

**Ensuring Equity in Efficiency:**  
**The Civil Legal Aid Community's Views of**  
**Online Dispute Resolution**

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## EXECUTIVE SUMMARY

This report summarizes research conducted by the National Legal Aid & Defender Association to inform Pew Charitable Trusts, in furtherance of Pew's Civil Legal System Modernization Project, on the views and experiences of the civil legal aid community as they relate to Online Dispute Resolution (ODR). For the purposes of this report, the civil legal aid community is broadly defined, including legal services advocates, members of the client community, mediators, judges, other court personnel, and technologists who specialize in the legal tech field.

NLADA conducted this study over the course of 13 months, during which it held seven focus groups and a number of individual interviews. Overall, the study included 53 total participants. This report is presented in five sections. Section I provides an introduction to the current growth of ODR and the critical need for the legal aid community's input on this new technology. Section II offers perspectives on the history of ODR and some of the existing literature on technology-based dispute resolution systems. Section III details our research methods and provides an overview of our research participants, and Section IV documents key themes that arose through this research. These themes were:

- Initial Suspicion, Distrust, and Concerns
- A Problematic Status Quo: Acknowledging the Current Environment
- Data Security
- Access, Autonomy, and Assistance
- Recognizing and Identifying the Potential Promise of ODR

Finally, in consideration of those themes and their relationship to each other, we conclude in a fifth section by identifying four guiding principles. Those are:

- Be Transparent
- Make it (Vulnerable) Client-Centered
- Create Multiple and Easy to Use Off-Ramps
- Get Good Data, But Not Too Much, and Evaluate for Equity

Although other groups have previously done important work in identifying principles or recommendations as it relates to legal technologies like ODR,<sup>1</sup> this is the first study that centers the perspectives of the civil legal aid community. Still, the purpose of this study is not to supplant or replace any of the critical work that has been and is currently being done in this area. Instead, the intent is to build upon the ongoing conversation and add new and important voices to the discussion.

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<sup>1</sup> See, e.g., Washington State Courts, *Access to Justice Technology Principles*, available at [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=am&set=ATJ&ruleid=amatj02principles](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=am&set=ATJ&ruleid=amatj02principles); The Joint Technology Committee (COSCA, NCSC, NACM), *Strategic Issues to Consider when Starting Virtual Hearings*, available at [https://www.ncsc.org/\\_data/assets/pdf\\_file/0014/20804/2020-04-07-gr-virtual-hearings\\_final.pdf](https://www.ncsc.org/_data/assets/pdf_file/0014/20804/2020-04-07-gr-virtual-hearings_final.pdf).

## SECTION I: INTRODUCTION

This report is the result of over a year of research, research that aimed to answer the question: how does the legal aid community view Online Dispute Resolution? This, however, raises a number of additional questions. First, who is included when we speak about the legal aid community? And what is Online Dispute Resolution (ODR)? Then, why is this a pressing matter? Why does it matter what anyone thinks of ODR? Why are the voices of the civil legal aid community so critically necessary on this topic in this moment?

NLADA has always defined the legal aid community to include both advocates and clients. Early on in the process of this research, we identified the client voice in particular as critically important. Beyond advocates and clients, however, NLADA wanted to include legal technologists, including vendors of technology-based products and technologists working within legal aid organizations. Finally, NLADA wanted to hear from court personnel who may face (or have already faced) decisions about implementing ODR platforms in their jurisdiction. Beyond simply ensuring that members of these groups would be represented, NLADA sought to hear from a diverse group of members within each of them. For this particular research, that meant attempting to have a participant group that was diverse in terms of race, disability status, geographic location, comfort with technology, and other factors. To the extent that we were able to reach a participant group representative of those intentions and the challenges NLADA faced during the research process is discussed further in the methodology section.

With an understanding of the issue of “who” we want to reach and whose opinions we need, the next step is to identify the what. NLADA was seeking the civil legal aid community’s views on ODR, but what is ODR exactly? When conversing with our participants, we began conversations by offering a short definition of ODR from Pew, which describes ODR as:

Online resources that can manage a case from start to finish and never require users to go into a courthouse.<sup>2</sup>

We used this definition because it was short, easy to understand, and still open-ended enough that it did not prevent participants from expressing their thoughts on a diverse array of possible ODR platforms. Doing so allowed us to quickly introduce a shared definition of ODR to our research participants without limiting the conversation. As discussed in our literature review, a more comprehensive answer to this question is somewhat more complicated.

ODR as a concept started to appear in law review articles as early as the mid-1990s.<sup>3</sup> In those articles, as titles like “The Role of Alternative Dispute Resolution in Online Commerce” suggest, the focus was on commercial disputes. It was through eCommerce giants, such as eBay, who needed a tool to settle thousands of disputes happening between customers separated by geography that this “online

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<sup>2</sup> Pew Charitable Trusts, *Online Dispute Resolution Offers a New Way to Access Local Courts*, available at <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts>

<sup>3</sup> Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 Conn. L. Rev. (1996) 953; E.C. Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 Ohio St. J. On Disp. Resol. (1996) 193.

alternative dispute resolution” was born.<sup>4</sup> By 2002, the state of Michigan established a pilot project with a fully virtual courtroom, where hearings were electronically attended through video and teleconferencing.<sup>5</sup> Still, this was for only a small group of certain kinds of cases, and virtual court as a concept is not something that took off in the early part of the 21<sup>st</sup> century. It would not be until 2015 that Canada opened the world’s first online tribunal that was “fully integrated into the justice system.”<sup>6</sup> It offered an online space where parties could explore possible solutions, negotiate, have a mediator facilitate, and even have a tribunal member read the case and issue a binding decision.<sup>7</sup>

In the last few years, however, ODR has seen a surge in both just interest and in use. According to the ABA, the United States had only a single Court-Annexed (hosted or supported by the judicial branch) ODR program in 2014.<sup>8</sup> Although that number would grow to 15 by 2016, all 15 of them were located in a single state (Michigan). There were, however, 16 new Court Annexed ODR sites in 2018 and 31 new ones in 2019. Around the time NLADA began this research, there were 66 Court-Annexed ODR sites in 12 states.<sup>9</sup> There is no sign that this growth, which saw a near doubling of ODR sites in 2019, will slow down, and ODR platforms appear to be here to stay.

What is driving such an increased interest in ODR? Is it justice for the low-income clients of legal aid? Or is it something else? The interest in ODR so far has not been coming from the civil legal aid community. For example, look at The Legal Services Corporation (LSC) Technology Initiative Grant (TIG) program. LSC is an independent nonprofit established by Congress in 1974, and it is the single largest funder of legal aid.<sup>10</sup> In addition to their basic field grants to programs, they have also annually requested applications for TIGs since 2000, and they currently fund projects in the categories of “Innovations and Enhancements,” “Replication and Adaptation,” and “Technology Improvement Projects.”<sup>11</sup> Despite a diverse array of projects, no legal aid program has ever been awarded a TIG from LSC for any project related to ODR.<sup>12</sup>

If the legal aid community is not driving the push for increasing ODR platforms in the civil legal justice system, why not? Is it simply because they lack experience with and knowledge of a relatively new technology? Or is their hesitancy rooted in a more principled opposition to how ODR platforms currently operate? And if the legal aid community has identified serious concerns with ODR, what, if anything, do they believe can or needs to be done to mitigate those problems in future platforms? What does the legal aid community see as the guiding principles for courts and developers who seek to expand the use

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<sup>4</sup> Ethan Katsh & Colin Rule, *What We Know and Need to Know about Online Dispute Resolution*, 67 S.C. L. Rev. 329 (2016).

<sup>5</sup> Lucille M. Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J.L. & Tech. 51, 56 (2002).

<sup>6</sup> Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal*, 34 Windsor Y.B. Access to Just. 112 (2017), at 114.

<sup>7</sup> *Id.*

<sup>8</sup> American Bar Association, *Online Dispute Resolution in the United States DATA VISUALIZATIONS*, available at <https://www.americanbar.org/content/dam/aba/images/centerforinnovation/odrvisualizationreport.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> Legal Services Corporation, *About LSC*, Available at <https://www.lsc.gov/category/about-lsc?page=3>.

<sup>11</sup> Legal Services Corporation, *LSC Notice of Intent to Apply for 2020 Grant Funding*, Available at <https://www.lsc.gov/sites/default/files/attach/2020/03/2020-TIG-LOI-Notice-Extended-to-May-15.pdf>.

<sup>12</sup> A list of Technology Initiative Grants awarded by LSC since 2014 can be found via links at <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig#Grants>.

of ODR in the civil legal system? These are the questions we sought to answer in our research. Still, the results and conclusions presented below are not intended to be a perfectly comprehensive view of all challenges with ODR or all possible solutions. Despite our best efforts, we are aware in the ways that many valuable voices get missed in studies like these. Especially in the constantly changing space of legal technology, we hope readers will approach the findings report as part of an ongoing conversation and an opportunity for further analysis, increased questioning, deeper discussions, and additional research.

## SECTION II: LITERATURE REVIEW

Online Dispute Resolution (ODR), in its most simple terms, brings the legal resolution processes, from filing to determination, online.<sup>13</sup> ODR is more of a “how” than a “what” as it encompasses both the method of the resolution process and the method of delivering that resolution. That method of delivering a resolution – referred to as *instrumental* ODR – places ODR as the tool facilitating the resolution process.<sup>14</sup> The method of resolution itself – referred to as *principal* ODR – defines ODR as the tool actually doing the resolution.<sup>15</sup> For example, principal ODR might classify cases and assist with determining final outcomes while instrumental ODR might offer videoconferencing and document assembly tools. Some researchers have viewed ODR not as a tool to “displace or challenge an existing legal regime but to fill a vacuum where law’s authority was absent or inadequate.”<sup>16</sup>

ODR finds its roots in alternative dispute resolution (ADR) and is born in similar promises and rhetoric. ADR is a broad term used to describe anything outside of the classic litigation model of settling a dispute (e.g., negotiation, conciliation, mediation, and arbitration). ADR’s emphasis on informal dispute resolution was promoted “with the rhetoric of egalitarianism,”<sup>17</sup> paralleling how current discussions of ODR focus on its possibility to increase access to justice<sup>18</sup> and save both parties and the courts time and money.<sup>19</sup>

ODR emerged from ADR in the mid-1990s during the eCommerce boom. During this period, eCommerce giants, such as eBay, needed a tool to settle thousands of disputes happening between customers.<sup>20</sup> Unable to have customers meet in traditional face-to-face settings, ODR (or “online-ADR” as it was first called) emerged as a tool to quickly solve these disputes in a rapidly expanding internet economy.<sup>21</sup> Now, ODR is moving to the public sphere. In 2002, Michigan established a pilot program for a fully virtual courtroom, where hearings are electronically attended through video and teleconferencing. Notes from the conference are recorded by an automated court reporter and are paired with video and audio recording.<sup>22</sup> This court was limited, however, to commercial and business cases with an excess of

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<sup>13</sup> Ethan Katsh & Colin Rule, *What We Know and Need to Know about Online Dispute Resolution*, 67 S.C. L. Rev. 329 (2016).

<sup>14</sup> Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 Ohio St. J. on Disp. Resol. 91 (2018).

<sup>15</sup> *Id.*

<sup>16</sup> Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 21 Int’l Rev. L., Comp. & Tech. 97, 99 (2007).

<sup>17</sup> Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wisc. L. Rev. 1359, 1361 (1985).

<sup>18</sup> Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal*, 34 Windsor Y.B. Access to Just. 112 (2017).

<sup>19</sup> Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. Marshall J. Computer & Info. L. 81 (2009).

<sup>20</sup> Ethan Katsh & Colin Rule, *What We Know and Need to Know about Online Dispute Resolution*, 67 S.C. L. Rev. 329 (2016).

<sup>21</sup> *Id.*; Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 21 Int’l Rev. L., Comp. & Tech. 97, 99 (2007).

<sup>22</sup> Lucille M. Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J.L. & Tech. 51, 56 (2002).

\$25,000 in dispute. In 2015, Canada opened the world's first online tribunal that was "fully integrated into the justice system," where individuals can explore the possible solutions, negotiate directly with each other, have a mediator facilitate discussion between the two parties, and even have their case transferred to a tribunal member who reads the case and issues a binding decision.<sup>23</sup> Initially, this tool was available only for condominiums disputes, but expanded into small claims matters under \$5,000, starting in 2017.<sup>24</sup> In 2007, the Netherlands launched Rechtwijzer, a pay-as-you-go app developed by the Hague Institute for the Internationalization of Law, the Dutch Legal Aid Board, and the US firm Modria, to assist couples going through divorce. It asked questions and guided users through interactive Frequently Asked Questions (FAQs) and forms. Rechtwijzer has since transformed into Justice42 ("Justice for Two") reportedly due to its financial unsustainability and low uptake.<sup>25</sup>

This literature review begins with defining ODR and providing a brief overview of its history and links to ADR. It then discusses how developments in ODR can affect perceptions of procedural justice and by extension, legitimacy in the courts. After that, the section examines the benefits of ODR identified in the literature, namely lower costs, increased efficiency, and improved access along with the potential drawbacks of ODR identified in the literature, namely institutionalizing inequality by advantaging those most experienced with the courts.

### WHAT IS ODR?

While ADR practices, such as arbitration, were used as early as the 1880s, ADR found its footing in the 1970s amidst calls for greater access to civil justice and perceived discontent with courts' handling of more minor disputes.<sup>26</sup> ADR was designed to increase efficiency, flexibility, reduced costs, and community empowerment.<sup>27</sup> Whether ADR lived up to its promise is debated – Critical Legal Scholars point to how informality can serve as a breeding ground for prejudice<sup>28</sup> and others point to the lack of actual diversion from trial and minimal effect on legal efficiency.<sup>29</sup>

While ADR emerged as an alternative for traditional court decisions and litigation, ODR emerged in commercial settings when there were no current avenues for resolving online disputes. Unable to solve

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<sup>23</sup> Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, 34 Windsor Y.B. Access to Just. 112, 114, 121 (2017).

<sup>24</sup> *Id.* at 122.

<sup>25</sup> Roger Smith, *Rechtwijzer: Why Online Dispute Supported Dispute Resolution is Hard to Implement*, Law, Technology, and Access to Justice (June 20, 2017), <https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>. See Also Justice42's Relaunch of Rechtwijzer (Fall 2017), available at <https://justice42.com/2018/12/08/justice42s-contribution-to-the-international-legal-aid-group-newsletter/?lang=en>.

<sup>26</sup> Calvin Morrill, *Institutional Change through Interstitial Emergence: The Growth of Alternative Dispute Resolution in U.S. Law, 1970-2000*, 4 Braz. J. Empirical Legal Stud. 10, 12, 20 (2017).

<sup>27</sup> Ethan Katsh & Orna Rabinovich-Einy, *A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution*, 32 Ohio St. J. on Disp. Resol. 695 (2017).

<sup>28</sup> See generally Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wisc. L. Rev. 1359 (1985).

<sup>29</sup> See generally Orna Rabinovich-Einy & Ethan Katsh, *A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution*, 32 Ohio St. J. on Disp. Resol. 695 (2017).



online disputes in traditional methods as parties would often be hundreds or thousands of miles apart, ODR emerged to fill the resolution void.<sup>30</sup>

Today, ODR has moved from the private sphere to the courts. Court-Annexed ODR programs have gone from 0 in 2013 to 5 (all in Michigan) in 2015 and then from 35 in 2018 to 66 (in 12 states) in 2019.<sup>31</sup> Although some ODR sites handle multiple types of cases, a few case types still dominate the ODR landscape. Of all court-annexed ODR sites, 34 handle traffic cases, another 20 handle warrants, and many others handle some form of small claims (8), civil debt (11), or past due judgment matters (5).<sup>32</sup> Still, other matters, such as divorce and landlord tenant have been started at ODR sites in 2018 and 2019.<sup>33</sup> Many ODR platforms involve a hybrid system of face-to-face interaction with technology.<sup>34</sup> For example, ODR may help with scheduling an email or teleconferencing a mediation session. Those who use ODR may also use technology to assist the mediation process, but all of this is dependent on having access to and an understanding of broadband internet and the necessary technology.

ODR can have several components: asynchronous communication (neither party must be present and the communication need not be sent or read during normal business hours), built-in legal information, triage (users are presented with different paths), electronic document management, access to mediators, negotiation spaces, document assembly, and payment methods.<sup>35</sup> In general, ODR will use a three-step model: first, parties receive feedback on their dispute; second, ODR offers them dialogue techniques; and third, ODR provides decision-making techniques to facilitate a resolution, such as involving an arbitrator or judge.<sup>36</sup>

ODR has begun to integrate aspects from artificial intelligence (AI) in the resolution process, from making determinations to referrals. For example, in Australia, when applicants apply for legal aid, they must pass both a financial and merit test.<sup>37</sup> Using the GetAid system, legal aid practitioners in Victoria utilize AI in the merit test, which helps determine the likelihood of a favorable outcome.<sup>38</sup> AI builds a decision tree with rule-based reasoning on the merits of the case, case-based learning, and applying patterns from previous cases (i.e., machine learning). AI's determination affects whether the legal aid

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<sup>30</sup> Ethan Katsh & Colin Rule, *What We Know and Need to Know about Online Dispute Resolution*, 67 S.C. L. Rev. 329 (2016).

<sup>31</sup> American Bar Association, *Online Dispute Resolution in the United States DATA VISUALIZATIONS*, available at <https://www.americanbar.org/content/dam/aba/images/centerforinnovation/odrvisualizationreport.pdf>.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> Susan Nauss Exon, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, 32 Ohio St. J. on Disp. Resol. 609, 615 (2017).

<sup>35</sup> *Online Dispute Resolution Offers a New Way to Access Local Courts*, Pew Charitable Trusts (Jan. 4, 2019), available at [https://www.pewtrusts.org/-/media/assets/2018/12/clsm\\_online\\_dispute\\_resolution\\_offers\\_a\\_new\\_way\\_to\\_access\\_local\\_courts\\_fact\\_sheet\\_v1b-1.pdf](https://www.pewtrusts.org/-/media/assets/2018/12/clsm_online_dispute_resolution_offers_a_new_way_to_access_local_courts_fact_sheet_v1b-1.pdf); Noam Ebner & John Zeleznikow, *Fairness, Trust and Security in Online Dispute Resolution*, 36 Hamline Univ. J. Pub. L. & Pub. Pol'y 143, 143-147 (2015).

<sup>36</sup> Lodder, A. & Zeleznikow, J., *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*, (Wahab, M., Katsh, E. and Rainey, D. eds.) (2011) 73-94.

<sup>37</sup> John Zeleznikow, *Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts*, 8 Int'l J. Ct. Admin. 30, 37 (2017).

<sup>38</sup> See *Id.* at 37 ("The merit test involved a prediction about the likely outcome of the case if it were to be decided by a Court. VLA grants officers, who have extensive experience in the practices of Victorian Courts, assessed the merit test. This assessment involved the integration of procedural knowledge found in regulatory guidelines with expert lawyer knowledge that involved a considerable degree of discretion.").

organization will take the case. AI can also assist in other manners; for example, portals using AI can identify legal issues and next steps when users might not identify them (e.g., “I can’t afford my child support” as requiring child support modification) and can provide users with information about and referrals to other support services, like social workers or domestic violence shelters.<sup>39</sup> AI can also assist in negotiating settlements by taking ratings from parties on options and suggesting solutions.<sup>40</sup>

In sum, ODR can:

1. Help parties identify their legal needs;
2. Offer a negotiation space for parties;
3. Connect parties with other services;
4. Help parties weigh pros and cons of different solutions;
5. Facilitate negotiation;
6. Assist with document assembly and management;
7. Build decision trees to facilitate resolution; and/or
8. Assist with payment methods if one party must pay a judgment upon resolution of the case.

