Family Court Online Dispute Resolution for Thinly Resourced Parents, Courts and Communities: Impediment, Improvement or Impossible Dream?

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Executive Summary

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This project was generously funded by the JAMS Foundation.

The mission of Resolution Systems Institute, which was founded in 1995, is to improve access to justice by enhancing court alternative dispute resolution. For more information about RSI, visit AboutRSI.org. Any comments or questions can be directed to RSI at info@AboutRSI.org.

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Introduction
Over the past several years, courts have increasingly adopted online dispute resolution (ODR). This is in part due to COVID-19, but it had begun prior to the pandemic. Expansion of ODR is also happening in the context of limited civil legal services for parties. A 2017 report from the Legal Services Corporation noted that low-income Americans receive inadequate or no professional legal help in 86% of all civil legal problems. The same report indicated that over a quarter of households have legal issues related to children and custody.1 This squares with what RSI has seen, as courts and communities often struggle to serve self-represented parents.

As an organization dedicated to strengthening access to justice by enhancing court alternative dispute resolution (ADR),2 Resolution Systems Institute (RSI) is interested in how ODR might potentially address some of these unmet needs. ODR offers great promise in reaching parents no matter where they live, providing an easily accessible service at convenient times, educating parents as to their rights and obligations, helping parents come to agreement when they do not have access to lawyers or mediators, and unburdening them from court appearances.

At the same time, this emerging technology can potentially harbor new problems that need to be identified, examined and addressed. For example, will ODR create barriers to access to justice? What safety issues might it create for parents? Will ODR protect party self-determination and other ethical standards? Will ODR be effective? Will thinly resourced parents, courts and communities be able to afford ODR?

The Project
Starting in 2020, Resolution Systems Institute (RSI) embarked on a project to investigate whether family online dispute resolution (ODR) might serve thinly resourced families, courts and communities, and if so, what would be required to make ODR accessible, ethical, effective, feasible and sustainable. To complete this project, we engaged in the following:

Conducted Research
RSI’s research followed two paths. The first was to identify where family court ODR was taking place. The second was to review the literature about ODR.

Surveyed States about their ODR Efforts
We reached out to court ADR or ODR leaders in 36 states and the District of Columbia (DC) with surveys and heard back from 24 states and DC. The survey asked questions about the

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2 Alternative dispute resolution, or ADR, is an umbrella term that includes processes such as mediation, arbitration and early neutral evaluation. ODR can be seen as falling under the ADR umbrella, as well.
background for ADR in respondents’ states, such as whether there is state support for mediation, whether family mediation is mandated, the need for mediation and ODR among those who are thinly resourced, what mediation and ODR services are available, and what the state is doing in terms of ODR.

**Surveyed Experts**
We surveyed 37 experts working in academia, ADR, court ADR, court administration, family law, funding, intimate partner violence (IPV), judging, legal aid, legal technology design, ODR, self-represented litigants and technology. We asked about the need for ODR, cases that are and are not suitable for ODR, barriers to ODR and how to overcome them, how ODR could be developed and sustained, and what benefits and concerns the experts see with regard to ODR.

**Gathered Experts**
We also gathered the 37 experts three times to build on their survey responses and get greater depth and nuance. For each gathering we identified a theme, held a brief educational session, divided the group into breakout sessions of four people, and posed a series of structured discussion questions. One member of each group acted as scribe and collected the thoughts of all participants.

**Drew on RSI’s Organizational Experience**
RSI’s decades of experience designing, operating, evaluating and consulting on court ADR have resulted in unmatched experience. Two previous projects particularly helped provide a solid foundation for this project. In one, RSI explored the potential for development of an ODR platform that would serve thinly resourced parents, courts and communities. In the other, RSI explored the potential for development of an online tool that could assist mediators in screening for intimate partner violence prior to family mediation.

**Tensions**
Through the above activities, the project identified three tensions that must be resolved in order for family ODR to serve thinly resourced parents, courts and communities.

**Tension One**
The driving desire to serve all parents is in tension with the limited-resource environment explored in the project.

