



## Online Dispute Resolution: Key Decision Points

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This document raises the key considerations and decisions that a court system must grapple with and decide when embarking on a court-annexed online dispute resolution (ODR) pilot project.

### **What is the court culture?**

What initiatives have had successful user (public) involvement? How were the needs of court users determined (by court personnel, or actual public engagement)? Are there active access to justice projects, and where are they in the process? What is the risk tolerance for the court? Does the court have a record of pilots that have succeeded as well as some that have failed? Who has the rule making authority? Is it possible to put temporary rules into place during the pilot or will court rules have to be officially and formally modified?

### **What is the purpose of the pilot project?**

Why is the court system interested in launching a court-annexed online dispute resolution system? What problem is ODR intended to solve? How and why does the court envision that an ODR system will plausibly address that problem? How can ODR bypass or alleviate inefficiencies in current procedures and processes? Who would see the benefit of the pilot project? How could this improve the experiences of court users and court staff alike?

Simply taking existing processes and putting them online will not necessarily result in significant strides towards solving the problem(s) that ODR is being deployed to address. The launch of an ODR pilot should be rightly understood as an opportunity to re-think and re-examine processes. Where can things be simplified or streamlined? How can the ODR platform be leveraged in that simplification and streamlining process? Does the court need to issue a standing order to authorize and set forth the goals and scope of the ODR pilot?

### **What is the jurisdiction and which case types?**

Where will the pilot take place? Will it be limited to a specific court or district? Will it be limited to specific case types or subsets of particular case types? For example, some jurisdictions are piloting ODR in the divorce context, but only for simple divorces with no



children involved. This decision will likely be driven by a combination of factors, including funding, buy-in, current procedures, case volume and stakeholder feedback.

### **Who will build the software?**

Some jurisdictions have elected to develop their own ODR platform, and others have decided to purchase an “off-the-shelf” vendor-developed ODR platform. A request for information (RFI) and/or request for proposals (RFP) can help inform a court system of the vendors and products available. These are also tools that can be used to ensure consideration of accessibility and ADA compliance, to define roles and responsibilities and to make clear data and privacy rights. A jurisdiction may wish to modify existing off-the-shelf products with a vendor, or it may seek to build a bespoke solution with contractors or in-house staff; and either choice has different potential costs, benefits and trade-offs.

### **How will ODR be funded?**

Grants, filing fees and legislative appropriations may all fund ODR pilot projects. There should be a sustainability plan in place and jurisdictions should also be aware that they might need to secure a combination of funding sources for different stages of an ODR launch. Grants may be available to help start a project, but the jurisdiction may be responsible for long-term operational costs. If a jurisdiction is considering using filing fee revenue to fund a project, is that filing fee existing or new? Is there a fee-waiver provision in place for those who cannot afford to pay? How will the jurisdiction ensure that fees do not price users out of the pilot?

### **Who will lead efforts and act as a champion?**

Strong support from the judiciary is critical to a successful pilot. Who will take on the role of external and internal champion? Does this champion (or champions) have the political capital and willpower to see the project through? Is this judicial champion comfortable speaking to diverse groups, fielding questions and handling potential push-back, from both internal and external groups?

### **How technologically mature is the court system?**

Does the court system currently have e-filing, digital evidence, or electronic payments? Does the court system typically buy software or build its own? Has the court system



successfully deployed off-the-shelf solutions? What is the capacity of the in-house IT department and how much of a backlog of issues do they have?

### **Who will own data and how will you ensure privacy?**

The court will need to have a plan in place early on that delineates rights and responsibilities regarding data and privacy for the court and system users, as well as regarding any vendors or contractors engaged in building the platform. How will the court treat chat records between parties and/or between parties and a neutral, as well as any documents uploaded in the platform during the process of negotiation?

### **How will the court plan for monitoring and evaluating the project?**

Courts should plan on collecting data in their initial assessment and planning process about case and litigant volume, outcomes and characteristics. Among the questions that a court should consider both before implementing and to track during the roll-out include: in what proportion of the targeted cases do defendants respond? What proportion of litigants have internet access (and how)? Are end users even interested in using ODR? This rethinking of procedures is also an opportunity to improve quality control and ensure fairness for litigants.

### **Will ODR be opt-in or opt-out?**

Will the system be mandatory in a given case type or optional? If mandatory, will there be exemptions? The jurisdiction may wish to provide exemptions for court users with limited English proficiency, limited digital proficiency or access, or those with certain disabilities. Or, the jurisdiction may develop plans to assist those users with ODR, such as providing the platform in multiple languages, engaging with translators or making sure that the platform is developed in a way that is accessible and usable with assistive technologies.

### **Will ODR use neutral parties and if so, who are they?**

Some jurisdictions may wish to use volunteer neutrals or mediators, whereas others may have staff who will fill that role. In either scenario, the jurisdiction should have a plan to ensure proper training and oversight of neutrals. Is there a cost associated with using a neutral, and if so, who pays - the user or the court? Is the use of a neutral mandatory or optional? How will the court determine how many neutrals are necessary for a pilot or for statewide adoption of the ODR project?



### **How is the ODR system court-annexed?**

How will the court own the ODR process? Is the platform connected to case management software? Is it connected to the e-filing platform? Is it connected to e-payment systems? If the ODR contemplates the involvement of volunteers, does the court train the neutrals? Does the court review settlement agreements?

### **What stakeholder engagement and marketing will be done?**

In both the planning and marketing phase of the project, the court will need to engage with internal and external stakeholders. Internally, this includes people like clerks, judges, local administration, state level administration and other court staff. Externally, this includes legal aid and pro bono providers, bar associations, consumer groups, community groups, an access to justice commission (if the jurisdiction has one), individual private attorneys, members of law enforcement, office of attorney's general or other executive agencies involved in pilot case types. Stakeholder engagement may be one of the areas where the judicial champion leads the efforts. Stakeholder engagement is a critical step in this process. Early and effective stakeholder engagement should also help with "marketing" the project before it is launched. Even soliciting feedback from reluctant stakeholders should eventually result in higher buy-in and engagement with ODR.