Nothing in this list is meant to claim that ODR is the only tool can perform these tasks or even that it is necessarily the best tool to do so. Rather, it is meant to illustrate that these are tasks ODR platforms can perform.

ODR does not:

1. Use algorithms or AI to determine judgements;
2. Tell the parties what to do;

## ODR AND SELF-REPRESENTED LITIGANTS

While there is no official figure for the number of “pro se” or self-represented litigants, the Self-Represented Litigation Network estimates about three in four civil cases have at least one self-represented litigant.<sup>41</sup> This figure is often higher for domestic violence survivors – where anywhere between 80<sup>42</sup> and 97<sup>43</sup> percent must self-represent when their safety and the safety of their children is at stake. These figures have led to the development of self-help services for pro se litigants. These

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<sup>39</sup> *Interactive Online Portals Offer Targeted Legal Resources on Demand*, Pew Charitable Trusts (Jan. 4, 2019), available at [https://www.pewtrusts.org/-/media/assets/2019/improving\\_access\\_to\\_legal\\_resources\\_online\\_factsheet.pdf](https://www.pewtrusts.org/-/media/assets/2019/improving_access_to_legal_resources_online_factsheet.pdf).

<sup>40</sup> Lodder, A. & Zeleznikow, J., *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*, (Wahab, M., Katsh, E. and Rainey, D. eds.) (2011).61-82.

<sup>41</sup> *How Many SRLs?*, Self-Represented Litigation Network (December 17, 2020), <https://www.srln.org/node/548/>.

<sup>42</sup> Nancy Kinnally & Jessica Brown, *Everyone Counts: Taking a Snapshot of Self-Represented Litigants in Miami-Dade*, American Bar Association (2017), [https://www.americanbar.org/groups/legal\\_services/publications/dialogue/volume/20/fall-2017/pro-bono-everyone-counts/](https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/20/fall-2017/pro-bono-everyone-counts/).

<sup>43</sup> State of New Hampshire Judicial Branch, *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts* (2004), available at <https://www.courts.state.nh.us/supreme/docs/prosereport.pdf>.

services may include document assembly, information on court protocols, and, recently, emphasis on the “mundanity” of courtroom procedures – such as information on where to sit.<sup>44</sup>

A recent evaluation of self-help services in Alaska, Idaho, Maryland, Minnesota, Montana, Utah, and California found that remote service delivery<sup>45</sup> was positively received by both the litigants and court personnel.<sup>46</sup> The evaluation found self-represented litigants did not need to travel to the court, reducing transportation costs, missed work, parking, and childcare costs.<sup>47</sup> The litigants also reported quicker delivery of information. The evaluation also found that of those who preferred a different delivery method (such as email or phone) ultimately preferred a different type of remote service delivery method, not face-to-face interaction. The researchers report:

“Studies in two of the participating courts showed that persons for whom documents were created using a remote services method [like via the Internet] were highly likely to obtain a determination on the merits – and obtain the relief they were seeking – if they filed the document.”<sup>48</sup>

Another study found when self-represented litigants used self-help services, they tended to “rate the fairness of court proceedings very highly, whether or not they believe they prevailed in the matter,” and judges tended to “give them satisfactory ratings” of how they acted in court.<sup>49</sup>

### BEST PRACTICES AS IDENTIFIED IN THE LITERATURE

Web portals are becoming a central tool for courts.<sup>50</sup> These portals help with document assembly and e-filing, and some offer more advanced services, including making specific referrals. However, as it stands, many portal have no formalized triage protocols (i.e., the act of processing and assigning court resources to cases based on subject matter and content). Further, separate legal portals, document assembly, and business analysis tools are not always intuitive nor do they consider “broader systematic issues.”<sup>51</sup> To achieve an integrated central tool, some have suggested a need for more triage protocols that offer connections between the litigants, courts, legal service providers in that case type, and social service providers. These protocols should be based on a comprehensive analysis of the differing needs of individual cases and litigants.<sup>52</sup> The best practices identified in this section are based on the literature on triage, self-help more broadly, AI, and ADR.

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<sup>44</sup> J. David Griener, Dalié Jiménez, & Lois Lupica, *Self-Help, Reimagined*, 92 Ind. L.J. 1119, 1130 (2017).

<sup>45</sup> For example, using mail, fax, scanning and transmission via email, photographic and transmission as email or smartphone message, virtual law office, e-filing, websites, chats, emails, voice telephony, co-browsing, text messaging, outbound dialers, videoconferencing and using a customer relations management software database.

<sup>46</sup> Self-Represented Litigation Network, *Serving Self-Represented Litigants Remotely: A Resource Guide* (2016), available at [https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%2008-16-16\\_0.pdf](https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%2008-16-16_0.pdf).

<sup>47</sup> *Id.* at 11.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> Maryland Administrative Office of the Courts & State Justice Institute, *Final Report: An Executive Program Assessment for State Court Projects to Assist Self-Represented Litigants* (2005).

<sup>50</sup> Tom Clarke, Richard Zorza, & Katherine Altneder, *Triage Protocols for Litigant Portals: A Coordinated Strategy between Courts and Service Providers* (2013), available at [https://www.srln.org/system/files/attachments/Triage\\_Protocols\\_for\\_Litigant\\_Portals\\_A\\_Coordinated\\_Strategy\\_Between\\_Courts\\_and\\_Service\\_Providers.pdf](https://www.srln.org/system/files/attachments/Triage_Protocols_for_Litigant_Portals_A_Coordinated_Strategy_Between_Courts_and_Service_Providers.pdf).

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.*

Best practices around ODR can be roughly categorized into five categories: those at the diagnostic stage, logistics, strategy, resolution, and collaboration states.<sup>53</sup> These best practices are premised on the notion that triage, ODR, and self-help services must be accessible and universal, consistent, comprehensive, transparent, and evidence-based.

### **1. Diagnosis**

This category addresses the need for proper introduction, or in some cases reintroduction, to the court system for a self-represented litigant. This area is designed to help litigants identify and understand their specific legal problems, analyze the value of pursuing an action, and understanding what the court can and cannot do for them. It may also be a place for ODR platforms to suggest that parties seek solutions elsewhere if ODR is or may not be appropriate for their legal issue. Some ODR solutions created for this category could include things such as software that helps categorize litigants into archetypes, an interactive question and answer portal, and an evaluation software that helps to determine the value of pursuing a specific claim in court.<sup>54</sup> All of these tools, however, raise questions about what data is used to make these determinations. First, does the data come from samples that are representative of self-represented litigants in that jurisdiction? Second, is the data reinforcing implicit and explicit biases that could unfairly disadvantage certain litigants?

In this stage, some have suggested that cases and case types need to be prioritized based on potential consequence level; for example, a housing issue that involves a Section 8 housing voucher is likely to have severe consequences for the tenant and will likely require more court resources than a similar case without a voucher.<sup>55</sup> Having online forms can help categorize cases into those that need (1) formalization with assistance, such as cases where parties merely need the court to officially record their agreement, (2) decision-making with assistance, or (3) intensive attention. Triage portals can identify whether people will be able to handle the case through purely self-help services, non-attorney services as local practice rules permit, unbundled assistance, and full representation. Challenges arise because there is not always universal agreement about how different cases should be categorized, decisions that sometimes require not just technical analysis but also value judgments.

These diagnostic tools run the risk of adding to the power imbalance. For example, landlords are more likely than their tenants to be repeat players in any dispute resolution system. Using an ODR platform could allow landlords to find new advantages to exploit in automating the process or other increased efficiencies. Additionally, using the portal could help them gather information to calculate the cost of going to court vs. eviction, how to minimize loss, get as much money as possible, the length of time until the eviction, and maybe even the odds that the tenant will seek legal representation. Meanwhile, if tenants choose not to use this tool to avoid these problems, they might miss out on inputting information about the details of the lease, the landlord's allegations, information about the consequences for housing vouchers, the defenses available to them, and the potential impact on their

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<sup>53</sup>Charles L. Owen et al., *Access to Justice: Meeting the Needs of Self Represented Litigants* (2002) (These five categories are based on an evaluation of virtual courtrooms performed by 22 students at the Chicago-Kent School of Law).

<sup>54</sup> *Id.*

<sup>55</sup> Tom Clarke, Richard Zorza, & Katherine Alteneder, *Triage Protocols for Litigant Portals: A Coordinated Strategy between Courts and Service Providers* (2013), 5-6, available at [https://www.srln.org/system/files/attachments/Triage Protocols for Litigant Portals A Coordinated Strategy Between Courts and Service Providers.pdf](https://www.srln.org/system/files/attachments/Triage%20Protocols%20for%20Litigant%20Portals%20A%20Coordinated%20Strategy%20Between%20Courts%20and%20Service%20Providers.pdf).

finances. This stage must also allow litigants to enter in hypothetical information so they can explore the possible solutions without being bound to a particular track.

## **2. Logistics**

This thematic area addresses how to prepare the litigant for their actual interaction with the court system. This category is meant to explain to a litigant explicitly what they are doing with each step and how or why that step moves them toward their ultimate goal, educating the party while helping them to navigate the system. ODR-relevant solutions can involve software to assist parties in generating a complaint. Online case managers allow litigants access to case information, education, tools, a free physical copy of their case documents, and schedules of action as well as tools to manage it.<sup>56</sup> This category could, if litigants consent, also involve a “digital sheriff” which works with existing court systems to serve documents.<sup>57</sup>

Some have called for self-help materials directed at low and moderate income individuals to “address the broad range of negative emotions experienced by these individuals, in addition to providing legal information. For self-help materials to be mobilizing and deployable, they must address individuals’ performance-minimizing and solution-inhibiting mental states.”<sup>58</sup> If litigants are already having negative experiences with courts and legal technologies, these challenges will only be compounded by confusion about legal mundanity, which refers to non-legal specific items and procedures (e.g., where to sit and what to do when) that can potentially leave the self-represented litigant uncomfortable.

One of the most important aspects of these issues is ensuring participants who voluntarily consent to participate in ODR know clearly what is required of them by law and what deadlines could effect their case. For example, if they participate in ODR, is the answer timeline tolled or not. If it is not tolled, the ODR materials must clearly explain to the person that they still need to be involved in the case and submit an answer to avoid a default judgment. In effect, if the person involved in the ODR is involved in litigation, the system must make that clear to the person while clearly explaining what ODR does to each of their litigant obligations, such as requirements related to answers, service, and waiver requests.

Another logistics best practice is to let the person use some of the ODR tools anonymously and without accepting ODR. This allows them to weigh if they want to participate and commit to the tool/process. The individual should be able to participate at the beginning of the case and still opt out at any point.

## **3. Strategy**

This area builds on the educational component of the logistics category, assisting the litigant with the complex task of building a case strategy. Depending on the situation, litigants might be offered information regarding what the court system deems important and compelling. A well designed, culturally competent tool that attempts to operate without bias can help extract a “fair and coherent representation of their story, their needs, and their objectives.”<sup>59</sup> Part of this will include information on how to challenge the system’s conclusions should a party decide to opt out as well as what will be considered on appeal if they go to a paper review only. Before someone opts into ODR, they need to be fully aware of what they might gain by participating and also what rights they might waive or what else they could lose by doing so.

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<sup>56</sup> Charles L. Owen et al., *Access to Justice: Meeting the Needs of Self Represented Litigants* (2002).

<sup>57</sup> *Id.*

<sup>58</sup> J. David Griener, Dalié Jiménez, & Lois Lupica, *Self-Help, Reimagined*, 92 Ind. L.J. 1119, 1129-1130 (2017).

<sup>59</sup> Charles L. Owen et al., *Access to Justice: Meeting the Needs of Self Represented Litigants* (2010).

Plaintiffs that initiate an ODR request before filing in court also need to know their options for using some of the tools anonymously, how data is retained, what records are created and how they will be used, and other options outside of the ODR tool/process, such as navigators, self-help centers in their region, and the option to seek help from a legal aid organization or pro-bono project.

This category also provides tools to help parties negotiate and settle their disputes without trial. ODR solutions could include online role-playing education for mediation and other ADR processes, access to information about the judge, education in basics on logic, and online tools to assemble a story and organize evidence.<sup>60</sup>

#### **4. Resolution**

This category attends to the power imbalances between a self-represented litigant (such as a tenant) and a more experienced party (such as a landlord). ODR must demonstrate care in crafting a just and balanced solution and design a fair and equitable process

In his seminal work, Marc Galanter argues that the repeat users of the court system have amassed institutional knowledge and know-how, preventing those unfamiliar with the legal rules and knowledge from succeeding in court. As he puts it, “the ‘haves’ come out ahead.”<sup>61</sup> The inequities potentially present in the diagnosis state (e.g., litigants not using or being unsure of how to use certain tools) can be compounded in the final stage, when those familiar with the court system (i.e., the repeat players) can use their institutional knowledge to their advantage. As it relates to this stage, online mediation software, and remote access to attorneys, among other things, may address the power imbalances and help level the playing field between the repeat and one-off players, at least to some degree. All of those options, if available, should be presented to the plaintiff or potential respondent before they opt into the ODR or file in court.

#### **5. Collaboration**

This thematic area addresses the need for partnerships and collaboration for support of self-represented litigants outside of the judicial system itself. The elements in this category are meant to capture and analyze data to help assess litigant uses and needs in order to initiate programs. This category aims to partner with outside organizations, creating “incentives and mutual value” in developing programs to help self-represented litigants access justice.<sup>62</sup> In this category, legal technology has the potential to identify communities in need of support, create online networking platforms for courts and communities, offer software that provides direct hyperlinks to information on digital legal documents, and flag potential repeat players who have the potential to benefit, at the detriment of others, from past experiences.

Any court looking to pilot ODR needs to include not just the courts, but also legal aid organizations that work with those communities, pro bono projects, self-help centers in the region, as well as their local Access to Justice Commissions. ODRs designed by for-profit vendors and courts alone, might miss significant features and processes that make the innovation fair for all participants and respected and adopted by all the players in that space.

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<sup>60</sup> *Id.*

<sup>61</sup> Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc’y Rev. 95 (1974).

<sup>62</sup> Charles L. Owen et al., *Access to Justice: Meeting the Needs of Self Represented Litigants* (2002), at 29.



## PROCEDURAL JUSTICE

Procedural justice is defined as an individual's experience and perception of justice – does the individual perceive their experience with the process to be fair?<sup>63</sup> Whether or not someone perceives the overall process as a fair and just one affects their acceptance of the resolution and whether they view the decision maker as legitimate. Those working to resolve a problem want to be able to tell their story, feel that they have been listened to, a sense that the mediator is being fair, and to feel that they have been treated with respect.

There are four criteria for procedural justice: consistency, decision quality, bias suppression, and control/representation.<sup>64</sup> Perceived procedural justice affects satisfaction with outcomes and how individuals define a just and fair process. In a widely cited work, Tom Tyler finds that citizens who received a favorable outcome are more concerned with ethicality and honesty, and citizens who received a negative outcome were more concerned with fairness and consistency. Fairness was evaluated in terms of how hard the authorities seemed to be trying to be fair. Most notably, Tyler found the perception and rating of procedural justice is more universal – people understand and conceptualize procedural justice relatively consistently, regardless of individual characteristics (e.g., race, age, gender).

Individuals are concerned with both the amount of process control – how much control they have over the process – and decision control – how much control they have over the actual decision (e.g., is it binding?). Research has shown that when individuals perceive themselves as having more control over the resolution process, they are more likely to judge the resolution as fair – regardless of how much control over the decision they actually had.<sup>65</sup>

### Fairness and Procedural Justice

People understand and assess fairness by different dimensions. How individuals assess fairness has important implications for the courts. Distributive fairness is subjective and asks whether people perceive that they have received a “fair share” of an outcome.<sup>66</sup> It is judged on perceptions of equality, need, generosity, and equity. When parties have a negative relationship, they are more likely to question these dimensions and reject the offer.<sup>67</sup>

While most literature on procedural justice has examine the idea in the context of formal court structures or policing, research suggests that it is also applicable to ADR, and by extension, ODR. Studies have found that in ADR, individuals are more likely to comply with the decision when they perceive more control, fairness, and legitimacy.<sup>68</sup> Using interviews and surveys, researchers examined the actions of corporate and individual litigants in federal tort and contract actions subject to an arbitrator's award. Whether a party rejected or accepted an award was mediated by the perception of procedural justice.<sup>69</sup>

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<sup>63</sup> Tom R. Tyler, *What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures*, 22 *Law & Soc'y Rev.* 103 (1988).

<sup>64</sup> *Ibid.*

<sup>65</sup> E. Allan Lind, Robin I. Lissak & Donald E. Conlon, *Decision Control and Process Control Effects on Procedural Fairness Judgement*, 13 *J. Appl. Soc. Psychol.* 338, 347 (1983).

<sup>66</sup> Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 *Marq. L. Rev.* 753, 754 (2003-2004).

<sup>67</sup> *Id.*

<sup>68</sup> Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 *Marq. L. Rev.* 753, 762 (2003-2004); Naomi Creutzfeldt, *Ombudsmen and ADR: A Comparative Study of Informal Justice in Europe*, Palgrave Macmillan: Basingstoke, UK (2018).

<sup>69</sup> E. Allan Lind, Carol T. Kulik, Maureen Ambrose & Maria V. de Vera Park, *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 *Admin. Sci. Q.* 224, 244-249 (1993).

The results “showed a strong and significant path [ $p<0.05$ ] from procedural justice judgements to award acceptance.”<sup>70</sup> Fairness and procedural justice directly relates to whether individuals will accept a resolution in ADR.

### **Implications for Procedural Justice in ODR**

ODR, like ADR, is not immune to judgments related to procedural justice. One study investigated perceptions of procedural justice for those who used the judicial ODR. The oldest judicial ODR is Money Claim Online in the UK, a platform that uses plain-language forms and legal materials for each question and form.<sup>71</sup> Once a litigant submits a form, the judge communicates with them via text, phone, and video. In a study of how litigants perceived procedural justice in this setting, the researchers found individuals perceived more procedural justice when they sent text messages to judges, and the judges, in return, sent video messages compared to when both individuals and judges sent text messages or both sent video messages. Further, self-represented litigants reported feeling “less frustrated, angry, hopeless and stressed” when they sent text messages and received video messages compared to a setup where both parties sent video messages.<sup>72</sup> These results point to the context-specific nature of procedural justice in the ODR setting.

In ODR, the method of communication is not the only factor in assessments of procedural justice. One study had participants play the role of someone with a dispute and use EZSettle, a dispute resolution software.<sup>73</sup> Whether participants believed they were engaging with a human or algorithm affected their perception of procedural justice.<sup>74</sup> In this study, participants utilized either instrumental or principal ODR. At a significant level, participants reported feeling more procedural justice when using instrumental mediation with a human arbitrator rather than principal mediation with a software arbitrator.<sup>75</sup> People also preferred having the decision-making conducted by a human arbitrator as they felt more informational justice, felt more respected, and trusted the arbitrator more than the software.<sup>76</sup> In addition to feeling overall as if there was more procedural justice when their case was decided by a human arbitrator. Participants believed that they had “more voice” as ranked on a 7 point scale when they believed their case was decided by a human arbitrator (average score of 4.77) compared to when they believed their case was decided by a software algorithm (average score of 2.75).<sup>77</sup> This points to the need to factor in other considerations when conceptualizing procedural justice, such as respect and trust.

Similarly, in a survey of litigants who used ODR (most were for a reduction in a traffic violation), researchers found that how user-friendly the system appeared to be and the outcome of the case

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<sup>70</sup> *Id.* at 240.

<sup>71</sup> Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 Cornell J.L. & Pub. Pol’y 331, 374 (2016).

<sup>72</sup> *Id.* at 376.

<sup>73</sup> Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 Ohio St. J. on Disp. Resol. 91 (2018).

