

# Ten Tips for Getting the Most Out of an Evaluation of Your ODR Program

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Online Dispute Resolution programs are expanding across the country. And some use artificial intelligence (AI). Researchers who conducted several of the first neutral evaluation online dispute resolution programs in courts within the United States share their insights on how to work effectively with evaluators to get the best possible program evaluation. Written in the form of a “top ten list,” the practical advice they offer is geared toward courts that are just starting to plan ODR programs, as well as ones that have already begun to design a program or have one in place.

Online dispute resolution (ODR) has found a home in courts around the country and has piqued the interest of court constituents nationally. As of 2019, ODR was taking place in 66 court locations across 12 states, for 14 case types, including family, traffic, small claims, and debt collection,<sup>1</sup> and according to a national survey conducted in 2021, 55% of respondents were willing to “participate remotely in an arbitration, mediation, or other procedure where a neutral third party helps opposing sides reach an agreement and avoid a trial.”<sup>2</sup> While it’s an open question whether the growth in court-connected ODR and public receptiveness to remote proceedings will wane once the pandemic’s effects seem more distant, many legal experts predict that ODR is here to stay. Courts that have already adopted ODR have done so with the expectation that it can meet various objectives, such as improved access to justice, reduced default judgments, enhanced party participation in the resolution of disputes, and more efficient court operations.

ODR offerings have greatly expanded and diversified since its origins in E-commerce through entities such as PayPal and E-bay. ODR programs now utilize various models, including text-based programs, guided interviews, or video conferences. These models vary in their synchronicity and richness.<sup>3</sup> “Richness” relates to opportunities to glean information from participating parties, such as by sight and sound. Video conferences are rich media channels whereas text-based models that involve instant messaging or email are lean. Synchronicity refers to whether parties communicate with one another in real time or with a delay. In-person meetings and video conferences are synchronous, whereas e-mail and messaging are asynchronous. Sometimes, in any given dispute, multiple modalities may be used.

Overall, the diversity of ODR options allows courts to consider which models may be most advantageous for the cases they

handle. In any modality, courts can determine whether they will offer negotiation, mediation, or both. Artificial intelligence (AI) is common in e-commerce dispute resolution and has potential for state court programs, too. As one observer has noted, AI can “automate classic third-party capacities such as identifying interests and goals, educating parties about available options, refining preferences and defining strategies, diagnosing applicable rules and applying them, classifying and routing cases to relevant resolution paths, calculating tradeoffs and enabling maximization of mutual gains, generating resolution options, and determining final outcomes.”<sup>4</sup> As this technology becomes more readily available, courts contemplating ODR may one day be able to decide whether to incorporate AI components into their programs to replace or augment traditional person-to-person negotiation or mediation processes.

Whatever reasons your court may have for adopting ODR, and whatever model it ultimately adopts, it is important to determine how much ODR helps you meet those goals and whether any post-launch changes might be worth considering. Objective evaluations are the best tools for helping you make these determinations. They can, for example, help you ascertain if litigants find the ODR registration process to be user-friendly, determine whether parties feel they can communicate effectively on the platform, and discover how time to disposition of cases that use ODR compares with that of cases that undergo a different court procedure. Additionally, objective evaluations can delve into whether ODR users have an experience of procedural justice, or fair treatment. While delivering procedural justice should be a hallmark goal for any court program, it can have particular relevance for programs that incorporate AI decision making. One simulation-based study found that “parties to an online arbitration process experienced lower levels of procedural justice when

## Footnotes

1. AMERICAN BAR ASSOCIATION CENTER FOR INNOVATION, ONLINE DISPUTE RESOLUTION IN THE UNITED STATES (September 2020), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf>. [https://web.archive.org/web/20230204175106/https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf].
2. *The State of the State Courts: A 2021 NCSC Public Opinion Survey*, NAT'L CTR. FOR STATE COURTS 6 (October 29, 2021),

[https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0021/70581/SoSC-Analysis-2021.pdf](https://www.ncsc.org/__data/assets/pdf_file/0021/70581/SoSC-Analysis-2021.pdf).

3. Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DEPAUL L. REV. 701 (2022), <https://via.library.depaul.edu/law-review/vol71/iss2/14>.
4. 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, 100 (2018), <https://ssrn.com/abstract=3074311>.

a (perceived) AI arbitrator determined the case compared to when a (perceived) human arbitrator did so.”<sup>5</sup>

Data on such issues can help you identify which elements of your ODR program may need improvement. Neutral program evaluations are the gold standard for such determinations. Based on our experience conducting some of the nation’s first neutral evaluations of state court ODR programs,<sup>6</sup> including the first of any family law program, we offer ten suggestions for working effectively with program evaluators. Several of our tips are geared toward courts that are just starting to plan their ODR programs, but most are useful to any court that is planning a program or already has one in place.