Courts have a responsibility to protect potentially vulnerable parents and ensure ODR is accessible and ethical. However, courts that are thinly resourced are unlikely to be able to

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3 See *Considering an Online Pre-Mediation Tool to Screen for Intimate Partner Violence: Findings & Blueprint*, Eric Slepak-Cherney & Susan M. Yates.
provide the full range of services recommended by some experts to ensure ODR is accessible for all parents, e.g., individualized education for each parent about their rights and one-on-one assistance while using ODR. Indeed, it is likely that these thinly resourced courts would be looking for ways to reduce their costs by implementing ODR, not looking to increase costs.

To address this tension, a safe tradeoff can be constructed by drawing on a long-established requirement of in-person family mediation. Prior to mediation, each parent must be screened individually to determine if a party has experienced intimate partner violence or other coercive behavior in the relationship that would make participation in a traditional mediation unwise. This need for screening in in-person mediation is also true for family ODR.

This screening can be expanded to address the concerns specific to ODR, such as issues related to language, disability or access to the internet. The screener would assist the parents in finding ways to access ODR (e.g., how to involve a translator), would work with them to determine if mandatory participation in ODR is appropriate (e.g., in the case of an insurmountable barrier due to a serious illness or a violent relationship), and would help them access other suitable services when needed.

Screening some parents out of ODR will reduce the number of families that can benefit from ODR. However, it will also help to ensure that ODR is accessible and ethical for the parents who do participate.

**Tension Two**

There is a tension between the need for voluntary decision-making (to help make ODR ethical) and the need for participation (to help make ODR effective).

Neither the literature nor the gathered experts agree on whether mandatory or voluntary participation is inherently better. There is, however, a way to address this tension.

A safe tradeoff can be accomplished — as in in-person family mediation — by requiring that parents who are not screened out of ODR try an initial ODR step. Because this comes after screening, it avoids requiring parents to use ODR if they are unable to participate in ODR or if they should not participate in ODR for any of a variety of reasons. It also increases the likelihood that a court ODR program will serve enough parents to make it effective by requiring that parents at least try ODR.

This approach would enable parents to see what they can agree on, without any pressure to reach agreement. Engaging in the ODR process will educate them about what issues the court requires they address and let them know where they stand with regard to one another’s positions. If they identify some areas of agreement, that would probably
encourage them to continue using ODR, as often happens in mediation. Even if they do not continue to use ODR to reach a full agreement, this step may narrow what they need a judge to resolve.

**Tension Three**

There is a tension between the cost of accessible, ethical, effective family court ODR and the ability of thinly resourced parents, courts and communities to pay for it.

In some jurisdictions, it is more than a tension: It is a chasm.

The project pondered ways to resolve that tension. It might be feasible to launch a national non-profit to provide ODR services, but we did not identify a way to sustain it over time. We considered platforms homegrown by courts and those provided by vendors. Both have continuing costs, whether ongoing maintenance and development costs for homegrown platforms or fees to vendors. Similarly, there are costs of screening for IPV and other barriers to use of ODR, followed by the costs of adapting ODR to be accessible, ethical and effective for individuals encountering barriers.

In the end, this tension could not be resolved. The project was unable to identify a feasible, sustainable path by which family court ODR could be provided nationwide to parents who need it via courts that cannot afford it.

**Recommendations**

**Recommendation One: Support family ODR**

There is a need for family ODR despite the growth in family ODR and the availability of family ADR in some areas. There should be nationwide support for providing family ODR to thinly resourced parents, courts and communities.

**Recommendation Two: Develop national standards for family court ODR**

National standards for family court ODR should be developed and promoted. They should provide definitions; descriptions; guidance and, potentially, specific measurable criteria. The standards should articulate how to ensure family ODR is accessible, ethical and effective.

**Recommendation Three: Consider how to assess whether family court ODR meets the standards**

During the development of the standards, the question of how to assess whether court programs and vendors meet the standards should be addressed. For example, who would conduct the assessments? What would be the impact of any finding by the assessment?

**Recommendation Four: Every participant should have a live conversation with a screener prior to ODR**

There are situations in which some parents should not participate in ODR; therefore, every parent should engage in a live telephone or video conversation with a screener prior to using
ODR. Together, they should explore whether: there was or is any intimate partner violence in the relationship; they have access to ODR; they are comfortable communicating in a language in which ODR is offered; they are comfortable with ODR technology; they are experiencing any mental illness or substance use issues that prevent them from participating in ODR; and they might need any accommodations as a result of disability.