<sup>74</sup> *Id.* at 136.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 137.

<sup>77</sup> *Id.* at 134.



affects whether the litigant views the resolution as fair.<sup>78</sup> They found that the more litigants were able to explain their situation and refer to more explanation types (e.g., context and identity), the more likely they were to perceive the experience as procedurally just. Several participants also reported that they felt the ODR did not appreciate the complexity of their explanation and felt like they might not be able to explain their cases well. As the researchers state, litigants referred to the “absence of rich in-person cues” when using ODR.<sup>79</sup>

This parallels one of the main concerns with ODR: when traditionally in-person legal proceedings are moved online, some believe there is greater potential for miscommunication as there is no potential for a neutral third-party to interpret body language or other non-verbal cues to determine whether a negotiation is going well, and there may be less versatility in how parties can present and express their positions.<sup>80</sup> Others say that negotiators’ moves are influenced not only by self-interest and economics, but also by their connections to each other; potentially meaning that in ODR, the lack of face-to-face communication or actual relationship building can have implications for perceptions of fairness and justice.<sup>81</sup>

### **PERSPECTIVES ON ODR: THE GOOD**

ODR proponents posit that ODR will improve efficiency, reduce the time and cost of attending court, allow participants to use legal information and resolution processes outside of court on their own time, reduce the workload of court personnel, and be more responsive to individual concerns and cases.

ODR can reduce the amount of time needed for hearings and accommodate work and childcare schedules. The possibility of ODR to reach people who might not be able to attend court has led one proponent to go as far as saying: “Due to its flexible nature, convenient venue, and affordable cost, the advantages of ODR would effectively eliminate barriers individuals with disabilities face when appealing a claim.”<sup>82</sup> ODR is a promising tool in that it can allow individuals with disabilities to avoid travelling to a designated local office to use the specific phone for the hearing and increase language access as not all individuals use verbal language. The same author continues: “Throughout the entire process, the appealing individual is in control of presenting their case. The individual may do it on their own time, within their own home, using their own words, and in a guided fashion to help facilitate the success of their appeal. The individual may file and argue claims that they would have not otherwise been able to pursue.”<sup>83</sup>

Others write that ODR may assist with removing implicit bias from outcomes because it “remov[es] a litigant’s appearance (race, gender, weight, etc.) from a judge’s consideration.”<sup>84</sup> Proponents like this

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<sup>78</sup> Youyang Hou, Cliff Lampe, Maximilian Bulinski, & J.J. Prescott, *Factors in Fairness and Emotion in Online Case Resolution Systems*, Proceedings of the 2017 ACM Conference on Human Factors in Computing Systems 1 (May 2017).

<sup>79</sup> *Id.* at 10.

<sup>80</sup> Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. Marshall J. Computer & Info. L. 81, 89 (2009).

<sup>81</sup> Nancy A. Walsh, *Perceptions of Fairness in Negotiation*, 87 Marq. L. Rev. 753, 756 (2003-2004).

<sup>82</sup> Jane Rose, *Implementing Online Dispute Resolution in MO HealthNet Appeals: Increasing Access to Remedies While Decreasing State Spending*, 83 Miss. L. Rev. 861, 877 (2018).

<sup>83</sup> *Id.* at 885.

<sup>84</sup> Maximilian A Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 Mich. J. Race & L. 205, 205 (2016).

sometimes speak about ODR in world-altering rhetoric, but it is not always clear, thus far, how closely that rhetoric has resembled on the ground realities.

ODR is significantly less expensive than entering into traditional litigation, which has the potential to open the justice system to more individuals.<sup>85</sup> ODR might improve the quality of negotiations because it gives litigants time and space to think about and develop their answers when compared to in-person quicker responses.<sup>86</sup> It also has the potential to prevent over-emotional responses that litigants might later regret. ODR allows participants to use tools at their own pace, which might help speed up the resolution process. Instead of needing to find a place and time when all participants can meet, more time and effort can be spent on negotiating and crafting a resolution.

### **PERSPECTIVES ON ODR: THE NEGATIVE**

Many of the concerns with ODR in the literature are rooted in the often-broken promises of ADR, which rode on similar promising rhetoric.

#### **Disadvantage those Unfamiliar with Legal Systems**

ODR can disadvantage inexperienced litigants, making it more difficult for them to present their information as effectively as more experienced parties or parties who have access to legal advice.<sup>87</sup> For example, if an inexperienced party does not know what words or phrases to use, how to classify a response, and/or if the software misclassifies a response, this could negatively impact their case, particularly if the AI is looking for those terms or concepts to make a recommendation or reach a conclusion. This reflects a troubling reality: the courts and alternative justice settings have a history of favoring those who understand how to use the system, often at the expense of those who do not.<sup>88</sup>

#### **Foster Prejudice**

ADR may amplify and potentially increase current racial and ethnic prejudice in courts into the online realm. Courts are not race neutral forums. How litigants are treated and how their voices are heard and allowed are filtered through staff and judges, individuals who bring their own biases to cases. As just one example, a recent internal review of the New York Courts by a special commission reported significant “accounts of explicit and implicit racial bias” that were “strikingly similar to the testimony from decades ago.”<sup>89</sup> It is unsurprising then that research has reported, for example, that black respondents express significantly lower levels of trust in courts compared to whites.<sup>90</sup> Those who do harbor racial or other prejudices are more likely to prefer informal settings for resolution because they are less constrained by the rules of the game than they would be in formal settings.<sup>91</sup> Because of this

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<sup>85</sup> Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. Marshall J. Computer & Info. L. 81, 89 (2009).

<sup>86</sup> *Id.* at 86.

<sup>87</sup> See generally, Bruce L. Mann, *Smoothing Some Wrinkles in Online Dispute Resolution*, 17 Int’l J. L. & Info. Tech. 83 (2009).

<sup>88</sup> See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc’y Rev. 95 (1974); Carrie Menkel-Meadow, *Do the Haves Come Out Ahead in Alternative Justice Systems? Repeat Players in ADR*, 15 Ohio St. J. Disp. Res. 19 (1999).

<sup>89</sup> Report from the Special Adviser on Equal Justice in the New York State Courts (2020), 26, Available at <https://www.nycourts.gov/LegacyPDFS/ip/ethnic-fairness/pdfs/SpecialAdviserEqualJusticeReport.pdf>.

<sup>90</sup> Sara Sternberg Greene, *Race, Class, and Access to Justice*, 101 Iowa L. Rev. 1263, 1301 (2015).

<sup>91</sup> For an overview, see: Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wisc. L. Rev. 1359 (1985).

imbalance, Critical Legal Studies have pointed to how minorities are more likely to suffer negative treatment in ADR than in the formal courtroom. This imbalance has led some to argue that ADR should only be used when parties of similar status and power go up against each other. Given the similarities between ODR and ADR, this same critique may be applied to ODR.

This power imbalance may shift with knowledge, pointing to the opportunity ODR has at helping individuals with strategy and logistics. For example, when individuals are taught how to bargain and how to negotiate even a little bit, it greatly increases their chances of successful negotiation.<sup>92</sup> However, if those individuals are left out of those conversations, they do not get that experience and knowledge, further disadvantaging them.

### **Undermine Trust and Formality in the Judicial System**

If courts adopt ODR as another public service they offer to all before they file a case, it could potentially undermine the perception of the quality of justice. In other words, accessibility might come at the expense of quality of justice. However, this might only be a relevant concern for those who have a level of legal consciousness and, additionally, already view themselves as standing “before the law” when they are in court.<sup>93</sup>

Because ODR emerged in the eCommerce setting to (1) resolve buy and sell conflicts (2) encourage use of online sales websites, and (3) avoid litigation costs or courts altogether, some have expressed concern that there are no ethical standards for ODR. In contrast, ADR practitioners must abide by formal ethical standards.<sup>94</sup> For example, in face-to-face mediation, ethical standards include: self-determination, impartiality, the avoidance of conflicts of interest, competence, confidentiality, and quality of the process. There are currently no such standards for ODR. One scholar proposes that accessibility, affordability, transparency, fairness, innovation, and relevance should comprise ODR’s standards, building on ADR, but unique to the online environment in which ODR exists.<sup>95</sup>

### **Technology as a Factor in Itself**

Merely introducing technology into a situation changes how people act. For example, people react differently to the perception of having a computer-controlled avatar make decisions.<sup>96</sup> One study found that when individuals perceive themselves to be interacting with a more human-like avatar (even if the avatar was computer generated), they are more likely to be susceptible to social influence.<sup>97</sup>

Using technology as a mediator or mediation tool offers different avenues for both communication and miscommunication. Some have argued that because of the lack of an in-person mediator, the missing neutral third-party who might otherwise interpret body language and non-verbal cues to gauge how

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<sup>92</sup> Charles B. Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?* 70 SMU L. Rev. 891, 905 (2017).

<sup>93</sup> For a discussion on legal consciousness, see Patricia Ewick & Susan Silbey, *The Common Place of Law: Stories from Everyday Life*, Chicago: University of Chicago Press (1998).

<sup>94</sup> See generally Susan Nauss Exon, *Ethics and Online Dispute Resolution* at 611-612.

<sup>95</sup> *Id.* at 609-610

<sup>96</sup> Jesse Fox et al., *Avatars Versus Agents: A Meta-Analysis Quantifying the Effect of Agency on Social Influence*, 30 Human-Computer Interaction 401, 401-402 (2015).

<sup>97</sup> *Id.* at 403, 418, 419.

successful the negotiation is going, can have serious impacts.<sup>98</sup> This leads to the question: Can conflicts be mediated online effectively?

In a 2003 experiment on ODR, one study reported that several participants had difficulty accessing the technology; for example, they were unsure of which internet browser they were using or how to update their internet browser if it was out-of-date.<sup>99</sup> There also was a mismatch between mediators and parties: 90 percent of the mediators said that the technology was easy to use, compared to 54 percent of the parties.<sup>100</sup> When offering mediation, the majority of the mediators reported that the lack of being physically present in the same space was not a huge barrier to setting ground rules and reframing the issues.<sup>101</sup> Mediators who took an opposing view reported missing “the ability to check their hunches based on non-verbal cues, and found it difficult to use techniques such as mirroring when language appeared neutral.”<sup>102</sup> The parties suggested that over online communication, mediators needed to be more diplomatic as they could not interpret verbal or non-verbal cues as clearly, affecting the trust-building mechanism of mediation. The study also found there was a greater expectation of speed: only 25 percent of respondents were satisfied with the speed of these proceedings and “[m]any wanted to proceed more quickly.”<sup>103</sup> Respondents expressed frustration when they did not receive responses from the other party or mediator couldn’t respond within 24 hours.<sup>104</sup> Further, 20 percent of the respondents said they had trouble expressing their ideas, concerns, and proposals.<sup>105</sup>

Ultimately, research on user experience points to the need for engagement, “[A]re they able to understand it, can they use it intuitively, and do they find enough value in the service to spend time (and perhaps also money) on it.”<sup>106</sup> If they cannot access the tool because their browser is outdated or if they do not understand how to use the technology, ODR is undermined.

This may have implications for populations that have lower technology adoption rates. A 2019 survey found that while 90 percent of Americans use the internet or email and 84 percent of Americans have a smartphone (of those who have cellphones), those in older generations reported lower rates of internet use and smartphone ownership. For example, 40 percent of those born 1945 or earlier and 68 percent of those born between 1946 and 1964 have a smartphone, compared to 93 percent of millennials.<sup>107</sup> Americans with disabilities are less likely to have a computer, smartphone, home broadband, or a tablet

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<sup>98</sup> Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. Marshall J. Computer & Info. L. 81, 91 (2009).

<sup>99</sup> Anne-Marie G. Hammond, *How Do You Write “Yes”? A Study on the Effectiveness of Online Dispute Resolution*, 20 Conflict Resol. Quart. 261, 268 (2003).

<sup>100</sup> *Id.* at 268.

<sup>101</sup> *Id.* at 269.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 274.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 Va. J.L. & Tech. 395, 402 (2016).

<sup>107</sup> Emily A. Vogels, *Millennials stand out for their technology use, but older generations also embrace digital life*, Pew Research Center: Fact Tank (September 9, 2019), <https://www.pewresearch.org/fact-tank/2019/09/09/us-generations-technology-use/>.

than those without a disability. Seniors with disabilities are the least likely to use technology.<sup>108</sup> Additionally, data show that “Black, Hispanic, limited education and low-income, and tribal and rural households” have long suffered in the digital divide with signs that these trends are deepening, not improving.<sup>109</sup>

## SECTION III: METHODOLOGY

Since introduced in the social sciences in the 1940s, focus groups have continued to grow in popularity across the market research and social science disciplines.<sup>110</sup> Focus groups are useful in that they help researchers understand how and why participants think the way they do.<sup>111</sup> In our setting, focus groups allow us to identify key concerns as well as guiding principles to utilize when developing, implementing, and evaluating ODR projects. Because focus groups are based in grounded theory, which means that themes and categories emerge throughout the course of data analysis,<sup>112</sup> this helps us to build an understanding from the ground up about what the civil legal aid community thinks about ODR.

Focus groups facilitate the ability to understand attitudes and experiences.<sup>113</sup> Unlike other qualitative methods, the narrative component of focus groups centers on the interaction between participants.<sup>114</sup> Sharing in the focus groups helps make meaning out of experiences. In other words, when using focus groups, social interaction produces the data. This emphasis on social interaction and narrative also helps the focus groups serve as a forum for discussing and clarifying concepts in ODR, as relatively few legal aid lawyers and clients have extensive experience with it.

The goal of this type of study is to get a deeper understanding of an experience (e.g., how do front- and back-end users of ODR conceptualize accessibility), not merely testing an existing hypothesis (e.g., ODR is more accessible and efficient). This may then lead to hypothesis testing; but the purpose is not to impose this hypothesis-testing structure upon the focus group.<sup>115</sup> We conducted focus groups until we reached saturation: no new information was being shared and conclusions became redundant.<sup>116</sup> These

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<sup>108</sup> Monica Anderson & Andrew Perrin, *Disabled Americans are less likely to use technology*, Pew Research Center: Fact Tank (Apr. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>

<sup>109</sup> Josh Waldman, *COVID-19 Deepens a Digital Divide that has long impacted low-income, Black and Hispanic, Tribal and Rural, and older households, according to recent reports*, Pro Bono Net (August 20, 2020), available at <https://www.connectingjusticecommunities.com/digital-divide-part-1/2020/08/>.

<sup>110</sup> Jennifer Cyr, *The Pitfalls and Promise of Focus Groups as a Data Collection Method*, 45 Sociol. Methods Res. 231, 232 (2016).

<sup>111</sup> *Id.* at 234.

<sup>112</sup> Gerry W. Ryan & H. Russell Bernard, *Data Management and Analysis Methods*, in HANDBOOK OF QUALITATIVE RESEARCH 769-802 (Norman Densin and Yvonna Lincoln, eds., 2d ed. 2000).; Barney G. Glaser & Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (1967).

<sup>113</sup> David L. Morgan & Richard A. Kreuger, *When to Use Focus Groups and Why*, in SUCCESSFUL FOCUS GROUPS: ADVANCING THE STATE OF THE ART 3-19 (David L. Morgan, ed., 1993).

<sup>114</sup> John F. Cragan & Donald C. Shields, *Understanding Communication Theory: The Communicative Forces for Human Action* (1998).

<sup>115</sup> Alison E. Parker et al., “Emotions are a Window into One’s Heart”: A Qualitative analysis of Parental Beliefs About Children’s Emotions Across Three Ethnic Groups, 77 Monogr. Soc. Res. Child Dev. 1, 26 (2012).

<sup>116</sup> David L. Morgan, Richard A. Kreuger & Jean A. King, *The focus Group Kit*, Vols. 1-6 (1998).

focus groups were not designed to reach a consensus, but rather to help us reach a better understanding of the issues and concerns with ODR.<sup>117</sup> They also are valuable in that they offer participants their own opportunity to develop opinions and frameworks as they discuss their experiences.<sup>118</sup>

### SAMPLING

This study on ODR uses purposive sampling based on suitability and availability. Participants were selected because they are believed to have a perspective on ODR we hoped to highlight or had experience with legal technologies. The groups do not mix client and service provider populations. This intragroup homogeneity helps build rapport among participants and helps them feel comfortable sharing experiences.<sup>119</sup> Because we are focusing on issues that might affect how willing a provider or a client might be to discuss issues (e.g., providers being concerned clients cannot use the software or clients being concerned providers do not listen), we stratify groups based on whether they are part of the client, service provider, or court communities. There are no other salient characteristics on which we will stratify the focus groups.

We obtained legal aid practitioners primarily through a survey we distributed to NLADA's networks in October 2019. We received 47 responses. From this survey, we selected participants who were available to participate at our various conferences. We encouraged those attending focus groups to bring a colleague whom they felt would be a valuable addition to the group. This allowed us to reach more people than the initial survey. We also recruited focus group participants from our Technology Section, a group of approximately 50 legal services providers and technology vendors who serve as our experts in the intersection of law and technology. We obtained clients through working with trusted providers: we worked with contacts in organizations and they recruited focus group participants for us.

We purposely over-invited participants for our focus groups as we expected some to cancel or not show. After our first focus group was attended by only two people despite many more signing up, we also began providing our cell numbers and asking those participating to provide their cell numbers so we could text to confirm participation. We immediately saw an increase in participants attending the focus groups.

To aid in recruitment for clients, we compensated participants in our "client community" focus groups. We provided them a \$50 subsidy for participating because they were required to travel to a specific venue and incur financial and other costs (e.g., taking time off work or childcare). We did not compensate focus groups with legal aid lawyers or technology vendors because the groups either were held at conferences they already were attending or because they were offering to volunteer their time.

We sought to create a diverse group of participants who would be representative of the broader legal aid community. To the extent that the focus groups did not sufficiently provide that, we sought to supplement our research with individual interviews that targeted some of the viewpoints we felt were missing. This included seeking out clients who brought racial and geographic diversity and advocates

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<sup>117</sup> Pranee Liamputtong, *Focus Group Methodology: Principles and Practice* (2015).

<sup>118</sup> *Id.*

<sup>119</sup> Jocelyn A. Hollander, *The Social Contexts of Focus Groups*, 33 J. Contemp. Ethnogr. 602, 602 (2004).



who had experience with specific practice areas, such as serving Native American communities in rural remote settings.

### **RELIABILITY AND VALIDITY OF DATA**

The criticisms and concerns of focus group methodology are not that different than those generally lobbied at qualitative research: reliability and validity.<sup>120</sup> Focus groups also rely on self-reported data, so when people want to conceal things or if there is too much heterogeneity in the groups,<sup>121</sup> it can pose problems, as individuals might feel pressure to conform to certain norms and not speak freely. Another potential problem is that participants may answer questions and frame the discussion around what they believe the researcher/moderator wants to hear.<sup>122</sup> There are, however, several tactics to ensure validity of findings: checking participants' statements with them as the group goes to make sure the moderator understands, including thick descriptions of statements in the presentation of data, having a co-researcher peer review the data, and using an external auditor who is new to the research review the findings at the end.<sup>123</sup>

One way of addressing these concerns is to triangulate the findings.<sup>124</sup> Triangulation refers to comparing the findings from one type of data collection (e.g., focus groups) with another (e.g., in-depth interviews). Triangulation helps us better understand a topic, akin to a wraparound view,<sup>125</sup> and our findings are more robust than using just focus groups or just interviews. This also increases validity as when both the interviews and the focus group analysis point to the same conclusions, we can be more confident in the conclusions. If they are inconsistent, triangulation can help pinpoint where those inconsistencies arise. This study uses both in-depth interviews and focus groups to triangulate the findings and data. Further, because each focus group session yields 15-30 pages of transcribed material, it is possible to assess the reliability of the data by comparing statements within and across sessions.<sup>126</sup>

We also conducted nine in-depth interviews and one conference call with three individuals involved in an ODR project.