### **TIP #1: NEGOTIATE DATA ACCESS WHEN CONTRACTING WITH AN ODR PROVIDER**

The best time to ensure you will have the data needed for a future evaluation, and to monitor program activity more generally, is at the time you negotiate your contract with an ODR provider. As you screen various providers, you should learn about how each ensures data security and confidentiality. This stage is also the ideal time to negotiate data access for your evaluation.

When narrowing down your list of potential providers, compare the terms and conditions that already exist on their platforms regarding the types of data that are collected, how the data are shared and with whom. To keep your evaluation options open, you will want to secure terms that obligate the provider to share data not only with you, but with external evaluators you might want to hire later. As you consider these data access terms, it is important to be mindful of any data sharing or confidentiality rules or policies in your jurisdiction for the types of cases you plan to include in your evaluation. Note that if you develop your ODR platform in-house, you will need to consider similar data-sharing and privacy issues. Your evaluator will likely need data that can be tracked on a person-by-person basis, so that, for example, the data that the platform collects for a particular disputant (e.g., what time of day they use the platform) can be matched up later with data for that same person from your case management system (e.g., their case’s outcome) and with any dataset the evaluator creates based on evaluation surveys (e.g., how satisfied that person was with their ODR experience). So, be sure your contract includes a clause that requires your provider to share the information they collect in a format that allows for this type of matching across your datasets and theirs, and permits both of you to share these identifiers with a third-party evaluator of your choosing for the purposes of a neutral evaluation.

If your program uses AI for decision making, ensure that you and your evaluator have access to written documentation about how AI is used and the assumptions upon which the system’s algorithms are based. Best practices suggest that algorithms should be carefully vetted for possible biases at the time decisions to use them are made and be regularly audited. Transparent documentation can assist you and your evaluator to understand ODR outcomes and, if relevant, mitigate inequities introduced by the algorithms.<sup>7</sup>

In addition, if the provider conducts their own proprietary exit surveys of ODR users who use their platform, ask them to agree to suspend that procedure for your court during your evaluation period so that their surveys do not compete for the time and attention of the litigants you want to survey for your evaluation.

Neither court whose programs we evaluated had an existing agreement with their ODR provider regarding evaluators’ access to data. Consequently, for one court’s evaluation, we could not obtain the data we needed in a format suitable for certain analyses. For the other evaluation, we experienced a six-week delay as we negotiated data access with the court, the state, and the ODR provider. This delay reduced the overall time we had to collect data, which meant we had less data to analyze.

### **TIP #2: DETERMINE WHEN TO EVALUATE**

Ideally, you would start to plan the evaluation of your ODR program at the same time you design your program. But evaluation planning can happen at any time, as can the evaluation itself. If you plan your evaluation before your program’s launch, the timing of your evaluation should be determined by a few considerations. It is best to begin your evaluation after the provider has addressed technology glitches that may emerge during the early testing of your platform. Evaluation should also occur after you undertake outreach efforts to ensure that parties know about your program and its eligibility requirements. Waiting until after initial technology fixes and outreach are completed increases the probability that the evaluation will accurately reflect your program’s use and effectiveness.

If your program is already up and running, evaluation can be an important tool for determining whether it is achieving its goals and for identifying areas for improvement. However, avoid times when any major changes are planned for your court or the ODR program itself, such as a change in the number of judges hearing the cases being evaluated or a major shift in court processes. Significant changes while data are being collected may introduce noise into the data, reducing the evaluation’s reliability and the conclusions you can draw. If you anticipate any major modifications to your ODR program, a “before and after” evaluation that measures the impact of those changes could inform you whether the changes have had a positive or negative effect on the program. If not, hold off on your evaluation until you have made the anticipated changes.

### **TIP #3: FIND A NEUTRAL EVALUATOR**

Selecting a neutral evaluator is important for enhancing the quality, usefulness, and credibility of your evaluation. In choosing your evaluator, you should consider their past work and whether they have experience evaluating court alternative dispute resolution (ADR) programs. It would also help if they were knowledgeable about ODR. An evaluator who understands the ins and outs of court ADR or ODR programs can draw on that understanding when assessing your program’s particular situation, zeroing in on strengths and weaknesses and making actionable recommendations for the future. If you hire someone who is

5. *Id.*

6. Donna Shestowsky & Jennifer Shack, *Online Dispute Resolution for Debt and Small Claims Cases: A Report on a Pilot Program in a Justice of the Peace Court in Collin County, Texas* (July 26, 2022), <http://dx.doi.org/10.2139/ssrn.4173414>; see also Donna Shestowsky & Jennifer Shack, *Online Dispute Resolution for Post-Judgment Family*

*Law Cases: A Report to the Ottawa County, Michigan, Friend of the Court* (July 27, 2022), <http://dx.doi.org/10.2139/ssrn.4173424>.