**Recommendation Five: Investigate the potential for a national program to conduct screenings**

In many places across the country, parents are not routinely screened prior to family mediation. We see the same practice developing with family ODR. A national program is needed to offer screening that is affordable for thinly resourced parents and courts that cannot afford to pay screeners for ODR.

**Recommendation Six: Require every parent who is not screened out of ODR to make an initial attempt to use ODR to identify areas of agreement with the other parent**

Requiring parents to attempt to use ODR after screening will provide an ethical combination of screening parents out of, and mandating them into, ODR. It will encourage the maximum number of parents to try ODR, thereby increasing the opportunity for effectiveness, but not require parents who are unsuited to ODR to use it. Parents who do use ODR should not be required to reach agreement using it, but the experience of trying the initial step can also encourage parents to keep using ODR if they find it to be easy to use and helpful.

**Recommendation Seven: Provide guidance and model materials to courts developing ODR projects**

Reliable, curated resources presented in an accessible format can help prevent courts from having to reinvent the ODR wheel. These resources could include, for example, guidance on how to determine what ODR processes and platforms to use, what standards to apply, how to select a vendor and what best practices are. These materials should also include model outreach and educational materials such as text for summonses, websites and communications with parents, as well as videos to which local court information could be added.

Courts also need assistance from experienced, knowledgeable experts to put those resources to work. Courts and communities with the least resources should be actively contacted, made aware of the resources, helped to assess whether there is a need for family ODR in their jurisdiction and, if there is a need, supported as they implement family ODR.

**Recommendation Eight: Enable courts to assess and improve their family ODR services**

ODR platforms generally can provide regular statistical information on how ODR is functioning. Courts may need assistance determining what data they need, working with their vendor to obtain the data, and learning how to draw useful information for reports.
Video mediation apps, such as Zoom, do not have such built-in reporting mechanisms. Courts using video mediation will therefore need to devise other ways to collect critical data.

Courts also need to ensure parents are experiencing procedural justice when they participate in ODR. For courts using ODR platforms, this will likely require the insertion of surveys into the ODR system or the adaptation of surveys provided as part of the ODR platform. Courts using video mediation will need to survey parties about their mediation experience another way, e.g., by email or text.

Additionally, courts should participate in comprehensive program evaluations when possible. They should share results of these evaluations with other courts and with ODR providers to inform other ODR programs.

**Recommendation Nine: Investigate the potential for a national family court ODR provider**

Although the project did not identify an entity that would be able to establish and sustain a national provider of family ODR, it is still possible that a resource-rich home for family ODR exists somewhere. Individuals and entities that are concerned with services to thinly resourced parents, courts and communities should explore whether there is a deep-pocketed funder who would commit to a multi-year national program.

**Conclusion**

This project investigated the study question, “How might family court online dispute resolution serve thinly resourced parents, courts and communities?” It found that family court ODR can be an impediment to access to justice if not provided in an appropriate manner. However, if it is provided in a manner that is accessible, ethical and effective, family court ODR can improve access to justice. Doing so will require standards for family court ODR, as well as resources to support the provision and evaluation of ODR. It will also necessitate comprehensive screening conversations with all parents prior to ODR, which will enable courts to require that all parents who are not screened out attempt at least an initial stage of ODR.

In the end, whether family ODR that is accessible, ethical, effective and feasible can be provided nationwide to parents who need it, despite limited family, court and community resources, remains an unanswered question and potentially an impossible dream. There is no clear path to determining how to sustain family court ODR services.
AUTHOR AND ACKNOWLEDGMENTS

AUTHOR

This report was written by Susan M. Yates, Executive Director of Resolution Systems Institute (RSI). Her work focuses on how innovations in alternative dispute resolution (ADR) can provide high-quality, ethical services to people and courts with limited resources. She sees great promise and great challenges in online dispute resolution (ODR).