### **HOW WE CONDUCTED THE FOCUS GROUPS**

Each focus group has one moderator and one notetaker. The moderator was charged with directing the focus group – asking questions, including all participants, and guiding the discussion. The notetaker asked additional clarifying questions and ensured that all topics were covered. The moderator and notetaker took effort to be less visible and active in the focus groups – the goal of the focus groups was to have the moderator facilitate, not direct the discussion, as we were there to learn from the participants' experience.

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<sup>120</sup> David L. Morgan, *Future Directions for Focus Groups*, in *SUCCESSFUL FOCUS GROUPS: ADVANCING THE STATE OF THE ART* (David L. Morgan, ed., 2013).

<sup>121</sup> Jocelyn A. Hollander, *The Social Contexts of Focus Groups*, 33 J. Contemp. Ethnogr. 602, 602 (2004).

<sup>122</sup> David L. Morgan, *Future Directions for Focus Groups*, in *SUCCESSFUL FOCUS GROUPS: ADVANCING THE STATE OF THE ART* (David L. Morgan, ed., 2013).

<sup>123</sup> Alison E. Parker et al., “Emotions are a Window into One’s Heart”: A Qualitative analysis of Parental Beliefs About Children’s Emotions Across Three Ethnic Groups, 77 Monogr. Soc. Res. Child Dev. 1, 26 (2012).

<sup>124</sup> David L. Morgan, *Future Directions for Focus Groups*, in *SUCCESSFUL FOCUS GROUPS: ADVANCING THE STATE OF THE ART* (David L. Morgan, ed., 2013).

<sup>125</sup> Brent Wolff, John Knodel & Werasit Sittitrai, *Focus Groups and Surveys as Complementary Research Methods: A Case Example*, in *SUCCESSFUL FOCUS GROUPS: ADVANCING THE STATE OF THE ART* (David L. Morgan, ed., 2013).

<sup>126</sup> David L. Morgan, Richard A. Kreuger & Jean A. King, *The focus Group Kit*, Vols. 1-6 (1998).

Focus groups lasted between 60 and 90 minutes, and never more than 120 minutes.<sup>127</sup> The room was always the appropriate size for participants – it never was cramped, which would make participants uncomfortable, and it was never too big, which would affect the level of trust and intimacy.

Our focus groups have distinct stages as follows:

Preparation: We would arrive between 30-60 minutes before the focus group to make sure the room was accessible. We would arrange the table and chairs in a circle and set up refreshments and light snacks.

Arrival and pre-discussion: We had participants complete the informed consent, obtained permission to audio record the session, and answered any questions they had related to it. We distributed subsidies (only with client community focus groups).

Introductory stage: Moderator introduces note-taker and assistant moderator. Participants introduce themselves, talk about work, interests, and why they are part of this focus group. Moderator introduces topics and also provides a shared definition of ODR to help frame the discussion (“Online resources that can manage a case from start to finish and never require users to go into a courthouse”). The moderator also reads the following aloud at the beginning of the focus group:

Opinions expressed will be treated in confidence among the project staff and research team. All responses will remain anonymous. We kindly request that you do not communicate the responses and opinions expressed by your co-participants with anyone outside of this meeting.

To this end, we have an informed consent form for you to sign. We expect this focus group to last approximately 90 minutes. You are free to leave this group at any point without penalty.

The notes of the focus group will contain no information that would allow for individual participants to be linked to specific statements. You should try to answer and comment as truthfully as possible. If there are any questions that you do not want to answer, you don’t have to. That being said, please try to be as involved as you feel comfortable.

Ground rules:

- The most important rule is that only one person speaks at a time. Please wait until others have finished speaking before you jump in.
- There are no right or wrong answers or opinions.
- You don’t have to speak in a particular order.
- If you have something to say, please jump in. It’s important that we hear from each of you. If we notice that you have stayed silent, we may call on you, and if we notice that you’re speaking more than others in the group, we may ask you to wait for others to share their input.
- You do not have to agree with other people in the group.

Questioning stage: The moderator follows the discussion guide, which was prepared beforehand and reviewed by the research team. The discussion avoided discussing “solutions” related to ODR – such as what transparency looks like in developing a tool – and spent a good chunk of time at the beginning talking about experiences with ODR and other legal technologies. The moderator was careful to avoid

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<sup>127</sup> Pranee Liamputtong, *Focus Group Methodology: Principles and Practice* (2015).



language like “great” and “excellent” because of the potential to introduce bias. Instead the moderator would say “Okay,” “Uh huh” and “Thank you” in response to participants’ comments.

If certain participants monopolized the conversation to an extent that other participants did not have time to share their views, the moderator would avoid eye contact and shift body language. If they continued talking, the moderator would interrupt or call upon others who had been speaking less.

Ending: The moderator asks final statements, such as: “If you could wave a magic wand and get whatever you wanted out of the civil justice system or ODR, what would you want?” and “I have no more questions to ask but is there anything else you all would like to bring up, or ask about, before we finish this session?”

Then, the moderator and note-taker would debrief after the participants left the room. They would compare the group to previous ones and discuss high-level themes that arose in the discussion.<sup>128</sup>

### ANALYZING THE FOCUS GROUPS

All focus groups were recorded so that we would be able to produce written transcript for content analysis. After the initial creation of the transcript, staff went through the transcript and removed personally identifiable information to ensure that participants could retain their anonymity. This included changing individual’s names and removing specifically named places, jurisdictions, organizations, and other details that would allow participants to be identified if their statements were quoted in the report.

Once the anonymization process was complete, we used a mix of hand coding and NVivo 12 to identify reoccurring themes. This allowed us both to refine our interview schedules early on in the project and test for data saturation toward the end of the project. Finally, once key themes were identified, we were able to use the transcripts to identify different perspectives on those themes.

### CHALLENGES IN METHODOLOGY

We were able to conduct seven focus groups, including groups with legal services providers, clients, technologists, and court personnel and mediators. In doing so, we were able to hit saturation on key themes about ODR, with many participants echoing the same thoughts. Beyond those focus groups, we also conducted one-on-one interviews with service providers and clients representing voices that were missing from the focus groups. The final result was total of 53 participants, including 16 individuals who identified as being part of the client community.

Nevertheless, we would have preferred to conduct even more focus groups, especially with the client community. The voice of the client community is too often missing from discussions about the civil legal justice system. As courts and providers discuss and perhaps disagree about how best to serve the client community, it is the voice of the client’s themselves that is most critical hear. Furthermore, of all the communities involved, the client community is the largest and most diverse.

We had planned additional client focus groups to take place in both urban and rural settings during the ABA/NLADA Equal Justice Conference in May of 2020 and during NLADA’s Litigation and Advocacy

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<sup>128</sup> Richard A. Kreuger, *Quality Control in Focus Group Research*, in *SUCCESSFUL FOCUS GROUPS: ADVANCING THE STATE OF THE ART* (David L. Morgan, ed., 2013).

Leaders Conference in July of 2020. Due to the COVID-19 Pandemic, those conferences were cancelled and those focus groups were no longer possible to conduct safely. As courts and legal offices shut down around the country, contacting the client community became a significant challenge for legal service providers and also for NLADA. We conducted additional one-on-one client interviews to ensure that we heard as many client voices as possible, but we nevertheless feel this study could be most improved by including more clients and a sample that was more representative of the legal aid client community.<sup>129</sup>

Further research should give special attention to the client experience and client voice.

Finally, the COVID-19 Pandemic has dramatically changed the lives of millions of people around the world in countless ways. One way in which it has changed things is that all spaces have been forced to adopt more technology based solutions. All of our focus groups and most of our interviews took place prior to the pandemic, but some took place after it had already necessitated lockdowns and increased the frequency of remote conferencing, both in and outside of legal contexts. Although we did not find differences in the key themes between our pre and post pandemic conversations, it would be naïve to think that attitudes about technology would remain stagnant during a time of such dramatic change. The extent that the pandemic has shifted attitudes about legal technology generally and ODR specifically would be another possible avenue for further research.

### THE PARTICIPANT GROUP

Over the course of the research, we conducted 7 focus groups with 42 total focus group participants. After we concluded the focus groups, we supplemented them with 3 additional client interviews and 2 additional advocate interviews. We also conducted 4 preliminary interviews and one in-depth conference call with 3 participants. Because one advocate who took part in a preliminary interview also took part in a focus group, the total number of unique participants was 53 (opposed to 54).

For our preliminary interviews, we reached out to four individuals in the field who were known subject matter experts on legal technologies generally. Two of these individuals had specific knowledge and experience with ODR as well. Within this initial group of four, there were:

- Two legal aid advocates,
- An expert in court administration, and
- An expert at a national advocacy organization.

Later, we also had a conference call with three individuals who were all located in a state where an ODR platform had launched within the last two years. They provided further background information and a foundation of knowledge of not just what had been reported in the research, but what was happening on the ground in the civil legal system as it relates to ODR. This group included:

- A law professor
- A member of the state's access to justice commission, and
- An advocate from a national advocacy organization who was based in that state

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<sup>129</sup> The Legal Services Corporation, which funds legal aid organizations in all 50 states, the District of Columbia, and U.S. territories like Puerto Rico and Guam, estimates that 29 percent of the clients served by its grantees are African American and 18 percent are Hispanic. See Legal Services Corporation, *Grantee Client Demographics*, available at <https://www.lsc.gov/state-data-grantee-client-characteristics>.

We allowed these initial conversations to help shape our research plan and how we would conduct our focus groups. Of the seven focus groups,

- 3 were conducted with legal aid advocates
- 2 were conducted with individuals who identified as part of the legal aid client community
- 1 was conducted with technologists (i.e. tech vendors and technology specialists at legal aid organizations)
- 1 was conducted with court personnel (judges, mediators, administrators)

In total, our focus groups included:

- 16 legal aid advocates
- 13 client community members
- 8 technologists
- 5 court personnel

We supplemented with 5 additional interviews to ensure we received certain perspectives. For example, our two supplemental advocate interviews sought out advocates who served Native American populations in rural remote settings. Our three supplemental client interviews allowed us to hear from more clients, but it also added racial and geographic diversity as those three participants hailed from the east coast, the middle of the country and the west coast and identified as Black, Asian, and Hispanic. Nevertheless, our client participant group was still disproportionately white (11 out of 16 or 68 %) compared to the general client population served by legal aid.<sup>130</sup>

Included in this section are summaries of the participant groups, along with a list of the participants and some background information. Data such as race, age, location, or information about a disability, is included only in the aggregate in an effort to protect confidentiality. Among the advocates group in particular, knowing the race, service area, or even either of those data points could allow some readers to identify a participants.

### **Legal Aid Advocates (18)**

We spoke with 18 legal aid advocates in our focus groups and supplemental interviews. The sample was 72 % white (13 of 18) and included advocates who were Black, Asian/Pacific Islander, Latino, and Native American. The Northeast, Southeast, Mountain West, West Coast, Southwest, and other regions were represented. Advocates identified during the focus group as working in rural, urban, or mixed environments, and the supplemental interviews ensured that advocates who serviced rural remote Native American reservations were also included. In the table below we list their (changed) first name, their position, and any relevant experience with legal technology and ODR if they shared that with us. If they did not, that space is left blank. In terms of title, 8 were directors of their programs, 5 were in other management or supervisory roles, 3 were staff attorneys, 1 was a non-legal advocate, and 1 was a clinical professor at a law school. One participant reported direct experience with ODR platforms while

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<sup>130</sup> See Legal Services Corporation, *Grantee Client Demographics*, available at <https://www.lsc.gov/state-data-grantee-client-characteristics>.

three others reported that the courts in their jurisdiction were currently considering implementing ODR for certain types of cases.

<b>Name</b>	<b>Position</b>	<b>Experience with Tech or ODR</b>
<b>Hannah</b>	Executive Director of a Legal Aid Org.	She has experience with self-represented litigants in a variety of settings, including ODR.
<b>Emma</b>	Executive Director at a Legal Aid Org.	She has overseen various technology grants and the courts in her jurisdiction are currently considering implementing ODR.
<b>Amelia</b>	Executive Director at a Legal Aid Org.	She has overseen various technology grants and the courts in her jurisdiction are currently considering implementing ODR.
<b>Elizabeth</b>	Executive Director at a Legal Aid Org.	She has overseen various technology grants and the courts in her jurisdiction are currently considering implementing ODR.
<b>Jacob</b>	Executive Director at a Legal Aid Org.	His organization has started using an online intake system.
<b>Mike</b>	Executive Director at a Legal Aid Org.	
<b>Timothy</b>	Executive Director at a Legal Aid Org	
<b>Jennifer</b>	Executive Director at a Legal Aid Org.	
<b>Daniel</b>	Deputy Director at a Legal Aid Organization	
<b>Sofia</b>	Directing attorney at a legal aid office	She is working on a document assembly tool.
<b>Madison</b>	Director of Pro Bono at a Legal Aid organization	She helps run an online platform.
<b>Linda</b>	Litigation director at a Legal Aid Office.	
<b>Nathan</b>	Managing Attorney at a Legal Aid Organization	He is working with the state to test guided tools for self-represented litigants.
<b>Liz</b>	Staff Attorney with a Legal Aid Organization	Formerly, she worked in the courts on their self-help services, such as portals, guided interviews, document preparation, and text messaging alerts.

<b>Ben</b>	Staff Attorney with a Holistic Public Defender	
<b>Matt</b>	Staff Attorney with a Holistic Public Defender	
<b>Ruth</b>	Non-Legal Advocate at a Disability Advocacy Organization	
<b>Cathy</b>	Clinical Professor at a Law School	

### **LEGAL AID CLIENTS (16)**

As mentioned above, our client group was disproportionately white compared to the legal aid client community generally, though we did have representation across different racial groups. Due to the location of some focus groups and the cancellation of others, the Mountain West region of the United States was overrepresented, though our sample did include clients from other regions. The client group expressed diverse experiences and comfort levels with technology, ranging from one client who was an IT specialist (“Andre”) with considerable expertise to another who expressed discomfort when having to browse unfamiliar websites. By design, our sample was over-representative of clients who identified as having a disability. These disabilities included vision impairments, cerebral palsy, traumatic brain injuries, generalized problems with mobility and dexterity, and others. Some clients had been born with their identified disability while others had recently acquired them. No clients reported any past experience with ODR. Below is a list of the client participants, their (changed) names, and their reported experience and comfort levels with technology.

<b>Name</b>	<b>Comfort and/or Experience with Technology</b>
<b>Andre</b>	He is a technology specialist who has experience in coding and making technology accessible to those with disabilities.
<b>Miranda</b>	She reported being overall comfortable with technology, but she was uncomfortable when using unfamiliar programs at her job.
<b>Susan</b>	She uses a desktop computer for work and different platforms as a student.
<b>Betty</b>	She reported being uncomfortable with technology, including using unfamiliar websites.
<b>Kaitlin</b>	She uses technology, often through a screen reader, and teaches adaptive technology to others.
<b>Mark</b>	He reported being uncomfortable with technology, adding that he needs “a bit of practice” to use technology efficiently.

<b>Mary</b>	She uses accessibility software on a regular basis and feels comfortable with technology.
<b>Patricia</b>	She reported that using technology by herself had become difficult due to chronic issues related to a recent injury.
<b>Christie</b>	She obtained a computer science degree before the onset of her disability. She feels very comfortable with technology, but sometimes runs into compatibility/accessibility issues.
<b>Joyce</b>	She uses technology for “pretty much everything” in her life, citing convenience as the primary factor for her.
<b>Nathan</b>	He reported being comfortable with technology, citing his young age and the fact that his education required him to learn and use technology for most tasks.
<b>Beverly</b>	She uses technology a lot, but reported being “terrified” of the idea of doing anything legal online, citing concerns about incompatibility with platforms and the tools she uses to make websites accessible to her.
<b>Leo</b>	He uses technology for most things in his life, including financial transactions. He reported feeling generally comfortable with technology.
<b>Marcus</b>	He has experience assisting organizations that offer online self-help support. He reported his concern about the lack of effective communication that can occur when people are not face-to-face.
<b>Alexandra</b>	She reported feeling generally comfortable with technology, but had concerns about using it for legal problems.
<b>Lauren</b>	She uses technology a great deal and would be comfortable using technology to solve a simple legal dispute, but not a more complex one where she needed to present exhibits or documents.

#### **LEGAL TECHNOLOGISTS (8)**

The group of legal technologists all expressed at least a baseline knowledge of ODR as well as other legal technologies. They came from different regions of the country and represented a diverse group in terms of their professional roles. Some were working directly with legal aid; others were working for non-profit legal technology vendors or projects and others worked at for-profit technology companies.

<b>Name</b>	<b>Role and Type of Organization</b>	<b>Primary Technology-Based Responsibilities</b>
<b>Ethan</b>	Director of Technology at a Legal Aid Org.	He maintains the organizations' web applications and performs data analyses.
<b>Patricia</b>	Director of Technology at a Legal Aid Org.	She maintains the organization's web site and other technology based projects. =
<b>April</b>	Founder of a Legal Aid Technology Project	She assists legal service providers in identifying technology opportunities and also implementing and maintaining those projects.
<b>Bart</b>	Technologist at National Non-Profit	He handles the non-profit's technology, maintains various directors, and does some coding.
<b>Austin</b>	Technologist at a For-Profit Legal Technology Company	He works primarily on document assembly, but has also been involved in building a litigant portal.
<b>Grace</b>	Director of a Legal Technology Project	
<b>Anna</b>	Works with Law Schools and Students at a National Non-Profit	She runs legal technology events and works on the creation of legal technology tools.
<b>David</b>	(Previously) Program Manager for a Non-Profit Technology Vendor	He worked primarily on legal information portals.

#### **COURT PERSONNEL (5)**

This group had a wide range of experiences with ODR and legal technology, running the gamut from reporting no experience whatsoever to being involved with evaluating and implementing ODR solutions. We ran one focus group involving court personnel and mediators, and it was our smallest and least diverse group in terms of geography, race, and age. All participants worked in the same region of the country, were white, and above the age of 45.

<b>Name</b>	<b>Role</b>	<b>Experience with Legal Technology and/or ODR</b>
<b>Barb</b>	Court Administrator	She works in the court system and is directly involved with the implementation of ODR in her jurisdiction.

<b>Oliver</b>	Mediator	He frequently uses video conference mediation.
<b>Michelle</b>	(Former) Judge	
<b>Lucas</b>	Mediator	
<b>Sandra</b>	(Former) Mediator	She has worked on triage projects and a virtual clinic for self-represented litigants.



## SECTION IV: RESULTS AND KEY THEMES

**Preliminary note on participant confidentiality:** *Quotations in this section will be attributed to individuals by name with a note describing the individual as a legal aid advocate, client, technologist, or someone working with the courts. Names have been changed and any personally identifiable information, such as names of organizations, places, or specific projects have been removed. This has been done to protect confidentiality in accordance both with best practices in social science research as well as assurances we made to our participants in the informed consent documents. For additional confidentiality, we do not include the dates of the interview or focus group in which the statement was given. Many of our focus groups took place at national conferences and were advertised within the legal aid community. Giving a specific date would make it simple for some readers to identify the specific conference and increase the likelihood that a statement could be matched to an individual. All statements were given during the time period of November 2019 and November 2020.*

**Preliminary note on participant classification:** *As stated in the note above, we prioritized confidentiality for all of the participants in this study. Because of that, we do not include details about the backgrounds of our participants and instead identify participants merely as a legal aid advocate (“advocate”), mediator, judge, court personnel, or client. This has a risk of essentializing some of our participants, many of whom may in fact have different roles at different times. “Clients” may be an advocate in another setting. Mediators and judges may view issues through the lens of a legal aid advocate if that was a position they held in the past. Nevertheless, we identified participants in the way they identified themselves to us, mainly in terms of whether or not they were thinking of ODR as a system they would be using, their clients would be using, or which they would be implementing or utilizing on behalf of the courts.*

Our conversations focused on the promises and potential pitfalls of ODR, our participants’ relationship with technology, their relationship with other key players in disputes, and factors that should be considered when developing new legal technologies for the civil legal justice system. After analyzing our conversations with all 53 participants, we identified the following as key themes:

- Initial Skepticism and Concerns
- A Problematic Status Quo: Acknowledging the Current Environment
- Data Security
- Access, Autonomy, and Assistance
- Recognizing and Identifying the Potential Promise of ODR

The ways in which our participants identified and considered these themes is discussed below.