7. Amy Schmitz and Leah Wing, *Beneficial and Ethical ODR for Family Issues*, 59 FAM. CT. REV. 1, 5 (2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561872](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561872).

not knowledgeable about ADR, be prepared to spend a lot of time explaining how ADR works, the theory behind it, and the specific issues involved.

Finding someone who meets all these criteria can be difficult. You may be able to get suggestions from courts that have already undergone evaluations or contact the authors of ODR evaluations directly.

#### **TIP #4: ENSURE THAT KEY PERSONNEL ARE INVOLVED IN THE EVALUATION PLANNING PROCESS**

Many personnel at your court have knowledge that can assist with evaluation planning. They can help you determine the questions you would like to answer, identify what data are needed, or work out how to access relevant existing data. These individuals include, at minimum, judges hearing the cases served by the ODR program and court staff members who understand the processes involved and the underlying technology.

The knowledge these individuals possess makes them valuable partners in planning your evaluation. In addition, if they participate in the planning, their resulting vested interest in the evaluation should reduce barriers and culminate in a better evaluation.

You will also want to decide who should serve as the point of contact for your evaluators. This person will answer the evaluator's questions and help to obtain data. Staff members should be clear on their role in the evaluation and what aspects they will handle.

For the evaluations we conducted, the courts provided us with two points of contact. In each instance, one person was the ODR project manager, and the other was a staff member who had significant knowledge about the ODR program and court processes. This system worked well for us in terms of getting the information we needed.

#### **TIP #5: PREPARE TO USE DATA FROM A VARIETY OF SOURCES**

To best understand your ODR program, you should obtain information from multiple sources. You will need data from your case management system to run comparisons on such factors as resolution rates and time to resolution between cases that undergo ODR and those that do not. If you do not want to run comparisons, case management system data might still be needed to determine time to resolution and final case outcomes for cases in which ODR is used and to determine ODR participation rates. Data from your ODR platform can be used to gain insights on, for example, the percentage of cases that reach agreement on the platform, whether that agreement was reached via negotiation or mediation, the number of days spent attempting to resolve the case online, and which mediators were most successful in helping parties reach agreement.

To collect systematic feedback from parties (or other stakeholders, such as lawyers), your evaluator will need your help to facilitate the distribution of surveys. They will work with you to determine which parties to survey (e.g., only those who participate in ODR or all parties eligible for ODR) and the best method for contacting the parties. They should also ask you to review the survey questions to ensure the survey covers what you would like it to cover and uses terminology specific to your court.

For one of our evaluations, our use of multiple data sources gave us the information we needed to provide the court with a

comprehensive understanding of how its ODR program was functioning, the manner in which parties were using ODR, and their perspectives on their experience. With this thorough approach, we provided personnel with information they could use to make evidence-based decisions about their ODR program.

#### **TIP #6: EXPECT TO SPEND TIME WITH THE EVALUATOR**

To conduct an effective evaluation, your evaluator will need to understand your ODR program and how it fits with your overall process for handling cases. It will save time and promote understanding if you provide them with written information about your program at the beginning of the project, including details on how parties gain access to ODR, or a process flowchart developed while planning your program. In addition, your evaluator will need to understand how ODR interfaces with your case management system, what communications you use to inform people about their eligibility for ODR, and how users register on the platform. Whether you provide them with written materials or not, your evaluator will want to spend time with you to discuss your program processes and get answers to any questions they have throughout the evaluation process.

In the evaluations we conducted, we enhanced our understanding of the courts' processes, the ODR process, and how it fit in with other court processes through question-and-answer sessions with staff members, obtaining samples of emails and texts sent to the parties about ODR, and attending a demonstration of the ODR platform. We also developed a process flowchart that helped us understand how the ODR program functioned within the court's broader case-handling process. We included this flowchart in our evaluations to help readers understand the program.<sup>8</sup> Gathering all this information with the help of court personnel helped us to provide more insightful feedback on the program, including recommendations for improvement.

#### **TIP #7: FACILITATE THE PARTICIPATION OF COURT PERSONNEL AND OTHER PROGRAM PARTNERS IN THE EVALUATION**

When moving forward with an evaluation, give court personnel and other program partners (e.g., mediators) who were not a part of the evaluation planning process a heads up about the evaluation and ask for their cooperation. Introduce your evaluator to relevant personnel and partners. These efforts should pave the way for your evaluator to reach out to them to get their perspectives on the ODR program and its impact on their work. When asking court personnel and program partners for their cooperation, be sure to reassure them that the evaluation's objective is to improve the program, not to find fault with it or with them.

