

Eight Lessons to Consider for ODR Implementation



Online dispute resolution (ODR) has been hailed as a potentially transformative innovation in court procedures that can increase access-to-justice, especially for self-represented litigants (SRLs), while making court operations more efficient and cost-effective. Over the past several years, state and local courts have launched dozens of ODR pilot projects with varying degrees of success. With financial support from The Pew Charitable Trusts, the National Center for State Courts (NCSC) worked closely with four states piloting ODR and has developed tools and resources, and provided technical assistance, for many of their efforts. The eight lessons outlined in this document are derived from the experience of working with those jurisdictions. These lessons have not yet been tested, and do not represent proven steps for successfully implementing ODR—rather, they reflect the learnings from the ODR adoption experiences in these four states. Through this work, NCSC had the opportunity to observe first-hand important lessons about the design and implementation of these programs that can improve or undermine the likelihood of success. We define “success” as the effective implementation and launch of ODR for functional public use (i.e., emerging from the implementation process with an ODR platform that is up and running). This document describes eight lessons to consider when implementing ODR, though it should be noted that all states have different court structures down to the local level, so there is no one size fits all answer to how to best implement ODR. These principles offer a framework of considerations and questions to jurisdictions as they embark on ODR adoption based upon observations in the states where NCSC provided technical assistance.

Lesson 1: Before you begin, understand what ODR is and what it isn't.

Distilled to a very basic definition, ODR is a technology platform on which litigants can negotiate agreements to resolve disputes. Common features of ODR include the ability to exchange information and documents; to negotiate asynchronously using chats or text messages; and to populate forms to memorialize details of settlement agreements. These platforms can operate independently of court systems or be integrated with existing court technology infrastructure, including case management, e-filing, and payment systems. Many platforms permit third-party neutrals to assist litigants who encounter difficulty reaching agreement. The development of ODR systems for use by state and local courts is relatively new and mostly designed for straightforward types of cases (non-criminal traffic, small claims, and consumer debt) with limited options in terms of outcomes for litigants.

While the design and functionality of an ODR platform is important, courts must also recognize that simply plugging in a well-designed platform is not sufficient in and of itself to assure a successful pilot program. Instead, the platform must fit into a functional infrastructure of court rules, business practices, staffing, and litigant information that protects litigants' due process rights and supports informed decision-making by the parties.

Although commercial ODR software can easily embed legal information into the platform, ODR vendors do not have an existing repository of educational materials for litigants that accurately reflects state law and practice in every jurisdiction. Instead, the content of legal information must either already exist or be developed by the court. Similarly, ODR platforms can accommodate online mediation services for litigants, but the court must supply and train mediators who are authorized and comfortable with providing services in an online environment. NCSC observed that, Courts that have launched successful ODR programs have taken time assessing the existing legal and operational infrastructure and investing resources to ensure adequate support for ODR.

Lesson 2: ODR projects can benefit from effective judicial and administrative leadership.

Because ODR programs should be designed to fit into a complex infrastructure of court organization, rules, practices, and local culture, NCSC observed in the course of its technical assistance that planning for such programs can benefit from judicial and administrative champions who are equipped to navigate among competing interests and priorities. Such champions in the jurisdictions that NCSC observed were knowledgeable about a broad range of institutional factors, such as the court technology, rule-making procedures, funding, and internal organization structures, that are likely to be affected by or implicated in ODR implementation efforts. They were also well-respected both internally and externally, and capable of leveraging resources and engagement from diverse stakeholders. Successful ODR planning can also be a lengthy endeavor, making the continuity of leadership over time also an important consideration.

Lesson 3: Identify and articulate the business problem(s) you want ODR to address.

Because courts are often juggling so many competing projects that require resources and leadership, NCSC observed that, in the states where technical assistance was provided, jurisdictions that can clearly articulate the reason for the ODR pilot were successful in crafting ODR solutions that attempt to address specific business problems.

Before embarking on ODR projects, the jurisdictions that NCSC observed articulated the business problem that they were trying to address with ODR---such as: reducing default rates, increasing litigant participation, expanding access to justice, etc.---and then, made all decisions around ODR design and implementation in accordance with addressing that business problem first. For example, one jurisdiction was trying ODR because they wanted to expand access to justice for self-represented litigants, and prioritized easy-to-use platforms that provided plain language and useful legal information within the ODR experience at low or no cost to the court user.

Lesson 4: Fully integrate ODR with case management and other court technology platforms.

A major potential benefit of ODR is the extent to which it can streamline case process both for parties and for the court. Commercial ODR platforms are designed to comply with industry standards for integration. NCSC observed that integration was impractical when courts operated on legacy systems that themselves were out of compliance with contemporary industry standards. Integration with CMS ensures that the court can monitor case progression and enter court orders and judgments without duplication of effort by either the court or the litigant. Integration with e-filing systems allows litigants to initiate and respond to case filings seamlessly. These platforms could also provide options for payment of court fees, requests for fee waivers, service of process, and other ancillary litigation tasks.