### **INITIAL SUSPICION, DISTRUST, AND CONCERNS**

In almost every conversation, both with individuals and in the focus groups, the initial discussion was marked by a significant distrust of ODR. In some instances, the reaction was very strong, with individuals seemingly opposed to any online system that fully resolved disputes. One client, when presented with the concept of ODR, said:

When people that are dealing with trying to get individuals to help them through any type of computer, any type of internet network, there's a problem.<sup>131</sup>

Another client opened with the statement, "Nothing is ever secure online."<sup>132</sup> The initial reactions of advocates were similarly leery of ODR. Advocate distrust was grounded in concerns about equity vs. efficiency, exacerbation of existing power imbalances, and questions about motivating factors for implementation. As we dug deeper into those concerns and upon further questioning, many participants expressed a more supportive view of ODR, at least in certain types of cases or in certain situations. Nevertheless, the concerns that drove their initial distrust remained at the forefront and often served to inform or frame their positions on how courts and developers should think about possible safeguards and when or why ODR might not be appropriate.

### **Questioning Motives: Who Gains When we Implement ODR? And How? Who is Promoting ODR?**

A number of our participants expressed distrust of ODR because they questioned the motivation of either the courts that adopted such technologies or the vendors who developed them. In particular, many advocates raised doubts that ODR would benefit their clients in any way while expressing skepticism that courts were motivated to adopt these technologies by anything other than cost savings. Even when individuals described ODR as "really promising," they still saw it as "primarily for the benefit of the courts."<sup>133</sup> Another, acknowledged potential benefits of the technology, but cautioned that, "it's important to make sure that when you're developing technologies, especially for our client populations, that you're not just trying to make your job easier"<sup>134</sup>

Some of these initial comments were grounded in a mistrust of courts generally. As one advocate put it, "Well, the courts are going to think it's successful if it saves money regardless of what the case outcomes are. Right? Because that's their bottom line."<sup>135</sup> Expressing a similar concern, one advocate felt that it was important to examine "what the incentives are for the court," adding that "we want to believe that courts are neutral, but they're really not."<sup>136</sup> More directly, one advocate stated, "I trust us. I just don't trust the judicial branch."<sup>137</sup>

Another advocate was more specific, expressing her concern about ODR being used as an insufficient solution to address the problem of a lack of judicial resources. She said:

I'm sorry, [a judge has] 300 eviction cases on [the] docket in the morning. I think we need more judges to handle eviction cases, like the solution is not to shove them all to some online platform, so they can litigate at midnight; that's not the solution.<sup>138</sup>

These comments serve to show the divide between legal aid advocates and both the developers of ODR and the courts that are implementing them.

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<sup>131</sup> Marcus, Client.

<sup>132</sup> Christie, Client.

<sup>133</sup> Amelia, Advocate.

<sup>134</sup> Madiso, Advocate.

<sup>135</sup> Elizabeth, Advocate.

<sup>136</sup> April, Technologist.

<sup>137</sup> Gabe, Advocate.

<sup>138</sup> Hannah Advocate.

The perception that ODR is seen by courts as something that primarily saves resources and increases efficiency is also held by court staff and judges. In discussing the potential promise of ODR, one judge noted that she could see as many as 400 eviction cases on a morning docket and having another option for some of these cases could be beneficial. Another individual who worked in the courts responded quickly to say:

I don't view it as case management or document management. I think that's a secondary effect.... [M]y view is it truly does provide access to justice. But it depends on how you define justice.<sup>139</sup>

The judge concurred, but noted, "I don't disagree with any of that, by the way. I'm just saying, as a practical matter, you know, the elephant in the room is docket management. From the judicial perspective."<sup>140</sup>

We do not conclude that advocates and court staff are wholesale opposed to courts using technology like ODR as a way to reduce a judge's caseload, but we did identify two aspects around ODR implementation that raised the level of advocate distrust with ODR:

1. ODR was being "sold" as a benefit to their client population in a way that they found dubious; and
2. ODR was being used primarily for cases involving low-income individuals.

On the first point, some advocates expressed doubt about whether or not the convenience of not needing to show up to court was actually a significant benefit for many of their clients. As one advocate said:

I'm very open to the concept that it could do something positive. But right now, it falls into the category of trying to solve a nonexistent problem. My clients are not complaining about the convenience of having to go to court by and large or those things. It's "I have a legal issue that needs to be addressed."<sup>141</sup>

Another advocate, shared a similar sentiment while pushing back against a common trope of ODR as "pajama court." She said:

I've heard it touted by lovers of the idea of online dispute resolution systems as, "You can go to court in your pajamas!" And my biggest concern is that's not what the people want. No one, I mean, the convenience is there, but not everyone is as excited about going to court in their pajamas as the court administrators think they are. ... a lot of these systems were really designed for the convenience of the court and not really contemplating much about the end user besides assuming that convenience is all that they care about.<sup>142</sup>

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<sup>139</sup> Barb, Court Personnel.

<sup>140</sup> Michelle, Court Personnel.

<sup>141</sup> Jacob, Advocate.

<sup>142</sup> Hannah, Advocate.

Advocates perceived ODR offering a large benefit to the courts and felt as if that benefit was not being discussed explicitly. Instead, some advocates noted they had heard ODR as something that would primarily be a benefit to clients, but they remained unconvinced. As will be discussed below, these views on the value of convenience were not universally shared among all advocates and clients and, even among advocates who did express this view, there were often other statements acknowledging at least some value to the prospect of increased convenience for clients. Nonetheless, the framing of ODR as primarily benefitting clients because it offered an increase in convenience left advocates not only unconvinced, but deeply skeptical of ODR. It made them feel as if the entire point was to simply devote fewer resources to already vulnerable and underserved clients. As one advocate said:

You know, what I'm more concerned about is how systems might drive our cases towards online tools to give less investment in the human component of them. They're not doing that when Target and General Motors have a lawsuit. They're not doing that when 3M or, you know, Ford Motor Company have millions of dollars at stake and litigation. They're doing it with the cases that are already getting the least amount of resource investment to deliver on the constitutional promise of equal justice for all.<sup>143</sup>

### **Competing Values: Efficiency, Convenience, and Access vs. Due Process and Equity**

Many advocates and clients expressed their concern about whether or not ODR platforms could deliver equitable outcomes. Even in recognizing a benefit of convenience and efficiency, advocates were concerned about critical processes being cut out in an online system and what they perceived as a lack of focus on equitable outcomes.

In particular, there was a concern that individuals in the technology world value efficiency and ease of use so much that it could clash with legal systems where equity should have a higher priority. One advocate expressed concern that "the culture of technologists is very focused on efficiency as a core value," adding that this culture could force changes legal aid advocates "wouldn't want to see." He concluded by saying "You essentially, get a fast, convenient, and maybe, depending on the issue, a positive outcome, but is it a just outcome? Is it a fair outcome?"<sup>144</sup> Another advocate expressed concern that "there are a lot of possibilities for important processes to be skipped over."<sup>145</sup>

Many felt ODR had been presented to them as a tool that could increase "access" to court processes, but many were unconvinced that such access was meaningful enough to increase equity. They talked about "equity not just access."<sup>146</sup> As one technologist put it:

Yeah... I think the courts have placed a lot of emphasis on access versus equity. And I think that's the problem. Because it's great to give them a tool to get in the door. But unless it's an equitable process and an equitable outcome, then we're not even a third of the way there.<sup>147</sup>

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<sup>143</sup> Michael, Advocate.

<sup>144</sup> Matt, Advocate.

<sup>145</sup> Hannah, Advocate.

<sup>146</sup> Daniel, Advocate.

<sup>147</sup> Grace, Technologist.

Being able to process more cases and being able to “serve” more people might, by some definitions, increase “access to justice,” but as the quote from court personnel in the above section indicated, it might depend on how you define justice.

A mediator also shared his concerns about the speed or efficiency of a process affecting the outcome. He said:

Well, I wonder about speed, because it does take... kind of checking back in with them and say “now, you know, just so you understand. You’re agreeing to make these payments at this time in this way. Yeah, well, now let’s go back and let’s think about that.” You ask them a lot of questions. “Well, you know, what’s your current employment when you get your paycheck and have them think through how we’re actually going to comply?” That’s a slowdown.<sup>148</sup>

Thinking in similar terms about the importance of slowing things down in person during settlements, one judge said:

When there’s an unfair agreement, or somebody is going to do something that’s not very bright, you can you can tease it out a little you can say, “Well, okay, so let’s talk about how this is going to work.” And sometimes the light shines and sometimes no matter how hard you try, the light never goes on. You can say okay, well, you’re going to do joint decision making, okay, and maybe it’s an abusive spouse and it’s chronic and systemic abuse and she goes, “He’s lonely and I don’t want to just take him away from his children” and you go “well, okay, so joint decision making means that when your five-year-old is getting ready for kindergarten, the two of you have to agree. And it’s not like you can call him up and talk to him and then decide that’s not joint decision making you actually have to make an agreement. And do you feel comfortable with that?” I mean, you can ask that.<sup>149</sup>

The mediator and the judge quoted above are expressing concern for speeding up cases like this in general and the ways that a slower process with in-person conversations might lead to more deliberation. For many others though, concerns that ODR would produce less equitable outcomes were primarily focused on cases where power imbalances already existed.

Concerns were not limited to the potential for ODR to increase efficiency and access while failing to *improve* equity; there were additional concerns that it could make existing inequities *worse*. One client relayed a story about representing herself in a small claims case where the opposing party was also self-represented. She understandably noted that, were the other party represented by any attorney, she would have felt “intimidated” and “less capable of presenting her case.” She added that she would be even less confident going up against an attorney in an online format, saying simply “it would be worse online.”<sup>150</sup>

One advocate, when discussing types of cases that might be better or worse for ODR opined:

But if somebody’s being evicted and they have a landlord on the other side with an attorney who’s probably used to the [ODR] system, then it seems to me a way that the low-income

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<sup>148</sup> Lucas, Mediator.

<sup>149</sup> Michelle, Court Personnel.

<sup>150</sup> Alexandra, Client.

person is going to get thrown out of their house faster. It's not gonna help. It's going to be efficient justice; quick justice; very fast... but if the system is just a way to get a judgment against a poor person, then I would say it's a bad idea.<sup>151</sup>

This concern, that repeat players, like landlords or creditors, would use ODR to take existing inequities and speed them up was voiced by a number of advocates. In one example, an advocate expressed concerns she had about a proposal in her jurisdiction for landlord-tenant ODR. The program never went into effect, and she said, “[A] lot of folks, including me, were very worried that landlords would figure out they can evict people really easily without any process at all.”<sup>152</sup> Another advocate expressed concern about a situation where a management company entered into ODR mediation with a single mom. Acknowledging that perhaps there could be a way for ODR to “structure the interaction in a way that protects the individual,” they were ultimately worried that the ODR system might just “exacerbate the power differences [that] are already there.”<sup>153</sup>

As one advocate noted, “when you have these drastically different power dynamics between a landlord and a tenant or a consumer and a predator, I think we need to be very careful when automating something like ODR.”<sup>154</sup> This same advocate was less concerned if the system was trying to mediate between “two small businesses.” Similarly, the advocate above who expressed concern that ODR systems could simply operate as “a way that the low-income person is going to get thrown out of their house faster” also said “IF it's two... low-income individuals who are unrepresented with a case against each other, it's probably ok because they're on a level playing field and they can access resources equally.”<sup>155</sup>

Many expressed particular concern about how these power dynamics combined with an automated system combined with the general values of mediation could too easily push clients into an unjust and falsely defined “middle ground” resolution, particularly in consumer debt cases. As one advocate put it:

[B]ecause meeting in the middle on a \$5,000 debt for a consumer defendant is an unaffordable settlement agreement for [a low-income individual]. \$2500 is meeting in the middle for the creditor. That's exactly what they want in the first place... that doesn't even get into whether or not you know, somebody actually owes the debt, whether or not the creditors could even meet their evidentiary burden.<sup>156</sup>

The recommendation here was that cases be first reviewed when entering an ODR platform and before filing in order to see if the debt is valid and the creditors can meet the evidentiary burden—before the defendant is dragged into court or forced to participate in an ODR case where important issues that could affect a legal defense if the case were later filed in court.

These concerns, about the way that running a “more efficient” dispute resolution process could lead to worse outcomes exacerbated advocates' distrust of ODR proposals. Many advocates viewed the courts as already giving their clients insufficient time or being frustrated with advocates who exercised their

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<sup>151</sup> Timothy, Advocate.

<sup>152</sup> Hannah, Advocate.

<sup>153</sup> Ethan, Technologist.

<sup>154</sup> Cathy, Advocate.

<sup>155</sup> Timothy, Advocate.

<sup>156</sup> Cathy, Advocate.

clients' due process rights. As one advocate put it, "[courts] give pretty short shrift to a lot of the cases that are our core work already." He continued, noting how his goals for his clients sometimes are at odds with judicial goals of efficiency, saying:

I've said to judicial officers in hearings, "I'm really sorry; due process is expensive. You know, I'm sorry that we're going to have a trial, and I'm going to win. But, you know, I know that's not what we're here to do from your standpoint, but that's just how it works sometimes when somebody gets an attorney."<sup>157</sup>

This quote sticks out as the starkest example of an advocate expressing the idea that due process and equitable outcomes was, in some instances, not simply unaligned with the efficiency goals of the court system, but in direct conflict with them. It is through that lens that advocates approach some of the new ODR systems promising a more convenient and efficient adjudication process. They sometimes see their role, as stated in the quote above, to slow things down in the system, fighting to ensure that courts will spend *more* time examining the specific issues in their client's case, and rightly so; lawyers can use the best strategy to protect their client's interest, and if the system is rushing to an unfair outcome for their client, it would be unethical for a lawyer not to use this strategy. This effort is not simply an attempt to delay inevitable outcomes, but necessary to secure the most just outcome. As the advocate above confidently states, "we're going to have a trial, and I'm going to win." It is unsurprising that advocates have a strong reaction to changes that boast increased efficiency and convenience as primary benefits. If ODR proponents want further buy-in from legal aid advocates, they will need to craft systems focused on equity-based outcomes and prioritize that focus. The advocates who expressed these concerns most strongly were among those who indicated more experience and knowledge of legal technology systems generally so courts and developers must think about these issues substantively and not simply view this concern as a branding challenge.

### **Push-Back on the Concept of Low-Hanging Fruit**

Many ODR programs target "low-hanging fruit," or cases where there is supposedly less at stake. As one court administrator described a proposed program, she said that it would start with small claims court, noting that those are good cases for initial ODR pilots because it is "high-volume, low-value cases."<sup>158</sup> When asked what the jurisdictional limit for small claims in the area where this program would operate, she said it was [a value between \$5,000 and \$15,000].<sup>159</sup> Many of the advocates with whom we spoke were familiar with this view that small claims were "low-value" and, thus, a good type of case to "test" ODR or just a good case for ODR platforms generally. These advocates did not necessarily disagree that low-value cases were a good place to start, but they pushed back on the idea of how to define low-value cases.

In discussing small claims, one advocate spoke to this exact scenario explicitly. She said:

[P]eople who are writing about ODR are saying that, you know, low-value cases are the low-hanging fruit in ODR. But for a consumer defendant being sued on a \$2500 debt, if they bring home less than \$1000 a month, that's not low, that's not a low-value case for the consumer-

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<sup>157</sup> Gabe, Advocate.

<sup>158</sup> Barb, Court Personnel.

<sup>159</sup> During this focus group, a specific amount was given. We list only a range so as to keep readers from identifying or narrowing down the jurisdiction. This is done to ensure confidentiality.



defendant. So I think we need to, we need to think about the subjective value of cases to the litigants.<sup>160</sup>

In discussing the limit for small claims in one state that was \$15,000, advocates noted, “that's starting to get to be not-so-small claims,” adding that small claims cases in many states have “a massive inequity,” where “something like 60 or 70 percent of plaintiffs have attorneys. Less than 1 percent of defendants have attorneys.”<sup>161</sup> Again, however, he finished his thought by saying, “I would be worried even in that setting, but I’d probably be less worried about amounts of money that were very small.” This shows that advocates were not opposed to the idea of ODR focusing on “low-hanging fruit,” but that consumer debt or small claims that may be considered low-value cases to some were still critical, life-changing amounts to their clients. Any distortion of process or increase in the power imbalances could have disastrous results for many low-income clients in these cases. In the opinion of those who represent low-income individuals, developers of ODR need to think more carefully how they define “low-value” and how that definition might not be static among differently situated individuals.

### **Complexity as a Challenge for Online Dispute Resolution Platforms**

Another source of skepticism expressed by both clients and advocates was that legal processes can be complex, difficult to understand, and unforgiving when a litigant makes a mistake. Advocates especially expressed concern that the more complex a legal problem was, the less appropriate it would be for an online format. As one advocate said, “I also think that there's complex cases that will not be able to ever be dealt with technology and that you need a lawyer. I don't think technology is going to solve all the problems in the world.”<sup>162</sup> This was a common message. Another advocate said she saw technology as “another tool” that could help low-income clients, but warned that it was not a “panacea,” noting that, especially in more complex cases, clients need different services. Other comments included statements like “I’m not sure that online portal is a proper form to bring something that could get really complex.”<sup>163</sup>

It was not just legal complexities that concerned participants. One mediator expressed concern over “cultural nuances,” noting that he recently handled a divorce mediation for a couple who had recently emigrated from a central Asian country. Thinking about some of the adjustments he had to make in his approach on that case, he said, “That may not work if you suddenly go online and we’re expecting kind of Western raised cultural expectations as to what the sentence means or what should happen.”<sup>164</sup>

There was a sense from some participants that online tools, whether they be ODR or other tools, could handle more complex matters if the tool was designed specifically or exclusively for attorneys. One technologist gave an example of an expungement tool explicitly geared toward lawyers. Like ODR, the tool allowed users to handle the entire process online, and as this technologist noted:

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<sup>160</sup> Cathy, Advocate.

<sup>161</sup> Gabe, Advocate.

<sup>162</sup> Emma, Advocate.

<sup>163</sup> Matt, Advocate.

<sup>164</sup> Oliver, Mediator.



It's not for the public to use. It's for experts to use to just kind of cut through some of the tedious stuff. And it's nice that it's for experts and not the public, because it doesn't have to be perfect.<sup>165</sup>

Similar to concerns about how we define low-value, advocates and others were interested in a careful consideration of how we label cases as straightforward or complex and how those decisions might make things more or less difficult for low-income clients.