In our evaluations, program and court leadership encouraged staff members and mediators to speak candidly with us about their experiences with the ODR platform and surrounding processes. Their participation in the evaluation helped us to understand how they were using ODR and their perspectives on its benefits and challenges.

#### **TIP #8: HELP YOUR EVALUATOR TO PILOT TEST THEIR SURVEY MATERIALS**

Your evaluator should pilot test the surveys they plan to use for your evaluation. To accomplish this task, they should obtain

8. *Id.*



feedback on their surveys before the start of the evaluation period from individuals who are similar to those who will be surveyed for the evaluation—typically, parties to similar cases. Your evaluator will need your help to gain access to those individuals.

Even if your evaluator has evaluated other ODR programs, every court has unique terminology that will be reflected in how questions are worded. It is important that survey questions be vetted to make sure they are properly understood by the types of people who will be asked to complete the survey in your particular jurisdiction. Ample research suggests that laypeople think about legal concepts and use terminology differently from those who work in the legal field. For party surveys, obtaining feedback on survey drafts from lawyers or court personnel is not a good substitute for getting suggestions from the type of parties for whom your ODR program is designed.

Pilot testing also helps to determine whether potential respondents view the survey as too long. It is unfortunate when surveys are well constructed but eligible respondents skip questions simply because the survey takes too long to complete. This concern looms largest when respondents are not being compensated for completing the survey, but it can also be an issue when the offered compensation is not sufficient given the time it takes to complete the entire survey.

#### **TIP #9: BE FLEXIBLE ABOUT THE LENGTH OF TIME SET ASIDE FOR DATA COLLECTION**

The time period allocated for data collection needs to strike a balance between being long enough to get the data necessary for analysis, but also measured enough to provide timely results. A rule of thumb is that the evaluation period should last at least six months and not more than a year. More data and thus more time generally means more rigorous and useful findings; however, too much time spent collecting data can reduce the relevance and impact of evaluation findings.

To accumulate enough data, programs that handle relatively few cases will generally need longer evaluation periods than ones that handle higher volumes. Your evaluator will work with you during the evaluation planning phase to determine what the time frame should be based on an approximate level of program use. But be prepared to be flexible. Your evaluator may recommend extending the data collection period if the level of program use and/or survey participation is lower than expected and they need more time to collect data to deliver a useful evaluation.

#### **TIP #10: SURVEY THOSE WHO USE ODR AS WELL AS THOSE WHO DO NOT**

Our evaluations have shown that the motto, “If you build it, they will come,” does not always apply to ODR. Surveying eligible parties who did not use ODR could help you to identify issues that might be driving lower-than-expected usage rates. Surveys can point to marketing or party education problems, or in the case of voluntary ODR programs, uncover program attributes that parties find unattractive and lead them to not use ODR. You can ask parties whether they knew about your program, how and when they learned about it, and whether they knew they were eligible.

In our ODR evaluations, we included an objective test of program knowledge by supplying parties with a list of ODR program attributes, some of which correctly described the program we evaluated, and others that did not. We asked parties to identify which attributes from the list described the program at their court, which provided useful information for identifying what

parties understood about the program, and where any misunderstandings lay.

In one of our evaluations, we observed that litigants did not use their court’s ODR program even though the court even though the court intended participation to be mandatory. By surveying those who did not use the program, we were able to discern that many did not know about the ODR program and that those who did know about it did not have a good grasp of the program’s key attributes. This information was incredibly useful in terms of identifying problems regarding how effectively the court communicated its mandate to parties and led us to provide recommendations for more effective party outreach and education.

In the end, when a court invests resources to establish an ODR program, a major goal is to have it be used. It is imperative to commit resources to effectively market the program, which should include efforts to educate parties and ensure they know they are eligible or required to use it.

#### **CONCLUSION**

Courts that have their ODR programs objectively evaluated should be applauded for their efforts. Evaluations can facilitate program design that is data-driven and evidence-based, rather than guided by anecdotes or hunches. This grounding in data is especially important when making decisions geared toward satisfying the interests of litigants, since understanding their unique perspectives requires collecting data directly from them.

Ideally, ODR evaluations will be conducted by neutral third parties who have no stake in the results and meet high research standards. Neutral evaluations are uniquely situated to offer an outside perspective on what works well about a program and to suggest how it might be improved. Moreover, when survey participants know that outside evaluators are the ones gathering survey data, and they are assured that any responses that identify them will not be shared with the court, they are likely to be more candid in their feedback, which can result in a more solid evaluation. In addition, constituents, including lawyers, are more likely to accept the findings of a neutral, outside evaluation that concludes that a program delivers beneficial outcomes. Courts that work well with a reliable evaluator should feel confident that they are taking the right steps to gain essential information about their program’s effectiveness and to obtain actionable recommendations for improvement.



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