ACKNOWLEDGMENTS

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RESOLUTION SYSTEMS INSTITUTE

Founded in 1995, Resolution Systems Institute (RSI) has long been a leading voice for the innovative and thoughtful use of court alternative dispute resolution (ADR). RSI’s mission of strengthening access to justice by enhancing court ADR is achieved through an array of services including research, monitoring and evaluation; court dispute system design; and operation of child protection, eviction and foreclosure mediation programs — all undergirded by an online resource center. For more information, see the RSI website at www.aboutrsi.org.

DISCLAIMER

Online dispute resolution is a rapidly changing field. This report reflects the status of ODR during 2020, the time of the project. Programs and resources that were developed between the time of the project activities and the time at which the report was finished are not included in the report.

Also, please note that individual experts who participated in the project may disagree with parts of this report or may feel that something they find important has not been included. This report should not be read as representing any individual expert’s opinions or those of the organizations with which they are affiliated.

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INTRODUCTION

Over the past few years, courts have expressed increasing interest in the adoption of online dispute resolution (ODR). Their motivations are varied and include, for example: the prospect of time and cost savings to litigants and courts; greater procedural justice, especially for self-represented parties; and a desire to modernize court offerings. The COVID-19 pandemic accelerated the exploration and adoption of ODR as courts responded to the need for effective remote services to serve litigants safely and expeditiously.

As courts steer more toward bringing their services into the digital sphere, the hoped-for benefits of ODR are accompanied by questions about potential drawbacks and risks. Is there sufficient need for ODR to make the investment in it worthwhile? If so, what is required to make ODR accessible, ethical and effective? Is ODR feasible, and can it be sustained? Underlying these questions is the concern that an increased reliance on technology, despite our best intentions, could broaden the justice gap for thinly resourced parties and courts.

This move into ODR is happening in the context of limited civil legal services for parties who are thinly resourced. This is particularly true for families encountering legal issues. A 2017 report from the Legal Services Corporation (LSC) indicated that over a quarter of households have legal issues related to children and custody. The same report noted that nearly 18 million families with children have a household income under 125% of the federal poverty level, and that low-income Americans receive inadequate or no professional legal help in 86% of all civil legal problems. These figures suggest a tremendous need to address issues pertaining to family matters in thinly resourced communities.

Is there a role for ODR in meeting this unmet need in family law? Interestingly, a 2020 report from the American Bar Association indicated that family law represented only about 5% of court ODR offerings nationwide. One big question is why. What stands in the way of courts adopting ODR in family cases? Are those barriers surmountable, or are there some reasonable issues that make family ODR a questionable undertaking?

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2 Throughout this report, we use the phrase “thinly resourced.” The phrase avoids having to strictly define the parents who might benefit from family ODR in any of the myriad ways they are described, such as poor, low-income, self-represented, qualifying for a fee waiver or having a particular income.


4 American Bar Association Center for Innovation, Online Dispute Resolution in the United States: Data Visualizations, (Sept. 2020).
RSI’S PERSPECTIVE

As an organization dedicated to strengthening access to justice by enhancing court alternative dispute resolution (ADR), Resolution Systems Institute (RSI) is interested in exploring how ODR can potentially address some of these unmet needs. We have focused on ODR because it offers great promise in reaching parents no matter where they live, providing an easily accessible service at convenient times, and helping parents come to agreement when they do not have access to lawyers or mediators to assist them. We see ODR’s potential to educate parties as to their rights and obligations, unburden them from court appearances, and give them greater ability to make decisions jointly. All this could be great motivation for courts to turn to ODR. At the same time, this emerging technology can bring new problems that need to be identified, examined and addressed.

Seeing the need for a well-researched, thoughtful answer to the many questions about family ODR, RSI reached out to the JAMS Foundation. The Foundation supported RSI’s project to explore family ODR. This report is the result of that project.

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5 Alternative dispute resolution, or ADR, is an umbrella term that includes processes such as mediation, arbitration and early neutral evaluation. ODR can be seen as falling under the ADR umbrella, as well.

6 See “A Definitional Challenge” below for more about the participation of mediators in ODR.

7 The project began in March 2020, and experts were convened in September and October of 2020. Family ODR developments after November 2020 are not addressed in this report.
Seeing the need for a well-researched, thoughtful answer to the many questions about family ODR, RSI reached out to the JAMS Foundation. The Foundation supported RSI’s project\(^8\) to explore family ODR. Broadly, we set out to explore whether family court ODR for thinly resourced parent, courts and communities would be an impediment to access to justice, an improvement in access to justice, or an impossible dream that would not accomplish its potential promise.