### DATA COLLECTION AND SECURITY

One area of concern that came up in almost every conversation was the issue of data. Participants had different levels of knowledge and experience with data security, but many expressed concern that low-income clients already had too much of their data available to too many different entities, entities whose interests may be in direct conflict with theirs. Concern was expressed about even well-meaning individuals and organizations collecting data unnecessarily and/or not keeping it as confidential or secure as it should be. In discussing an app designed to help homeless youth connect with services, one technologist noted that data was a “big question” for her. She said:

[I]f you're trying to use this data to identify where there are service needs, what are you actually collecting about the individual person that's downloading this app? Are you getting them to sign into the app? Does that mean you have to get them to log in with a name and an email address? Are you asking them other questions? ... [W]hat are you using that data for? And how are you protecting that data to make sure that it's actually secure?<sup>166</sup>

Many advocates had strong feelings about exactly what data should be collected, how it should be stored, and who should retain ownership over it. One advocate said:

If you look at the kinds of things that are proliferating online, as far as legal advice and legal help, many of them have very little transparency about who you're sending your information to and what's being done with it. And these things are proliferating... And those are presumably, you know, profitable and viable for some reason that people aren't necessarily aware of.<sup>167</sup>

This advocate felt strongly that there needed to be a shift in how all parties viewed client data in these platforms, saying that he would like to see an “emphasizing of ‘this is your information, here’s what you can do to remove it from our system, here’s what you can do obtain a copy of it in a form you can read.’”<sup>168</sup>

These strong feelings came partly from a concern that clients would not know or be able or willing to protect their data on their own. When asked about the prospect of disclaimers about sharing data or giving clients the option to share less data, one advocate said “I think clients just click through it, and I think the systems should have it set up so that [less data is collected].”<sup>169</sup> This belief had been confirmed

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<sup>165</sup> Ethan, Technologist.

<sup>166</sup> Anna, Technologist

<sup>167</sup> David, Advocate.

<sup>168</sup> David, Advocate.

<sup>169</sup> Timothy, Advocate.

by technologists when user testing some of their own legal technology. One technologist told us that, in their experience, most users “will sign off on any disclaimer you put in front of them.” She explained:

[W]e user tested forms with a ton of disclaimers and never had anyone in user testing asked me a question about it. They're just like, click, click, click, click, because they've been trained that unless they click through those disclaimers and we've even made it plain language and there's only like four. But I've never seen anyone actually read them. They're just like click, click, click, click, boom.<sup>170</sup>

Her takeaway from that experience was that legal services organizations and technology projects need to make it priority to be “good stewards” of any data they collect.

Adding to the skepticism about disclaimers, warnings, or options about data sharing was a concern they could have a chilling effect on clients who may stand to benefit from a certain legal tech tool. As one advocate put it:

The reason why I get nervous about some of this stuff in terms of the disclosures, is that does that then stop somebody from participating the system that can actually help them, right? ... all of these new flags [on the internet], are you accepting my cookie policy when I launch your website? Right? [If I say no], does that mean, I can't go and [access your] website because I didn't accept your policy?<sup>171</sup>

Regardless of the reasoning, there was agreement that tools should be careful to only collect data that serves a specific purpose, limit who has access, and have robust security in place *without* putting any onus on the client to have to “opt” for greater security.

### **A PROBLEMATIC STATUS QUO: ACKNOWLEDGING THE CURRENT ENVIRONMENT**

As the above sections make clear, many of our research participants expressed serious concerns about implementing ODR in a variety of situations. They were concerned about power imbalances, prioritizing court resources or efficiency over a client's interests, and the ways that ODR could make the already existing problems the civil legal justice system worse. Still, participants were realistic about the fact that the current civil legal justice system does in fact already have many current problems. As the imperfections of ODR or other technologies were raised, the conversation often focused back to the practical reality within which we all find ourselves. Whether it was the need (and lack of) professional legal assistance, the lack of judicial resources, or simply the traumatic nature of legal problems, our participants did acknowledge that some of the concerns they expressed about ODR and the limits of such platforms might not be caused by shortcomings in the technology alone but the inherent injustices and shortcomings in the civil legal justice system writ-large.

These acknowledgements spanned the spectrum from acknowledging that ODR or other legal technologies might be an imperfect improvement to a problem that may not otherwise be solved to an opinion that technology is not likely to solve existing problems (but without a concern that it will make it worse).

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<sup>170</sup> Grace, Technologist.

<sup>171</sup> Emma, Advocate.

It was often when these points were raised that advocates especially expressed less negative or at least more mixed positions on ODR. Thoughts could be framed not just on whether a platform would be ideal, good, or bad, but whether or not it would be better or worse than the status quo. Building off that, participants had thoughts on how to mitigate potential harms, what a system would need to not merely do no harm, but actually offer meaningful improvements.

### **Legal aid (and Courts) as Resource Starved**

One of the first issues that came up about the practical realities was the lack of resources of legal aid programs. As one practitioner put it “And my one overarching concern about us, all of us trying to do justice for people is, you know, we're so resource starved.”<sup>172</sup> This was echoed by others with statements like, “there's only so much in terms of resources just because of the dollars and the fact that the need is so great, right?”<sup>173</sup> These comments are not made in a vacuum, and they are not simply practitioners complaining. In 2017, the Legal Services Corporation released a study of the civil legal needs of Americans and found that 86 percent of the civil legal problems of low-income Americans received either inadequate or no legal help.<sup>174</sup> And this is not simply a problem of being unable to find the right resources. The report found that of the eligible problems presented to legal aid, only 59 % would receive any legal assistance at all and only 28 % to 38 % would receive legal help sufficient to fully address their needs.<sup>175</sup> Further, the report identified a lack of resources as the primary reason for this problem, finding it to be the cause of 85 – 97 % of the unaddressed civil legal needs.<sup>176</sup>

One advocate whose program worked in rural remote settings talked about the difficulty in reaching clients to both identify legal problems and address them. She said “the biggest challenge has been funding,” and went on to add that they simply were “not large enough to be able to put attorneys into all the small communities.”<sup>177</sup> Another advocate noted that “the nonprofit space or public service space is always underfunded.”<sup>178</sup>

It's also not just legal aid who is resource starved. In the earlier sections, we shared statements of frustration from advocates about courts giving their clients short shrift or looking for ways to increase efficiency to deal with overburdened dockets. Pushing more cases online may feel like an inadequate response, but as one court administrator noted:

[W]e can't have 80,000 more judges and 80,000 more attorneys that provide services for free. I mean, it's just, it's just not gonna happen.<sup>179</sup>

One judge shared that, when she retired, she had 537 open cases. She explained the problematic nature of such an overloaded docket as follows:

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<sup>172</sup> Michael, Advocate.

<sup>173</sup> Grace, Technologist.

<sup>174</sup> Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (2017)*, available at <https://www.lsc.gov/media-center/publications/2017-justice-gap-report>

<sup>175</sup> *Id.* at 42.

<sup>176</sup> *Id.* at 44.

<sup>177</sup> Jesssica, Advocate.

<sup>178</sup> Anna, Technologist.

<sup>179</sup> Barb, Court Personnel.

So that's 537 open cases. You only work 200 days a year, right? Maybe less than that, I'm not sure. But you know, I work 12 hours a day for five days a week. Let's say, 60 hours a week for 14 years. And, it is not humanly possible for judges to do everything everybody expects us to do, or expected us to do. And when I retired, they got two more judges. But they needed four.<sup>180</sup>

According to this judge, the challenges were exacerbated by the large number of litigants who had to proceed without a lawyer. She estimated that “in [her] domestic relations cases, 65% of [the] cases, at least one side didn't have a lawyer,” and this “made the case even harder and slower.”<sup>181</sup> Echoing that thought, one advocate had this to say about in-person court:

[T]hey're going through people like this [snaps fingers quickly] right? They have so many people that they're trying to get through in a single day.... even if you just go to traffic court, you have 50 plus people's sitting in the room. They're trying to get through everybody as quickly as possible.<sup>182</sup>

Advocates and courts and clients can all agree that the current civil legal justice system is not delivering on our nation's promise on equal justice for all. The sad reality is that such a statement is not even remotely controversial among our research participants. These groups may also agree that shifting more cases online is, at best, an imperfect solution. Nevertheless, the current situation is not exactly ideal. A 2019 publication recognized that “the legal profession does some things very well,” and that attempting to “[take] lawyers out of the picture for poor and low-income clients would impose great costs on society.”<sup>183</sup> Participants with whom we spoke would agree with this sentiment, and it summarizes well some of the concerns, especially voiced by advocates, about taking things out of the courtroom. Nevertheless, this same publication still concluded:

There is no question that the profession is falling short in the provision of legal services to poor and low-income people, and that it can no longer maintain a monopoly over work that it has long failed to perform. Even if all lawyers were entirely devoted to addressing the justice gap with some portion of their time, the depth and breadth of the gap make it unlikely that the profession could address it on its own.<sup>184</sup>

Those authors were looking specifically at the role of non-lawyer advocates, but they could have just as well been talking about the role of technology for self-represented litigants. The system needs more judges, more legal services attorneys, and more resource intensive assistance to low-income clients. ODR and legal technology more generally, as so many of our research participants noted, cannot cover up that fact. But what should be done when all parties recognize that those things which are so desperately needed are not going to be provided? Can ODR make improvements where other resources cannot, or at least, will not be used?

### **An Already Unjust System**

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<sup>180</sup> Michelle, Court personnel.

<sup>181</sup> Michelle, Court personnel.

<sup>182</sup> Ruth, Advocate.

<sup>183</sup> David Frank Levi, Dana Remus, and Abigail Frisch, *Reclaiming the Role of Lawyers as Community Connectors*, 148 *Daedalus*, 1, 5 (2019).

<sup>184</sup> *Id.*

The lack of resources for courts and legal services creates an unjust system, especially as it relates to self-represented litigants. Some reservations about ODR, as noted above, relate to how moving some disputes online could worsen the situation, but many comments were simply skeptical that ODR would fix already existing inequities. Such comments are not exactly an endorsement of ODR platforms, but they represent a distinctly different view.

One advocate voiced her skepticism when she said, “I don't know how tech solves for inequalities among marginalized communities.”<sup>185</sup> Getting into more specific issues in the courtroom, another advocate said:

Landlord attorneys and creditors attorneys already negotiate in the hallway before a trial to try and get, you know, a stipulated agreement in a settlement agreement. So if we're using ODR to replicate hallway settlement agreements against self-represented litigants, then that's another way in which ODR potentially replicates an unfair and an imbalance of power process.<sup>186</sup>

And one technologist cautioned that, in thinking of developing ODR systems, “you don't want the court designing it because they're liable to design something that looks exactly like what's going on.”<sup>187</sup> These all speak to reservations about potential ODR systems, but they speak to them in a different way than some of the reservations cited earlier in this report. They warn about an ODR platform that could be “just as bad” as what’s going on in courts right now. One advocate described the current situation as one in which “you have a huge amount of unrepresented litigants who are being sort of taken advantage of by a system that's weighted heavily against them.”<sup>188</sup>

These perspectives are important because it can help us tease out which problems are ones that might be caused and worsened by moving things online and which problems are going to exist even if courts never implemented a single ODR platform. As one client put it, “when you have an attorney and a non-attorney, there will always be that power imbalance, whether it's in-person or not.”<sup>189</sup> The same advocate that referenced unrepresented litigants being taken advantage of had this to offer:

[P]art of it is saying “this is an area where we need to create more access technologies and path to that,” but it's also a conversation with the state courts to say, “how do we adapt our processes to make it more accessible [and] to allow for more of a technology interface or whatever it may be?”<sup>190</sup>

There was both a desire and a skepticism about the promise for ODR to fix some of these problems, but there was general agreement that, with or without ODR, these problems were real and not being addressed in the traditional court system.

### **Court as a Traumatic Experience**

Another area where participants expressed dissatisfaction with the current system was how unpleasant, traumatic even, it was for clients to attend in-person court. Simply avoiding the emotional stress of

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<sup>185</sup> Elizabeth, Advocate.

<sup>186</sup> Cathy, Advocate.

<sup>187</sup> Austin, Technologist.

<sup>188</sup> Susan, Client.

<sup>189</sup> Marcus, Client.

<sup>190</sup> Nathan, Advocate.

being present in court was cited as a potential benefit to ODR. One client noted that courtroom was an immediately stressful place. She said “you’re not sure where to go, who to talk to, who to address,” and she thought that “it might be a little less anxiety online just because you’re not there.”<sup>191</sup> Another client followed up on that thought, adding, “[Thinking of a person with] super bad social anxiety issues, and being in a regular courtroom with all those people could potentially send that person into a panic.”<sup>192</sup> This client saw ODR’s potential to avoid this kind of trauma some people may experience as “another reason” that it might be “useful.” Clients spoke consistently about court as a traumatic, intimidating, or overall unpleasant experience. As one client put it, “whenever you go in a court, you can be with a lawyer, without a lawyer, you’re going to be intimidated because people are making a decision about the reason why you’re there.”<sup>193</sup>

Advocates were also aware of and concerned with this trauma to clients. One advocate described “the trauma of going through a metal detector and through security to get into a courthouse to appear before a judge” while another noted that “when we ask consumers, they said they suffered debilitating anxiety from thinking of going to court.”<sup>194</sup> Whatever concerns individuals had about ODR, they were still clear that calling the current experience of going to court unpleasant was a severe understatement.

### **Face-to-Face Interactions: More Reliable and Acceptable to Clients? Maybe, Maybe Not**

Although some research participants spoke of an advantage of litigants being able to see people face-to-face when matters important to their life were being adjudicated, there was not widespread agreement on this issue. Clients, advocates, and court personnel all expressed varied, and sometimes explicitly contradictory positions, even among advocates working with similar populations or in similar practice areas. For example, one advocate who works with Native American populations said:

[T]hey want to see somebody face-to-face, and I think people have that initial reaction, that they’re going to be able to present their case or make themselves be more sympathetic or you can understand their position better if they can just sit down and talk to you. I don’t know if that sense would make somebody say, “oh, I don’t want to do it because I want to sit down with somebody,” but I think people feel that way, and I think that’s just a natural reaction.<sup>195</sup>

Another advocate who also works with Native American populations had this to say on the topic:

I could see that being of a factor, but truthfully, I think that coming up with a resolution that works for them is probably going to be more of a determination of their satisfaction rather than whether they saw the person face-to-face.<sup>196</sup>

In the domestic violence context, one advocate expressed ambivalence on the issue. She recognized that “going to court and telling your story,” often with their abuser in the room with them, was “traumatizing” for many of her clients, but that the experience was also often “very empowering,” and that they might not get that in an online format.<sup>197</sup> Other advocates expressed that “some” of their

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<sup>191</sup> Kaitlin, Client.

<sup>192</sup> Robert, Client.

<sup>193</sup> Alexandra, Client.

<sup>194</sup> Elizabeth, Advocate.

<sup>195</sup> Timothy, Advocate.

<sup>196</sup> Jennifer, Advocate.

<sup>197</sup> Elizabeth, Advocate.

clients might feel the need for face-to-face interactions, but “most would not,”<sup>198</sup> while another advocate noted that views on this are changing with time and that we’re trending in a direction “where [decisions being made online] is going to be much more acceptable.”<sup>199</sup> One technologist believed that from the point of view of clients, “it’s going to depend on the stakes.”<sup>200</sup>

One mediator said “when litigants are physically in the room, they feel like they are actors, rather than more passive.”<sup>201</sup> A court administrator who also had past experience as a mediator, however, disagreed. She said, “in so many of our cases, we force victims to be re-victimized when they walk into a courtroom.... online is a much more neutral space for a lot of victims.”<sup>202</sup>

Clients also had different views on this topic. One client expressed strong feelings about how disempowering she felt an online adjudication could be:

I don't know. I'm going to disagree. It should be acceptable. I just try and imagine how I would feel if I thought I was right and then I just got an email message that said, “you're wrong, you lose, good luck,” without being able to say that's not fair. I don't know. I think that's a little disempowering in that I try and measure if you're in a public benefits case, if you were on your telephonic hearing and they just hung up on you and said, “You lost. Goodbye.” I don't know how you would build it to respond to that, but I just think that that feels pretty dehumanizing. Sometimes I do think the small claims stuff merits that a little bit more, but that, I don't know, that to me seems disturbing.<sup>203</sup>

Other clients expressed the opposite idea, like some of those quoted above on how traumatic they found court. There were also milder statements on each side of the argument, such as “I'm sure it'll be efficient, but I'm one of those [who] prefer[s] face-to-face,”<sup>204</sup> or “I kind of like the idea that there's the option to not be face to face. I mean, I get that people like face to face meetings, but I actually like talking via email.”<sup>205</sup>

As many people offered opinions on whether or not clients would feel disempowered or more empowered, less intimidated or more intimated, it did seem to be, as one advocate concluded, “a matter of personal taste.”<sup>206</sup>

### ACCESS, AUTONOMY, AND ASSISTANCE

Another key theme that emerged in our conversations centered on questions of access and accessibility. Who has the technology to access an ODR platform and who does not? How serious of a problem is the digital divide? Once a user can access an ODR platform, how accessible is it? Does it work with the technology they have? Is it accessible to those with disabilities? These conversations raised questions about who was an appropriate user and even questions of who should be screened out of an ODR

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<sup>198</sup> Nathan, Advocate.

<sup>199</sup> Amelia, Advocate.

<sup>200</sup> Grace, Technologist.

<sup>201</sup> Lucas, Mediator.

<sup>202</sup> Barb, Court Personnel.

<sup>203</sup> Madison, Client.

<sup>204</sup> Miranda, Client.

<sup>205</sup> Betty, Client.

<sup>206</sup> Ethan, Technologist.



system, but those conversations, especially among clients, led to a deeper look at client autonomy and who gets decide what's best for them.

### **Access to Technology vs. Access to In-Person Court**

Our research participants reported that their clients, specifically those in rural and rural remote areas, often did not have access to the kind of technology they would need to fully participate in an ODR platform.

One advocate talked about technology on Native American Reservations as presenting “big challenges,” noting that even getting a cell phone signal can be difficult. She said it can “depend on where you’re standing in a community” and that they would sometimes try to go to another street block to be able to access the internet from a cell phone. She described it as a problem throughout the rural areas in her state.<sup>207</sup> Even beyond internet access, she added that one of the services she and her colleagues offered to the community was to, “load up people into a bus and take our computers, take our printers, mobile computers, mobile printers, mobile scanners, and just meet people in the communities.”<sup>208</sup> The simple tasks of being able to print documents, upload documents, or even type documents was something that was not available to all the members of the communities they serve. An advocate who worked on Native American reservations in another part of the country told of a similar situation. In thinking through how an ODR platform could be successful in his area, he said “you’d have to set up centralized locations where you have equipment and online access and, you know, a sort of public library sort of setting,” noting that internet access would be a barrier for the clients his program serves.<sup>209</sup>

Reports of these problems were not limited to Native American reservations either. One technologist, in discussing a particular rural area of her state, noted that “if you build a platform that’s dependent on my folks having Wi-Fi, they can’t all go to the McDonalds with their non-computer to get Wi-Fi. That’s at least an issue in [my state]. We have dead zones.”<sup>210</sup> These comments are consistent with publicly available data and estimates, which have noted a significant and deepening digital divide in the United States, with “Black, Hispanic, limited education and low-income, and tribal and rural households” being disproportionately affected.<sup>211</sup>

Even advocates in urban areas expressed concern over access to technology presenting a barrier. An advocate who practiced solely in an urban setting noted that his service area also included locations where high speed internet wasn’t a realistic option. He described the situation as follows: “you could say to [the local internet provider], I need [high speed] internet in my house. And they say great, we will lay a cable. It’s \$5000 for that.”<sup>212</sup> Another advocate, after hearing about problems of internet access in rural areas, said “The truth is that exists in urban areas too. [City] is a city of [number] million people and [poor neighborhood] does not get the same service that [rich neighborhood] does.”<sup>213</sup>

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<sup>207</sup> Jennifer, Advocate.

<sup>208</sup> Jennifer, Advocate.

<sup>209</sup> Timothy, Advocate.

<sup>210</sup> Grace, Technologist.

