the costs and inconveniences of trying to meet at the same time in the same geographic location. While minor criminal or violation cases like traffic may only require one appearance, even a single appearance is burdensome for many who do not have child care or cannot take time from work to go to court. The burden of appearing in court is greater for civil cases like landlord-tenant disputes and small claims cases or for family court cases, where multiple trips to court may be required. While many courts are now embracing video conferencing to manage geographic distances, that technology does not resolve the barrier of scheduling all parties to participate at one time. A Court Innovations study highlights that nearly 40% of those using Michigan's system reported they would not have been able to appear in court in person.<sup>11</sup> In addition, an online solution removes some of the anxiety individuals may have over appearing in person to address uncomfortable issues like outstanding warrants, overdue fees, tickets, and other legal matters.

### Reduced time and administrative resources.

Certain cases suitable for ODR, such as small claims, often require significant administration before the case comes to trial. Cases may be handled multiple times by a series of court personnel, requiring significant court resources. ODR has the power to reduce the time and resources traditionally dedicated to administering and deciding cases by allowing the parties to resolve their cases either without administrative assistance, or with the help of just a few dedicated court staff.

This reduction in the need for human administrative intervention does not necessarily mean jobs will be eliminated. It does mean staff will have more time

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<sup>11</sup> Persky, Anna Stolley. "Michigan Program Allows People to Resolve Legal Issues Online." *ABA Journal*. American Bar Association, 1 Dec. 2016. Web. 01 Dec. 2016.

to do their jobs well and more time to handle complex cases that are not appropriate for ODR in the first place. Many courts still struggle with budget cuts enacted during the 2008-2009 recession.<sup>12</sup> ODR can help courts better utilize their human resources by off-loading repetitive, non-value-add processes.

#### Faster payment, earlier collections.

When the dispute in question involves fines or fees, the court is responsible for enforcement and collection. An ODR solution can assist defendants in determining ability to pay and setting up an appropriate payment schedule with automated payment reminders. A faster resolution and disposition also means earlier payment. ODR facilitates resolution and helps litigants comply with judgements.

#### Increased customer satisfaction.

By increasing the efficiency and effectiveness of handling court cases, ODR not only enables courts to increase their case throughput and compliance but provides a platform for improved customer satisfaction. In Michigan, more than 80% of those who used the online dispute resolution system reported they would recommend it to a friend or family member.<sup>13</sup> Courts can combine ODR and other technologies with court staff expertise to generate trust among constituents, make the court more approachable, and bring disputes to resolution more quickly.

## Considerations

There are both practical and ethical considerations for courts looking at the potential for ODR in their jurisdictions. They 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.

The considerations pertinent to whether a court should adopt ODR for one or more of its functions are becoming clearer and more identifiable. These include but are not limited to the following considerations:

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<sup>12</sup> Hannaford-Agor, Paula, J.D., Scott Graves, and Shelley Spacek Miller. "The Landscape of Civil Litigation in State Courts." nscs.org, National Center for State Courts and State Justice Institute, 1 October 2015. Web. 30 Nov. 2016.

<sup>13</sup> Persky, Anna Stolley. "Michigan Program Allows People to Resolve Legal Issues Online." *ABA Journal*. American Bar Association, 1 Dec. 2016. Web. 01 Dec. 2016.

## Types of proceedings

Not all cases are suitable for online dispute resolution. For those that are not, certain processes or parts of the case might be handled online. In situations where cases are too complex to be fully resolved online, ODR may still offer valuable process improvements. For example, some aspects of a conflict might be resolved using ODR, leaving others for resolution through traditional court proceedings. Disputes which could not be resolved completely online can be identified as such, then flagged for court review.

## 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. Questions to consider include the court's responsibility in maintaining records if peer-to-peer negotiation ensues in software provided or licensed by the court, what information should be private, and what information should be available to whom, when, and how?