To focus the project, RSI set out to study the question: “How might family court online dispute resolution serve thinly resourced parents, courts and communities?” This report reflects our efforts to answer that question.

This study question identified two areas of focus for the project: (1) family matters and (2) those who are thinly resourced.

**FAMILY MATTERS**

RSI has, for the past several years, been particularly focused on ODR and access to justice as it relates to the field of family law. We have focused on family matters because the stakes are so high — ongoing parental conflict can have very negative effects on children, even leading them to be withdrawn and depressed or to be aggressive and act out — but the resources available to address these conflicts are often scarce. We know that parents are increasingly self-represented in court, which can lead to drawn-out cases and continuing conflict. It also puts judges in a challenging position because, in order to remain impartial, they are limited in the assistance they can provide to the self-represented parents who appear before them.

Family law is an incredibly broad field,\(^9\) comprising a litany of issues, including, at a minimum, dissolution of marriage, separation of unmarried parents, child and spousal support, division of marital assets, parental decision-making authority and parenting time. Some courts may include other case types, such as juvenile justice, child dependency and guardianship. Understanding how to develop successful ODR for all these cases would have been a complex, multi-year undertaking. Given the time frame of the grant period and the need for input in a rapidly developing field, we narrowed the scope to focus on the non-financial child-related issues that are addressed in parenting plans. These typically include

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\(^8\) The project began in March 2020, and experts were convened in September and October of 2020. Family ODR developments after November 2020 are not addressed in this report.

\(^9\) RSI wrote a primer on Family Court for any experts participating in the project who had limited background in family law. See Primer: Family Court, Appendix 1.
issues such as parenting time; holiday and school break schedules; and decision-making for extracurricular, educational, religious and health-related matters.

Within that context, we wanted to ensure that the project reflected the reality of what parents are going through. According to the Pew Research Center, one-quarter of all parents in the US are unmarried, a figure that has steadily risen over the last 50 years, so we wanted to make sure we considered unmarried parents who are separating, in addition to divorcing parents. We also did not make a distinction between pre- or post-decree issues because the issues would largely be the same whether a divorce decree or a finding of parentage had or had not been entered.

THINLY RESOURCED

We have focused on parents, courts and communities that are thinly resourced because we know that parents’ ability to pay for services, e.g., lawyers and mediators, and the ability of courts and communities to provide these services vary enormously from state to state and within many states. We see the same patterns emerging as ODR is developed. Some jurisdictions are positioned much better than others to develop and offer ODR. By focusing on those with more limited resources, we hope the project and this report will expand the reach of ODR and its promise to serve more families in new ways.

At the same time, we have concerns as ODR is increasingly adopted, such as:

- How to ensure ODR will be made available to all parents, regardless of ability to pay
- How to avoid ODR becoming something that only resource-rich jurisdictions can offer
- How to ensure that ODR offered to thinly resourced parents is not of poorer quality than ODR available to those who can afford to pay for it

We focused on serving thinly resourced parents, courts and communities as a way to ensure those issues, and others like them, are articulated and potential solutions are explored.

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THE PROJECT

COMPONENTS OF THE PROJECT

We designed four components of the project to seek an answer to the study question, “How might family court online dispute resolution serve thinly resourced parents, courts and communities?” For more detail, see Methodology, below.

RESEARCH

To begin, we conducted research on the current literature about ODR and about where court ODR was being provided.

SURVEYS

We developed, distributed and analyzed two surveys. One went to the national experts we invited to participate in the project. The other went to individuals connected with state court ADR programs across the country.

GATHERING OF EXPERTS

We gathered a group of experts three times (on Zoom, as a result of COVID-19) and engaged them in discussions about issues related to family court ODR.

INCORPORATION OF RSI EXPERTISE

Throughout the project, we included insights from our extensive research, evaluation and hands-on experience in court ADR, as well as our deep dive into possible development of family court ODR for thinly resourced parents, courts and communities.