<sup>211</sup> Josh Waldman, *COVID-19 Deepens a Digital Divide that has long impacted low-income, Black and Hispanic, Tribal and Rural, and older households, according to recent reports*, Pro Bono Net (August 20, 2020), available at <https://www.connectingjusticecommunities.com/digital-divide-part-1/2020/08/>.

<sup>212</sup> Ben, Advocate.

<sup>213</sup> Daniel, Advocate.

These comments were about communities where reliable high-speed internet was simply not available to clients. When it was available, there were still potential problems. As one advocate noted, “how many of our clients have a smartphone? No cell connection.”<sup>214</sup> Expressing a similar sentiment, one advocate expressed his belief that these platforms would need a physical location for clients to log on. He said:

One of the things that be really helpful for a lot of people in terms of signing up was having physical locations as well, because not everybody can access their phones. [When] working with indigent population, a lot of their phones get turned off, they can't afford cell phones. So they need somewhere else to go, right.<sup>215</sup>

Whether they were in urban or rural settings, most advocates expressed a concern about clients having easy access to the technology necessary to effectively use an ODR platform.

Surprisingly, however, many with experience in rural settings expressed more of mixed concern for two reasons. First, they had seen their communities be resourceful with accessing technology in the past. Second, many of the areas where technology might be more difficult to access were also the areas where physical court buildings were harder to access. On the first point, the same advocate who talked about needing to bring printers and scanners to her community also noted that “it’s surprising how much they can access websites... most of the time, it’s on mobile phones.”<sup>216</sup> On the second, point, she also noted how difficult it could be for clients to make it to a court appearance. Noting the lack of public transportation available, she said that attorneys would sometimes drive 90 minutes to pick up clients to ensure the client could attend a court appearance. She said “we try to discourage it, [the attorneys] picking up clients, but we all do it.”<sup>217</sup> Another advocate from a different area of the country expressed the challenge of meeting with clients. He said, “and if we take [rural county]... it has one attorney in that whole county.... they're going to have to travel to participate with somebody else. And where technology might provide them, you know, easier way to get their matter resolved.”<sup>218</sup>

Clients also expressed the ways in which access to in-person court presented challenges. One client, who described having problems with mobility and dexterity, liked that ODR offered “the convenience of being able to not have to go out,” noting that going to court could be especially tough for people with disabilities or a person that doesn’t have a vehicle and they have to ride public transportation.”<sup>219</sup> None of this is to say that the concerns about access to technology are to be dismissed. Rather, they should be recognized as the significant barrier they are, but it should also be recognized that requiring people to make it court in a more traditional model can also pose significant barriers.

### **Screening and Autonomy**

Many participants expressed concerns about how ODR platforms would deal with clients who had disabilities, cognitive impairments, or literacy issues as well as clients who were not fluent in English. One advocate was particularly concerned about how the system might work for those with “cognitive

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<sup>214</sup> Amelia, Advocate.

<sup>215</sup> Matt, Advocate.

<sup>216</sup> Jennifer, Advocate.

<sup>217</sup> Jennifer, Advocate.

<sup>218</sup> Jacob, Advocate

<sup>219</sup> Betty, Client.

issues.”<sup>220</sup> A client participant expressed concern about language barriers.<sup>221</sup> Some advocates felt that the concerns were so obvious that it could be assumed everyone present was thinking about them. One advocate said:

I think it's probably a given at this table, but we're all concerned about language proficiency, literacy, disability or ability, and how all that plays into interacting with a system because, you know, many of our clients are not as able to use online tools in the same way that all of us can and do.<sup>222</sup>

Another advocate wanted to confirm that there was something built into the system to screen out people for whom ODR is not appropriate?<sup>223</sup>

These concerns were common among advocates, but some advocates pushed back on at least part of this thinking. As one executive director said, “I mean my hackles go up when I hear legal paternalism [and statements like] ‘Oh, We have to have a lawyer or the pro ses can’t possibly figure it out on their own.’”<sup>224</sup>

That idea, that clients could and should make their own decisions on these issues was universally echoed by clients. In particular, many of the research participants were low-income individuals who were living with disabilities or faced other challenges. To a person, however, they did not want to be automatically screened out of any ODR program. One client expressed this idea as follows:

[Y]ou say that if you were to do a pre-screening and that's for whatever discussion, but then someone would reflect back and say, well, then you don't qualify for this. I think that if there were an option to say, “would you like to opt out?” ... rather than being told that you're not capable? I think that in and of itself is very defeating to think that you're not capable enough and that you should have an option to continue or not.<sup>225</sup>

Another was passionate as she said: “Let me try and fail, you know? Don't tell me up front and not even let me try. Because I'm not my disability. I'm a human, I have a disability, but I always want to try.”<sup>226</sup> Similar statements on this issue included:

If it were to screen people out, it would be better to offer preferences and to give the option so the individual can decide whether or not they want that choice. And that would also mean providing what it would take to make it work online. And if you feel that this would not work for you, then you could opt out. Let us make informed choice. Let the person with the disability or low literacy make an informed decision. Maybe the person who's illiterate has somebody that they trust, who is literate who can help them. They still should have the right to [participate in ODR] the same as anyone else.<sup>227</sup>

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<sup>220</sup> Linda, Advocate.

<sup>221</sup> Susan, Client.

<sup>222</sup> Mike, Advocate.

<sup>223</sup> Elizabeth, Advocate.

<sup>224</sup> Amelia, Advocate.

<sup>225</sup> Susan, Client.

<sup>226</sup> Miranda, Client.

<sup>227</sup> Beverly, Client.

It should be noted that these viewpoints were consistent regardless of an individual's expressed comfort level with technology, which ranged from being "uncomfortable navigating around [unfamiliar] websites" to having significant knowledge of computer programming. Although advocates may have some concerns about how ODR might not be a good fit for some clients, clients with whom we spoke expressed a universal desire to make their own choices and not be automatically screened out of an ODR program.

### **Assistance**

Clients wanted a chance to participate, to make the decision to opt in or out of ODR themselves. That does not mean they had no concerns about accessibility. Instead, they were passionate about ensuring the technology could meet them where they were, including accommodations and assistance if it was necessary. Advocates agreed about this priority. One advocate emphasized that it was critical for developers of ODR to "think through... what ... support mechanisms they're going to have in place."<sup>228</sup>

One of the first challenges advocates and clients both identified, however, was the delicate nature of asking litigants to declare a disability or medical condition. One advocate noted that "checkboxes could be a little bit problematic because I don't think you're going to get everybody checking... because people don't want to see themselves [as having a disability] or don't disclose."<sup>229</sup> Another suggested:

[A] question that was very generic that wasn't like "I have a mental health issue." But "is there anything in your life that may cause you to take a little bit [longer] or you may need an accommodation" and list out a bunch of various options, but you don't have to check any one of them.<sup>230</sup>

Here, clients and advocates were mostly on the same page. Confirming these concerns, one client shared:

I can tell you there's a lot of people in the [disability] community that would have a serious issue with like admitting they had any kind of disability. Or like not admitting, but telling people what their disability was and stuff like that. Not a ton, but there are people out there that want to keep that private and don't want to talk about it.<sup>231</sup>

Others agreed, as one client said, "I don't think people will be honest about it because of stigma. People don't want to say, I have this disability and it limits me."<sup>232</sup> Clients who expressed this concern, however, suggested a different solution. Instead of going to more generic questions, they thought it might be better to go more specific, but change the language and approach of asking. Instead of asking individuals to identify as having a disability, they thought ODR platforms should instead offer certain accommodations, such as an interpreter or a larger font. As one client stated, "having the options to not identify myself necessarily as having a disability, but I do need this and this help. I will go all for it."<sup>233</sup>

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<sup>228</sup> Timothy, Advocate.

<sup>229</sup> Amelia, Advocate.

<sup>230</sup> Elizabeth, Advocate.

<sup>231</sup> Mark, Client.

<sup>232</sup> Miranda, Client.

<sup>233</sup> Andre, Client.

Still, the client community did express some skepticism that these tools would be accessible to them. Some individuals were visually impaired, and they needed tools like Job Access With Speech (JAWS) to access websites and other technologies. As one client said, “[the] biggest thing I’m running into technology is websites tell me that the platform I’m using is not supported by their browser.”<sup>234</sup> She said that this happened to her about 7 out of 10 times she tried to access a website. This became a source of anxiety, as another client noted:

I am terrified of ever having to do anything legal online. Because of the incompatibilities sometimes of the technology. The accessibility technology sometimes does not cooperate. And even though some government websites claim to be accessible, they’re not. Let me just tell you that right now.<sup>235</sup>

Part of the frustration on the part of these clients is that they could see accessibility was in fact possible, but not always a priority. For example, they reported that the outlook calendar worked well with JAWS, but Gmail was “a mess.”<sup>236</sup>

Going beyond issues of more formal accommodations or compatibility, many clients expressed concern about the challenges of just working with a new software. They wanted opportunities to learn, to practice, and to have someone whom they could ask for help. Clients wanted to know there would be “a real live person” to whom they could say “I’m really not getting this or what does this mean... even if they couldn’t give legal advice... just explain maybe in simpler terms.”<sup>237</sup> One client, expressing her desire for the availability of in-person assistance, thought of it in terms of “doing self-checkout at a grocery store, and you’re doing it, and then you don’t know what to do next and somebody comes over and helps you. That would be my preference.”<sup>238</sup> This client imagined an ideal scenario would include both online support and, if an individual was really struggling, support available at the court house. She explained that what she was envisioning was “someone [at the courthouse] who could help you maneuver through the ODR process... someone to provide you with the technical assistance.”<sup>239</sup>

Other clients thought accessibility could be improved with tutorials. One client said that she would like a tutorial so that, “if I knew I had a mediation coming up next month... I could practice with a tutorial that included the subject matter of what the mediation would be about.”<sup>240</sup> Another client in the same focus group agreed a tutorial would make ODR “less intimidating.”<sup>241</sup> Sharing a similar sentiment, one client emphasized that he would the chance to have “practice runs” that were combined with “reminding people it’s an optional thing.”<sup>242</sup>

When it came to accommodations and accessibility, clients did not want to be screened out. Whether they felt comfortable or anxious about new technology, whether they lived with a disability that could pose challenges to participating in ODR or not, they wanted to the choice to be their own. They wanted

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<sup>234</sup> Kaitlin, Client

<sup>235</sup> Beverly, Client.

<sup>236</sup> Andre, Client.

<sup>237</sup> Susan, Client.

<sup>238</sup> Lauren, Client.

<sup>239</sup> Lauren, Client.

<sup>240</sup> Miranda, Client.

<sup>241</sup> Betty, Client

<sup>242</sup> Mark, Client.

autonomy. Opposed to being screened out, they wanted a system that *could* work for them, a system with options and support, one that had the option of live or even in-person technical support.

### **RECOGNIZING AND IDENTIFYING THE POTENTIAL PROMISE OF ODR**

Up to this point, our key themes have mostly focused on the concerns and challenges of ODR or, at best, an acknowledgement of the problematic nature of the status quo. Still, participants in our study did recognize a lot of promise in ODR. Many recognized the opportunities to increase access, reduce defaults caused by an inability to get to court, and provide a more convenient and less traumatic experience. For certain types of cases, participants also saw a possibility to meaningfully increase just outcomes. Still, the skepticism noted at the beginning of this section remained, at least to the extent that, even when discussing potential benefits, participants often emphasized a need for caution.

On the issue of access to the courts, most all participants agreed that an optional ODR platform would increase access. One advocate discussed it this way:

[I]t provides access to the person that can't get to court at 8:30 in the morning because they have a job. There's an ability for them to participate in the system in a way that they wouldn't have been able to participate in the past. And I think there's something there... that, to me, is some of the promise of online dispute resolution that now maybe more people that don't actually owe all of that money in that collection that can at least contest that issue, or, at least for us, I mean, this is on the small claim side, ... military folks [may] end up losing their security deposits because they can't come to court to do those issues, right? So I think there's also a way it gives an opportunity, it really does open up an area, maybe not for our most low-income folks, but at least for that working-class group. That's what some of the design of these systems are about. It's about that gap group that we can't serve because they don't qualify for our services. But it's not that they can afford a lawyer either or take off time from work to adjudicate.<sup>243</sup>

Similarly, many clients expressed an interest in the idea of not having to go to court, of being able to resolve their disputes online. This interest sometimes persisted even when presented with potential high stakes matters, the kinds of cases advocates almost universally agreed should not be handled through ODR. When we asked one client how she would feel going through ODR in the event that her landlord was trying to evict her, she said she would “feel more comfortable online,” explaining that it “sometimes you say things [in person] in a way that you don’t want, but it’s too late because you already said it... when you’re writing it, you can review it before you hit the submit button.”<sup>244</sup>

Advocates, when recognizing potential benefits to ODR almost universally wanted to talk about it in terms of limiting it to very specific types of cases. In an above section, we noted that advocates were concerned that many cases identified as “low hanging fruit” or “low-value” were not so low-value to low-income litigants. Despite the disagreement on what truly constitutes a low value, and thus low risk, case, advocates agreed that this is where ODR should be focused. They had positive views of existing programs that allowed litigants to “negotiate traffic tickets... bench warrants and child support,” even if they followed up with a concern that courts then took an attitude of “we must keep growing and growing and doing everything through [ODR].”<sup>245</sup> Another advocate thought “custody,” “child support,”

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<sup>243</sup> Emma, Advocate.

<sup>244</sup> Lauren, Client.

<sup>245</sup> Hannah, Advocate.

and “visitation” were all “perfect situation[s] for [ODR],” cautioning that her position was contingent on no domestic violence being identified.<sup>246</sup> One client thought that “divorce mediation” could be especially good for ODR because “those get emotional and out of hand when you’re in the same room. So, my thought would be, it would be better to do it with the computer.”<sup>247</sup>

Small claims often came up as possible good fit for ODR, with one technologist saying “we think that that has really good promise.”<sup>248</sup> This, of course, can be contrasted with many advocates expressing serious reservations about small claims ODR and how many so-called small claims can actually be very large amounts for low-income clients. Perceptions of small claims filings being a good or bad fit for ODR was not universal.

Similarly, participants didn’t always agree about housing law as a good fit for ODR. Advocates, almost universally, had serious concerns about allowing landlords to pursue eviction claims from start to finish through ODR. Thinking about other housing law cases that could be handled through ODR, one advocate said this:

Maybe it depends on the kind of housing case. If it’s, you know, I didn’t get my deposit back or if, you know, something like that. Probably... if it’s an eviction case, in my mind, it’s just an easier way to get somebody out of the house. Even it might be more efficient, even though it might save resources, unless you’re going to give the tenant an attorney or some form of legal assistance, I wouldn’t do that one.<sup>249</sup>

Another advocate, thinking through a similar scenario was concerned that:

[I]f [tenants are] able to make an action against [their] landlord, for example, for their failure fix something, then the sort of necessary counterbalance will be that landlords will insist that they have the ability to, evict somebody online.<sup>250</sup>

Thinking about it a little differently, one advocate thought ODR based mediation could be useful in a pre-filing context. She felt like there was some promise in using “technology solutions in a pre-litigation context” to see if parties could “find a middle ground” or if there were “ways to work out it out” before moving forward with more formal court processes.<sup>251</sup> Another advocate in a separate focus group noted that most of their landlord-tenant cases “resolve themselves in some sort of mediation or negotiation” so he thought there were “opportunities in that arena [for ODR] to offer benefits”, though he did express some concern, saying “I don’t know where the safeguards are.”<sup>252</sup>

Whether it was in small claims court, housing court, family court, or another area of law, participants often felt more positively using ODR in pre-filing, allowing litigants an option to resolve the case before coming to court, but then having more traditional court options if they couldn’t reach an agreement.

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<sup>246</sup> Jennifer, Advocate.

<sup>247</sup> Miranda, Client.

<sup>248</sup> Grace, Technologist.

<sup>249</sup> Timothy, Advocate.

<sup>250</sup> Ben, Advocate.

<sup>251</sup> Cathy, Advocate.

<sup>252</sup> Jacob, Advocate.



Some even imagined an ODR platform to help litigants potentially reach partial agreements that might streamline the court process once they did get to court. As one advocate put it:

I don't think that necessarily all of the issues have to be resolved through ODR. If only one can be resolved. If we can just do a parenting plan, or parenting time, or child support, you know, one issue where both parties need to have their chance to tell their story. I think that goes a long way.<sup>253</sup>

This concept presents a shift that took place in some conversations with participants did not view ODR as a platform that replaced traditional court processes but worked in conjunction with it. And this advocate was not the only with this vision. One court administrator who had fairly extensive experience with ODR platforms thought ODR could be helpful to litigants and judges even if no issues were resolved. She said:

If we can sponsor a publicly facing triage tool communication platform and have that be a safe space, then I think that courts should create that space and that tool for folks. Because even if they're not able to resolve their case... look at British Columbia's solution resolver that's again a beautiful tool because it summarizes as you're working through your issues. At the end, you can print your issues so you can go into a courtroom and present to a judicial officer and he or she can understand what is it that you're asking for... that's been a real struggle for self-represented litigants, because when they go into the courtroom, they're overwhelmed. They don't speak the language the judge speaks, and the judges are stressed.... that's the one thing these tools can do, too, is to really help the judicial officers in feeling like, "Oh, I see what you're trying to say."<sup>254</sup>

It might seem strange to think of an Online Dispute *Resolution* platform having a significant benefit in cases where it doesn't actually resolve any part of the dispute. Still, as advocates and members of the court discussed the difficult realities in terms of judicial resources, any platform that helped litigants get to the heart of their disagreement or really distill on what matters exactly they needed a court to rule was seen as a significant potential benefit.

That participants looked at ODR a bit differently as they discussed it and heard others discuss it is likely a good sign for the future of the platform and its ability to adapt and change in ways that make it more beneficial to both courts and low-income litigants. This need to step back and rethink matters was a reason that participants felt there was a possibility for significant positive change. One advocate said:

[T]here's real hope in being able to potentially change our court systems and the way in which we approach disputes because of technology... it's at least opening those conversations. It's not so much about creating tools to get through all of the bureaucratic stuff, but really starting to ask questions [such as] why do you need that? Why does that person have to do this and they all read this? Why is it all these formalities that are in our family law system when those two people agree to what they want to do for the kid? ... [W]e are able to start asking different

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<sup>253</sup> Linda, Advocate.

<sup>254</sup> Barb, Court Personnel.

questions, because technology... helps stimulate a different way of looking at what we're actually doing.<sup>255</sup>

Throughout our conversations, participants identified all kinds of concerns related to the implementation of ODR and potentially problematic unintended (or even intended) consequences. Still, participants remained receptive to the idea that ODR and other technologies could support or even reshape the civil legal justice system in ways that would significantly benefit low-income litigants.

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<sup>255</sup> Emma, Advocate.

## SECTION V: GUIDING PRINCIPLES AND CONCLUSION

Section IV explained the key themes of our discussions. This section will attempt to use those themes along with the hopes and concerns expressed within them to identify guiding principles for future ODR platforms. The goal is that by following these principles, developers of ODR platforms will be able to create inclusive and accessible systems that increase equitable outcomes for low-income clients.

### **PRINCIPLE 1: BE TRANSPARENT**

Some of the key themes that emerged from our conversations included concerns about how equitable future ODR platforms would be and the importance of allowing clients to make their own informed choices. It is with some of those themes in mind that transparency is identified as a key guiding principle. If ODR platforms are launched to coordinate with, supplement, or even substitute traditional court processes, they must be transparent.