## Audience

Courts must determine the audience for ODR. Should certain kinds of disputes be handled through ODR exclusively, or should ODR be an option only? Should users be limited to self-represented litigants? What processes should be in place to help someone who is self-represented versus someone who is represented? For example, if the plaintiff is a debt collector with representation, how should the software ensure that the defendant knows his/her rights and how the relevant burden of proof works?

## Platform

Whether the court works with an existing vendor, selects and customizes an off-the-shelf solution, develops a solution in-house, or hires a firm to build custom software, courts should be sure to factor in capacity for support over the lifetime of the solution. Ensure the platform can integrate with the court's case management system or other technologies and applications. It should 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.

## Citizen access

Making court functions available online ultimately provides better access to the justice system to a much larger portion of society. Courts are recognizing that ODR could be hugely beneficial to their jurisdictions and the people they serve.

With the enormous potential for improving the public's access to justice, courts may still dismiss ODR options because not all sectors of the public have easy computer access. Though the digital divide is real, internet access is primarily an issue if websites can only be used from desktop or laptop computers. The proliferation of smartphones over the last decade has narrowed the digital divide significantly. More than two thirds of U.S. adults now own a smart phone, up 29% over the previous 4 years.<sup>14</sup> The Council of Economic Advisers reports that the biggest technological gains recently have been in populations whose members started with the least.<sup>15</sup> Further, Pew Center research has identified a class of "smartphone-dependent" internet users: those with "few options for online access other than their cell phone."<sup>16</sup>

This evidence suggests that courts may be able to expect increasingly uniform levels of technology access and adoption by the public. However, the poorest neighborhoods and most rural communities still have a "substantial distance to go"<sup>17</sup> to achieve levels of access and adoption equivalent to their urban counterparts.

Because a large portion of this technological convergence relies on mobile technologies, courts must implement websites and apps that are mobile-responsive. Software must adjust to the platform from which it is accessed (laptop, tablet, smartphone, etc.) and go through rigorous user acceptance testing (UAT).

Analytics from some existing ODR solutions reveal that system users are heavily mobile-dependent and likely to access ODR via smartphones. Additionally, mobile-dependent populations are also likely to have more limited ability to communicate effectively in writing – a skill essential to utilizing an ODR system no matter where the individual accesses the internet. Courts should ensure that ODR applications are mobile-optimized and user-friendly.

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<sup>14</sup> Smith, Aaron. "U.S. Smartphone Use in 2015." PewResearchCenter: Internet, Science & Tech. Pew Research Center, 01 Apr. 2015. Web. 30 Nov. 2016.

<sup>15</sup> Council of Economic Advisers. *Issue Brief: Mapping the Digital Divide*. Rep. The White House, July 2015. Web. 30 Nov. 2016.

<sup>16</sup> Smith, Aaron. "U.S. Smartphone Use in 2015."

<sup>17</sup> Council of Economic Advisers. *Issue Brief: Mapping the Digital Divide*.

## Getting to resolution

Courts must determine how the system will help drive fair and transparent resolutions.

A public dispute resolution system must produce outcomes that are fair and just, not just convenient, efficient, and cheap.<sup>18</sup>

A good ODR platform will bring parties together and much like effective mediation, explore goals and acceptable outcomes for both parties. If resolution is truly not possible, then the case should go to court and the parties should enjoy the right to have their case resolved in a timely manner.

## Conclusion

Many courts recognize the advantages of ODR technology for online sales disputes but may dismiss it as an option for court business citing the complexity and importance of the court's cases. However, courts that have piloted ODR are providing encouraging preliminary confirmation of the anticipated benefits.

Courts must carefully consider their processes and rules, the population(s) they serve, and any unique factors before embarking on an ODR system development initiative. If full integration of ODR into court processes is not an immediate option or even a long-term planning interest, courts risk little by leveraging ODR technology to achieve iterative improvements in court processes.

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<sup>18</sup> Condlin, Robert, J. *Online Dispute Resolution: Stinky, Repugnant, or Drab*. 21 Nov. 2016. Web. 6 Dec. 2016. U of Maryland Legal Studies Research Paper No. 2016-40. Available at SSRN: <https://ssrn.com/abstract=2873918>