RESULT OF THE PROJECT

This report represents the culmination of the project. It starts with definitions of ODR processes, then describes the framework and methodology for the project. It presents results and analysis, followed by some tensions identified during the project. It ends with findings and recommendations.
ODR Processes

ODR can take many forms, and because the field is rapidly evolving, it was important for us to set a definition of ODR for the purposes of the project. The need for a clear definition was underscored by the fact that we engaged a broad coalition of experts from different sectors, with different levels of exposure to ODR, who would benefit from clear boundaries while working on the project.

We began with the definition of ODR supplied by the National Center for State Courts (NCSC): “A public-facing digital space in which parties can convene to resolve their dispute or case.” NCSC goes on to provide a useful description of court ODR, saying it is “hosted or supported by the judicial branch and designed specifically to meet the needs of the public (not lawyers, judges, or court staff). ODR can include tools for gathering legal information, exploring options, and managing a case from start to finish without setting foot in a courthouse.”

While the NCSC definition provides a good starting place, we provided a more defined structure by asking our experts to focus on a particular set of ODR processes. Because there are so many processes available under the banner of “ODR,” we wanted to explicitly define the ones we were considering for this project. We view these processes to be the most widespread and relevant to family ODR at the time of the project.

ODR Platforms

Before describing ODR processes, it is helpful to explain the word “platform” as used in ODR. An ODR platform is software, typically accessed via the internet, that parties use to navigate the dispute resolution process. It might be accessed via an app or a website. For example, an ODR platform may be similar to a tax-filing platform like TurboTax, but unlike TurboTax, an ODR platform assists two divergent parties in engaging in conflict resolution.

ODR Processes

An ODR process is the manner in which parties interact with one another (and with a neutral if one is involved) on the ODR platform. Some are similar to well-established ADR processes, e.g., video mediation as compared with traditional in-person mediation. Others, such as guided interviews, are more dissimilar from existing ADR processes.

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11 As part of the project, RSI wrote a primer on ODR. See Primer: Online Dispute Resolution, Appendix 2.
12 National Center for State Courts, Online Dispute Resolution.
Video Mediation
Video mediation involves conducting mediations on video conferencing platforms such as Zoom, Skype or WebEx. This is what mediators often imagine when they first learn about ODR. As with in-person mediation, mediators can bring everyone together or caucus with various parties using breakout rooms. There are also important differences between in-person and video mediation, such as issues about access, security and confidentiality.\(^\text{13}\)

Chat Mediation
In a chat mediation, a neutral mediator and the parties communicate via an ODR platform by writing messages back and forth. The mediator in chat mediations can message certain parties or everyone at once. People are notified when others post new messages directed to them on the platform. For purposes of this report, when we discuss chat mediation we assume an asynchronous process (using a format that resembles email or text communication). Note: In surveys for the project, we didn’t differentiate between synchronous and asynchronous.

Guided Interview
In guided interviews, an ODR platform walks each party through a series of predetermined questions. For example, in a parenting case, a parent would be asked about topics such as what weekly, holiday and vacation parenting time schedule they would prefer. Then, either the other parent would review the first parent’s responses and indicate what they do and do not accept, or the other parent would answer the same questions and the platform would compare their responses. This process is asynchronous, and typically requires no assistance from non-parties, such as a mediator or a case manager.

Guided Exchanges of Chats
In this form of ODR, the ODR platform asks a series of questions designed to assist the parties in negotiating between themselves. For example, in a landlord-tenant case about a security deposit, the platform might ask how much the tenant is seeking, how much the landlord is holding, and how much each one is offering or would accept to settle the case. They may also be asked for brief explanations. Each party is notified when the other has posted a new message on the platform. This process is asynchronous, and typically requires no assistance from non-parties, such as a mediator or a case manager.

\(^{13}\) Note that video mediations use a videoconferencing platform, not an ODR platform. The videoconferencing platform itself does not include elements that help guide users to resolution as an ODR platform does. There is, therefore, some disagreement as to whether video mediation is truly ODR. We chose to include it in this project because it is being used increasingly by courts, and because it has many of the same issues as other forms of ODR. See more about this in “A Definitional Challenge” below.
MORE ABOUT ODR PROCESSES

Not only can ODR processes take many forms, but the processes may be combined. For example, parties might participate in a guided interview or guided exchange of chats prior to participating in a chat mediation or video mediation. ODR processes do not operate in isolation, but are part of court ODR systems that include case movement from the traditional court process to ODR, through ODR, and back to the court.