Lesson 5: Engage with stakeholders early and often.

NCSC found in its work with the four states that A common misunderstanding about the importance of stakeholder engagement is conceptualizing it narrowly as a post hoc marketing strategy. Several of the courts that NCSC observed thought broadly about opportunities to engage stakeholders in platform design, content development, and user-testing. Early, and found that meaningful stakeholder engagement helped the court better understand users' needs, which can be important for optimal program design. It also provided an opportunity to leverage existing resources, especially for the development of litigant education and information that might not otherwise exist, and to secure buy-in from stakeholders who have invested in the program's success.

NCSC's observations revealed that, in those instances, internal stakeholders were often as consequential as external stakeholders. Courts have been described as loosely coupled organizations involving complex relationships among independent judges and magistrates, clerks of court, prosecutors, and other insiders. Although ODR is often marketed for the benefits it offers litigants, NCSC's conversations with these groups in the jurisdictions they served offered examples of how internal stakeholders may view

ODR as either creating more work or potentially threatening their job security. In those jurisdictions, early and meaningful engagement with internal stakeholders ensured that the ODR design addressed those concerns.

Lesson 6: Remain faithful to core principles, but flexible about how court rules and business practices embody those principles.

A potential benefit of ODR could be the opportunity to streamline case processing, making the process more transparent and user-friendly for litigants and more efficient for the court. NCSC observed that, when discussions about ODR implementation got bogged down on customizing the platform to comply with existing rules or business practices, the courts that identified the underlying principle that those rules and business practices were intended to operationalize, and asked whether the proposed ODR procedures adequately furthered the principles could modify the rules or business practices, or, if not, could modify the ODR procedures.

Lesson 7: Process simplification should focus on the user's experience, not on internal court procedures.

NCSC observed that a common misconception about process simplification is that it should focus on eliminating unnecessary steps in the court's internal business practices. While it is often the case that internal court operations can be consolidated and streamlined, this could be viewed as a side benefit of the ODR planning process, not the primary objective. In fact, ensuring that the user's experience is both helpful and seamless may involve adding more steps to the court's internal processes. For example, the process of requesting a filing fee waiver is often dealt with by courts as distinct from the process for filing a given case type. When implementing ODR, a jurisdiction that builds the fee waiver request and decision making to grant or deny into the front end of the process for filing a case type that can be dealt with via ODR has actually added steps to the overall process, but for the users has streamlined matters because both filing and requesting a fee waiver now happen within the same workflow and platform.

Lesson 8: Be clear with commercial vendors about project goals and expectations.

NCSC observed that jurisdictions that had effective communication with commercial vendors had a clear idea about project goals and expectations. Successful jurisdictions that NCSC observed began by spending a lot of time watching demonstrations, ideally of platforms operating in actual courts, and not just vendor models. They identified the capabilities that they expected the platform to perform, and understood that vendors do

not have litigant information for every type of case in every state. This type of content was provided by the court. Likewise, the vendors do not provide mediators for ODR, so part of the conversation with vendors included from where and how mediators will be recruited to participate, and under what rules. These types of details were explicitly addressed in the bidding process and in contract negotiations.

A final note on the impact of the COVID-19 pandemic on ODR implementation efforts.

Stay-at-home orders implemented in response to the COVID-19 pandemic dramatically changed court operations across the country. Courthouses were closed to the public. Like many other work environments, judges and court staff embraced a variety of technology solutions to continue essential court operations remotely. In many jurisdictions, court policymakers were forced to enact administrative rules and orders to suspend requirements for in-person interactions with judges and court staff that had posed major business process challenges for ODR. Seeing that the wheels of justice continue to turn, and may turn even faster and more effectively, in response to temporary rule changes to keep the courthouse accessible has, in NCSC's interactions with court leaders, changed a lot of hearts and minds about the potential benefits of ODR in the future.

At the same time, these changes also meant that some jurisdictions felt less urgency to engage with those issues because they had been temporarily solved or at least moved to the back burner. COVID-19 strained courts in so many ways, that temporary solutions (e.g., permitting mediation via videoconference) have sometimes been accepted as good enough for now. It is also important to recognize that even absent a global pandemic, court staff have limited bandwidth, funding, and staff resources for undertaking significant new projects. A well-designed and executed ODR program should be recognized as a major undertaking that should not be launched in competition with other mission-critical projects. Instead, be mindful of the lessons learned from adapting to COVID-19 and from the successes and mistakes in other jurisdictions to invest the time and attention necessary for a successful ODR program in the future.