One technologist spoke about a plan to make one court a “total virtual court,” and one of his first concerns was there would be “no court watcher.” He felt strongly that such a plan “could be very bad if you sealed out witnessing by the public in a court case... as we develop technology to deal with court cases, there still has to be an access for witnessing.”<sup>256</sup> When it comes to new technology, of course, transparency is more than just allowing someone to watch the final project in action. Many participants voiced a need for technological transparency, saying things like “We need to have more transparency around source code when these [tools] are being used to impact people’s lives”<sup>257</sup> while others spoke of technology vendors they trusted as doing things like “using open source code... and they’re sharing it with these organizations.”<sup>258</sup>

Another aspect of transparency is the way ODR platforms are presented to clients. Many participants emphasized a need for ODR systems to better communicate to users exactly what the system could and could not do and what other options they have. One technologist summarized these sentiments when she said:

Make sure that folks are aware of their other rights as well to make sure folks are aware of legal aid.... you should give folks more informed education about what their possibilities are. Right? *Before* the decision they’re making. It has to be baked into the program.<sup>259</sup>

Another advocate emphasized that this kind of information was important in “recognizing [users’] agency” as it would allow them to “determine what the stakes [are], if the benefits outweigh the costs.”<sup>260</sup> Included in such a concept, would be using plain language to outline what can be gained by using the ODR platform, but also what rights a user might be waiving, what negative outcomes could result, and what options will be available or foreclosed to them if they are not satisfied with the outcome. Again, this is in keeping with the nearly universal statements from clients that they wanted a choice as to whether or not they should use an ODR platform. If they have a disability or there are other

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<sup>256</sup> Bart, Technologist.

<sup>257</sup> Ben, Advocate.

<sup>258</sup> Anna, Technologist.

<sup>259</sup> Grace, Technologist.

<sup>260</sup> Daniel, Advocate.

factors which could present a challenge, they do NOT want to be screened out; they want to decide for themselves if it is a good fit for them. Of course, they can only do that if the system is open and transparent about how it operates, what it can and cannot do, and what the risks are in using the system.

## **PRINCIPLE 2: MAKE IT (VULNERABLE) CLIENT-CENTERED**

Another principle that emerged from our themes was how critical it was that these systems are client-centered. That means that those who develop and implement the tool are able to identify the clients who will use their systems with an eye toward which clients may be the most vulnerable and making sure it works for everyone. Low-income and self-represented litigants as well as communities of color are especially vulnerable in the legal system. Additionally, individuals in rural communities, those with limited English proficiency, and those with disabilities also face increased barriers to meaningful participation in legal processes. Those who develop and implement ODR platforms need to account for how easy or difficult it will be for users to navigate these systems. This means involving clients early on and throughout the development process, thinking about what it means to build a culturally competent tool, and making access widespread and meaningful.

### **Inclusive Development**

As technology tools are developed, resources expended, partnerships formed, and platforms are rolled out, change becomes harder at each step in the process. If a court system spends significant funds for a vendor to develop a tool and, after considerable time and investment, it becomes clear that this tool does not work well with some clients, tweaks and improvements can be made at the margins, but it is unlikely that the court system will want to abandon the project. That is why it is important to include potential users early on and throughout the development process, particularly low-income or otherwise vulnerable users.

When we asked one advocate if he thought client input was most important before or after development, he said:

I think it's both. Because you always know when you want to develop an app who the affected population you're trying to serve is so why not, before you're even beginning or when you're coding it, get input into that and then beta test again, later.<sup>261</sup>

Another advocate emphasized the need for “testing assumptions at every stage of how it's designed,” adding the critical questions: “did you use user test it? Did you have the people using the system tell you what they think?”<sup>262</sup> Clients expressed similar views. As one client put it:

Beta testing is the most important thing for the disability community. When we test things, even if it's not software using these, like a pilot program for our assessment tool or whatever, when we test it, not only to inform the progression of it, but also test it, actual testing, we get much more data.<sup>263</sup>

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<sup>261</sup> Ben, Advocate.

<sup>262</sup> Amelia, Advocate.

<sup>263</sup> Andre, Client.

In terms of involving stakeholders, clients should be at the center, but it should not be limited to them either. As one Native American advocate said:

[J]udges definitely need to be at the table. Probably within the tribe, the social workers. The social workers are the ones that are seeing the families come and talk to them about some of the problems. The tribal leaders, the councilmen within the different districts, they are the ones who want to be able to provide the services to their constituents so they need to understand how it works so they could suggest to citizens that this is something good that they should try.<sup>264</sup>

If there are stakeholders who work intimately with the potential users of an ODR platform, they should be consulted early on in the development process. What challenges do they see in the communities they serve? Are those challenges things that could complicate a user's ability to access or successfully operate within an ODR platform? If so, how can developers design something that at least tries to mitigate those challenges? Access to justice commissions are also stakeholders who can provide an important perspective when they get a seat at the table. The key decision-making groups need to be diverse, inclusive, and represent the demographics of legal aid clients and court users in general.

### **Culturally competent**

Part of the principle that these systems should be client-centered is a recognition that client communities are not all the same and individual clients within a community are also not all the same. With that in mind, ODR systems should make all possible efforts to be culturally competent for the communities and individuals who will be using them.

When asked what they would want to see in ODR systems, one technologist said it directly: "culturally competent." Explaining what she meant by this, she talked about the need for appropriate and accurate language translation and the need to understand "user testing related to... translated content... and how websites like this work with different cultures."<sup>265</sup> In some communities, it's possible that one version of this might be to simply conclude that ODR might not be the best tool. As one advocate said, "sometimes some of these approaches aren't going to be appropriate," and she cited work with at least one specific community. Based on how they worked and communicated with her office, she felt ODR was not likely to be a good fit for most of those clients.<sup>266</sup> She concluded with these thoughts:

[T]he piece on culturally appropriate education comes from using stories, understanding culture, understanding so many different things and being able to communicate how the system in the United States can potentially work right?<sup>267</sup>

The advocates we interviewed who worked specifically with Native American populations were not necessarily pessimistic about using ODR in their service area, but they did note that the systems would need to be adapted to work with the communities they serve. One advocate pointed out at least one group with whom his program worked has their own laws, but beyond that, the group also has "some cultural issues that you have to have an understanding of," and that these issues can create "a clash between western law and Native American law."<sup>268</sup> It is important to note that although issues of

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<sup>264</sup> Jennifer, Advocate.

<sup>265</sup> Grace, Technologist.

<sup>266</sup> Emma, Advocate.

<sup>267</sup> Emma, Advocate.

<sup>268</sup> Timothy, Advocate.

cultural competency may be raised quicker in conversations about serving Native American populations, it is not an issue that applies only to easily identified and discrete communities. These are issues that must be addressed in all communities. Cultural competency goes beyond translation to other languages or accounting for an alternative set of laws. It also means using the register and language of youth, parents, different racial and ethnic groups, the disability community, and others. All of these groups are not monolithic, and providing a system that works well across all of these groups is not something that can be done fast or cheap. A lot of this work has already been done by the legal aid community on their statewide websites or by other stakeholders. Duplication of efforts is not recommended, but community outreach and listening to a diverse group of stakeholders is.

Cultural competency and how it relates to the law are deeply complex topics that we cannot cover fully in this research. Adding technology into these spaces only further complicates matters. We simply wish to emphasize that this principle should be front and center in the minds of any jurisdiction or developer who wants to develop ODR systems. In order to actually address these principles, one must necessarily engage in a situational specific analysis that begins with identifying the communities and groups who will make up the users of your system. Tools that are rolled out without significant efforts to understand the unique make-up of the potential users and how they might interact with the technology will ultimately do a disservice to the jurisdiction.

#### **Create MEANINGFUL Access: Usability, Accommodations, and Assistance**

In looking at our key themes, we learned that access was a major hurdle identified by many participants. Advocates tended to focus on the challenges of accessing technology. Clients, meanwhile, were more likely to identify their concerns of accessibility in terms of how difficult it might be for them to use an ODR system. Accordingly, their concerns centered around accommodations and what, if any, assistance would be available to users as they move through their case online.

Over and over again, advocates made a point to emphasize how important it is to make sure that these platforms are mobile phone friendly. As one advocate put it, “Step one, it has to be capable of utilization on a smartphone.”<sup>269</sup> Another said that he has “a phone I bought from T-Mobile three years ago now for \$20 that I use to test stuff” to ensure that legal technologies would be accessible to someone who might not have the most expensive or cutting edge technology.<sup>270</sup> Detailing the importance of keeping legal technologies mobile friendly, one advocate noted that when she tested the ODR platform in her state, “I thought if I had to do this on my phone, I would quit.” She added, “we have to really be cognizant that, for a lot of people, this is their only access. And if we’re asking them to type out long paragraphs, I think that’s a barrier.”<sup>271</sup>

In some areas, advocates expressed a need to have a physical location with computers where clients could access an ODR system. Some may view such resources as defeating the purpose of ODR, but the potential benefits of ODR, as noted in our discussions of key themes, need to be more than simply the convenience of staying in your own home. And in some locations, like certain Native American reservations, computers being available in a community center might be the only way that some clients could access the platform. Additionally, even if internet access was not the primary concern, a physical

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<sup>269</sup> Liz, Advocate.

<sup>270</sup> David, Advocate.

<sup>271</sup> Hannah, Advocate.

location could even be staffed, allowing clients to seek out basic assistance with the platform. As one mediator noted:

So having people that are trained to help use the tools. And maybe the public libraries are kind of, now that's getting away from the ideal. But public libraries are used very effectively, especially in rural areas where they are the portal for any sort of online access.<sup>272</sup>

There has to be some accommodation for the fact that low-income litigants might not always have reliable access to technology, and their lack of access may not always be predictable at the beginning of their legal case. Having a physical location option could serve as a good safety valve.

As noted in the results section, clients themselves voiced a desire for accommodations; they wanted to be able to receive them without feeling stigmatized; they wanted a chance to practice with the software; they wanted live assistance, someone who could answer their questions about using the platform. Part of making a client-centered ODR platform involves not having a “set it and forget it” attitude about the software. Whether it is related to a client’s disability, a client using outdated technology, or just regular run-of-the-mill user error, clients expected that they might struggle with a new system, that they might have questions. A client centered ODR system needs to have quality customer support and easy to access technical assistance to help litigants who want to use the system but might need more help.

### **PRINCIPLE 3: CREATE MULTIPLE AND EASY TO USE OFF-RAMPS**

Going back to what it means to be client-centered, clients emphasized the importance of making their own choices, of not being told that ODR was not for them or their only option. Those sentiments were often, however, coupled with statements that revealed an assumption they could easily opt out, either at the beginning or at some later point in the ODR process. Clients shared these views with statements such as “let me try,”<sup>273</sup> and “if you feel like this would not work for you then you could opt out,”<sup>274</sup> and “if you’re failing, you will automatically come to the conclusion... maybe I shouldn’t do it,”<sup>275</sup> and “[the ODR system] should give you some kind of like different option [if you’re making mistakes] or remind you that you can do something else... you don't have to do it this way.”<sup>276</sup>

But what if those off ramps are hard to see? What if an ODR platform allows litigants to opt out, but fewer than 5 % or fewer than 1 % do? Should we assume that litigants must really like the ODR system or is that a sign of an ODR system where off ramps are too few and far between or where litigants, for whatever reason, don’t feel comfortable opting out? Should ODR systems instead only be opt-in system?

At least to the last question, participants in our study, especially those who primarily worked with technology, believed that ODR systems needed to be opt-out systems, meaning that the default would be that all litigants in certain cases would be enrolled and, if they did not wish to participate in ODR,

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<sup>272</sup> Lucas, Mediator.

<sup>273</sup> Miranda, Client.

<sup>274</sup> Beverly, Client.

<sup>275</sup> Andre, Client.

<sup>276</sup> Mark, Client.



would have to exercise their choice to opt-out. One technologist analogized it to e-filing for attorneys. He said:

[I]f your goal is to drive adoption, opt-out is the way to go. Look at electronic filing, if it's permissive. You only have about, the numbers show about 15% of the attorney population will actually utilize it. Whereas if it's mandatory, but they do have the option to opt out for whatever reason, you're closer to 99.9%.<sup>277</sup>

Another technologist said, “for user experience design, selecting [participation in ODR] as the default [will] dramatically increase the participation in that system,” and she added that if you require users to opt-in to participate in ODR, the lower participation rate will mean “we're not going to continue funding that system even if it's potentially giving people better outcomes or it's a better experience for people.”<sup>278</sup>

Another technologist echoed this position, stating “I think [ODR] should be opt out to get people to adopt it.”<sup>279</sup> Still, she had some concerns, adding, “but you have to do that with, you know, here's why this might be right for you, here's how you opt out, informed consent.”<sup>280</sup> This sentiment was shared with other advocates who agreed that it made sense to have default participation with a chance for litigants to opt-out, but that developers needed to “create something [so that] people actually can find information on how to opt-out, right?”<sup>281</sup>

The most in-depth comment on this topic came from an advocate who framed his concerns as follows:

In this type of tool, who's figuring out when the off ramp is and how are they figuring it out? I am not aware of technology yet that's able to accurately ascertain when an off ramp should be available... certainly, people themselves are generally not going to be aware of when they should be pursuing an off ramp. So if we could get to the point where the tool could help people get to that point, effectively using some of that technology, maybe, but that's what I think what would need to happen is that the tool saying, “Hey, you said this, this could raise this issue, ... you might want to, you know, consult or seek legal help.”<sup>282</sup>

There was not an objective standard that any participants could identify when it came to what an off ramp should look like, when or how exactly it should be presented or even how often. This is another example of the ways these principles all intersect with each other. An ODR platform that is transparent about its opt-out procedures and opt-out rates can give advocates the information they need to examine the situation and ask the right questions. Meanwhile, a platform that is client-centered, user tested, and tailored to the communities it serves is more likely to have appropriate off ramps in the first place.

When a user does choose to opt-out, it should be at no penalty to the participants, no extra costs, and their data should be removed within clearly written time periods.

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<sup>277</sup> Austin, Technologist.

<sup>278</sup> April, Technologist.

<sup>279</sup> Grace, Technologist

<sup>280</sup> Grace, Technologist.

<sup>281</sup> Amelia, Advocate.

<sup>282</sup> Mike, Advocate.

#### **PRINCIPLE 4: GET GOOD DATA, BUT NOT TOO MUCH, AND EVALUATE FOR EQUITY**

This almost contradictory principle really comes down to asking two different sides of the same question:

1. What data do systems need to perform meaningful and helpful evaluations?

AND

2. What data is not necessary?

Data security and the over-collection of data was discussed as part of the skepticism many had in regard to ODR and legal technology generally. There is a sense that low-income clients are already over-surveilled and taken advantage of when it comes to giving out data that provides value to others, but never to themselves. It was also universally understood by participants that most low-income clients (and most everyone else) take insufficient steps to protect their data. Advocates emphasized the importance of the need for all parties to be “good stewards” of litigant data, for the onus and responsibility to be on the parties who collect and retain data. This involves not just keeping data secure, but also not collecting more personal data than necessary, even if it will be kept secure or disaggregated at a later stage.

Nevertheless, another important principle that participants identified was the critical need for evaluation. One advocate emphasized the need for “reliability-based testing and feedback to make sure that [ODR platforms] are doing the thing they're supposed to be doing.”<sup>283</sup> The ability and need to evaluate goes further though, as participants emphasized the need to evaluate for the “right” things. Over and over again, we heard advocates underscore the need for evaluations to “prioritize due process and fairness at the same level as efficiency”<sup>284</sup> or “evaluate the fairness of those negotiated resolutions.”<sup>285</sup> One technologist framed the situation as follows: “I think there has to be a good evaluation. Not just what are the court’s goals, but for the ODR program? What are the consumer and users’ goals? And what are the metrics that we’re going to [use to] measure that?”<sup>286</sup> Thinking even further down the line, one advocate started to imagine evaluating systems in a more long-term context as she said:

[I]s this a payment plan for a consumer debtor who then defaults later and then [the other party] goes in and enters a judgment? Is this a tenant who has a stipulation to make a repayment as well as their regular rent every month, and then they end up getting evicted by the stipulated judgment a few months down the line because they failed on the plan? Is this a non-criminal domestic violence restraining order? Because it’s a negotiated resolution, but then the abuser violates this restraining order and that’s not enforceable with the police department because it’s a negotiated resolution? What are the outcomes further down the line, not just the outcomes of the actual ODR experience?<sup>287</sup>

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<sup>283</sup> Hannah, Advocate

<sup>284</sup> Hannah, Advocate.

<sup>285</sup> Cathy, Advocate.

<sup>286</sup> Grace, Technologist.

<sup>287</sup> Cathy, Advocate.

These, of course, present challenges in data collection and having a baseline comparison. As one advocate noted:

Are we consistently evaluating how the courts... how the cases have been mediated? Are they doing the research ahead of time to know how many other cases are settling and what are the normal outcomes and are we seeing completely different outcomes now with ODR? I don't think they are collecting the data and the way that needs to be collected in order for us to actually see the differences.<sup>288</sup>

This raises the challenges that exist in crafting meaningful evaluations under the current environment, given what data exists and does not exist. The first step in crafting a data plan for evaluation is to identify the key research questions with a diverse group of experts and leaders and technologists from the for-profit and non-profit sector. If the questions are asked only apply to one type of user, fail to address race or gender differences, or don't factor in barriers due to lack of income, just to mention a few examples, then the data collection and evaluation design will fall short.

Perhaps surprisingly, those who were hardest on the court system's ability to evaluate projects were mediators, judges, and court personnel. One judge expressed her frustration that courts "like to pat themselves on the back," by conducting superficial evaluations where someone "stand[s] out in the courtyard and ask[s] people questions" only to get unhelpful responses such as "oh my goodness, 80% of the people thought they were treated well and politely." She felt that the whole point of some of these evaluations were simply "asking litigants to tell us what we want to hear."<sup>289</sup> A mediator suggested a more useful measure would be to see how often problems come back to court and need to be adjusted or adjudicated again, suggesting that the initial resolution was not a success. He also noted, "courts have [this data] in their files. Let's take a family case as an initial divorce. How many post-decree motions are filed? There's a log every time someone is allowed to modify child support, change the parenting arrangement, but courts don't think 'I could use this data.'"<sup>290</sup>

If courts are creating new ways to resolve disputes, there needs to be an evaluation if these new ways are offering improvements, causing new problems. or producing the same results. Not only that, those who implement ODR need to think carefully about how they are going to evaluate and, specifically, what they are evaluating. The adage is that what you measure is what you value, and it could not be truer in the ODR context. Our final guiding principle is that data must collected toward an eye for measuring for due process and equity. If we cannot ensure that the other principles (transparency, a client-centered system, and easily identifiable off-ramp) are not actually increasing equity and due process for users, then it is all for naught. It is the civil legal *justice* system and so it is justice for which we must measure.

## FINAL CONCLUSIONS

ODR presents challenges and the potential for exacerbating disparate treatment of low-income clients and their cases. It risks automating unjust and biased systems, stripping out important due process protections, and increasing inequitable outcomes, particularly among already vulnerable litigants. At the

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<sup>288</sup> Emma, Advocate.

<sup>289</sup> Michelle, Judge.

<sup>290</sup> Oliver, Mediator.

same time, however, it offers considerable potential for increasing access, empowering self-represented litigants, and perhaps even increasing equity.

The challenge lies in how we reduce the potential harms while creating systems that are most likely to realize those potential benefits. There are no one-sized-fits-all easy answers about what a fair and just ODR platform should look like; there is not and never will be a clear template to follow. Instead, the answers lie in the process with a key first step being a recognition that justice and equity should always be the priority, and it must be the dependent variable for which you test. Beyond that, courts and developers must hear from and truly listen to those who will be directly impacted and are most vulnerable along with the people who serve them and work alongside them. They must make this a priority not just at the outset of the process, but throughout it so that the communities who use the civil legal justice system are informing and shaping it on an ongoing basis. With or without ODR, the civil legal justice system cannot achieve its promise of equal justice for all unless it hears these voices loudly, clearly, and regularly.