Additionally, these examples of ODR processes were in use as the project was happening. Although future variations on ODR may range from artificial intelligence to blockchain to others not yet imagined, we stayed with the known processes so that findings and recommendations can offer tangible guidance for current practice.

A DEFINITIONAL CHALLENGE

One challenge throughout the project was deciding whether to differentiate between video mediations and other forms of ODR. On one hand, by including both types of technology, we got a better view of the extent to which courts are using technology to resolve disputes. So, in the surveys, we defined ODR very broadly to include video mediation. On the other hand, many courts simply moved their in-person mediations online in response to the COVID-19 pandemic, using a video conferencing platform such as Zoom or WebEx, but they didn’t use a platform designed specifically for ODR (or an “ODR platform”). So, during the gatherings, we asked the experts to be clear about whether they were discussing something that was specific to video mediation, applied only to ODR conducted on a platform specific to ODR, or related to both video mediation and other ODR platforms and processes.

This difference is important for several reasons. For example, video mediations rely on mediators, unlike some other ODR processes such as guided interviews or guided chats. If courts and parents don’t have access to mediators, they don’t have the essential resource to conduct video mediations. Additionally, video mediations are synchronous, with all parties participating at the same time, so they do not offer the benefit of some other ODR processes of parties being able to engage in ODR when it is convenient. On the other hand, while new procedures and policies must be carefully considered and put in place when using video mediation, there is no need to create or buy an entirely new ODR-specific platform. Additional expenses are limited, too, with costs likely limited to training mediators and obtaining licenses for video conferencing platforms.
Having defined the scope of the project, we next developed a framework within which to consider how family court ODR could serve thinly resourced parents, courts and communities. In reviewing the available literature, conducting our surveys and drawing on our own long experience in dispute system design, we designed a framework of six key characteristics that family ODR would need in order to serve thinly resourced parents, courts and communities. Each of the characteristics builds on the ones that precede it.

1. NEED

*An established need for family ODR is a necessary prerequisite to implementing family ODR.*

It makes sense to commit the resources necessary to implement family ODR only if there is sufficient need. For purposes of this project, if a court is effectively serving thinly resourced parents through an existing avenue, such as mediation, we do not see that situation as one in which ODR is necessarily needed. We see “need” as the situation in which parents do not have access to lawyers and mediators to assist them. Courts that do not have a need as we define it here may want to expand services by offering ODR and can benefit from the guidance in this report, but that is not the focus of the project and report.

2. ACCESSIBILITY

*If a need for ODR is established, ODR must be accessible.*

In order for a family ODR system to serve thinly resourced parents, courts and communities, parents must be able to avail themselves of that system. The question of accessibility can be broken down into two steps: first, getting in contact with the ODR platform, and second, being able to use ODR once the contact is established. The former has to do with the disputants’ ability to get online and utilize the system with the device(s) they have available. The latter means that access is ensured for individuals with limited English literacy, parents with disabilities, survivors of intimate partner violence (IPV) and other potentially vulnerable groups.

3. ETHICALITY

*If people need ODR and it is accessible, it has to be safe and ethical.*

As a court service, and potentially the primary court-offered method for parents to develop parenting plans and resolve any parenting disputes, family ODR must provide a system that is ethical in every way. This includes an ethical “floor,” for example not falling below standards for safety, confidentiality, transparency and fairness.
4. EFFECTIVENESS

*If people need ODR and it is accessible and ethical, it has to be able to achieve its goals effectively.*

As with any court program, a family ODR program must be able to achieve its stated goals. Of course, courts will have to set their own goals, but we posited some of the following: whether users can utilize the system with minimal friction; whether the underlying dispute system design is clear, streamlined and procedurally sound; whether use of the ODR system is worth its expense; and whether the ODR system is overall a boon to the court, parents and, most importantly, children.

5. FEASIBILITY

*If people need ODR and it is accessible, ethical and effective, it has to be feasible to build.*

Understanding that courts themselves are often thinly resourced institutions, it must be feasible for them to take on ODR. To make that determination, it is key to determine what mix of courts’ financial, technological and human resources are available in combination with resources from outside the court.

6. SUSTAINABILITY

*If people need ODR and it is accessible, ethical, effective and feasible to build, it has to be sustainable over time.*

If a court ODR program can be developed and implemented, it must then be sustained over time. Family court ODR must have sufficient funding, participation by parents and support from program partners to keep it afloat. Our exploration of this issue was informed mostly by the funding required to provide family ODR to thinly resourced parents, courts and communities.

REFINEMENTS

During the course of the project, we received input that did not fit into the above framework, such as issues related to program partner participation, selecting and managing neutrals, monitoring and evaluation. Ultimately we decided that, in order to keep the project and this report manageable, we would not attempt to collect and analyze information about those topics, or more broadly, how to develop and operate family court ODR, such as budgeting, dispute system design, monitoring and evaluation, program planning, staffing, working with program partners, etc. For a complete guide to developing and operating court ADR programs, most of which is applicable to ODR, see [RSI’s Guide to Court ADR Program Success](RSI's Guide to Court ADR Program Success).
METHODOLOGY

RSI looked to four components — research, surveys, gatherings of experts and RSI’s experience — to answer the project’s study question: “How might family court online dispute resolution serve thinly resourced parents, courts and communities?”

An essential step before working on the components was to identify and invite experts from around the country who would contribute their knowledge, experience and wisdom. We sought expertise from those working in academia, ADR, court ADR, court administration, family law, funding, intimate partner violence, judging, legal aid, legal technology design, ODR, self-represented litigants and technology.

We expected that including voices from all these constituent groups would support an analysis that could address the concerns raised in the framework. A list of the participating experts can be found at the beginning of this report. We were immensely gratified by the willingness of these esteemed individuals to participate. Their involvement in the project was essential to its effectiveness. However, due to time constraints, the experts did not have an opportunity to weigh in on this report. (See Disclaimer above.)

RESEARCH

An important early step in the project was to assess the state of the field. Family court ODR is still in its early days, and there is no definitive resource indicating where family court ODR programs are being piloted. Therefore, we leveraged our nationwide court ADR contacts to find out which jurisdictions are currently offering family ODR. We also conducted online research to identify other programs in states where we did not have contacts. From this we identified as many family ODR programs as we could.

Additionally, we reviewed existing ODR scholarship, research, standards and other resources. RSI’s previous work, such as RSI’s Special Topic on ODR for our Court ADR Resource Center, provided a foundation for an initial literature review. From there, we pared down the resources to the ones we felt were most relevant to this project. The resulting reading list was shared with the experts and has been included as Appendix 3 in this report.

The research also helped flesh out the Project Framework by considering documents such as the International Council for Online Dispute Resolution (ICODR) Standards, to add more substance to ethicality. Resources such as Michigan’s Considerations in Implementing Court ODR Systems helped identify particular issues for the project. And articles on evaluation helped us articulate what is needed in effective ODR.
SURVEYS

We developed and analyzed results from two surveys to collect facts and perspectives about ODR and the need for it. We sent one nationwide survey — the National Survey of State Courts — to state court ADR administrators, state court administrators with multiple responsibilities including ADR, and a few others selected for their knowledge of a particular state’s court ADR activities. We sent the other survey — the Expert Survey — to the experts who were participating in the project.

The surveys were enormously helpful in two main ways. The National Survey of State Courts answered the question about the need for family ODR. That survey, along with the Expert Survey, also helped identify the tough issues the project needed to address.

NATIONAL SURVEY OF STATE COURTS

One critical challenge underscored by our research was the lack of information about the need for family ODR throughout the country. We had a fairly good sense of the demand for family ODR in our home state of Illinois, and anecdotally from informal conversations with some court ADR administrators around the country in the course of our work. However, the project presented us with a golden opportunity to conduct a more reliable assessment of what courts needed.

We reached out to every state for which we could find a state court administrative contact or other individual with reliable information on the status of ADR and ODR in their state. This led to surveys being sent to court ADR connections in 36 states and the District of Columbia. In all, we heard from administrators from 24 states and the District of Columbia, for a total of 25 respondents. We asked them about the availability of alternatives to litigation for family cases, including mediation and ODR. Further, regardless of what was available, we asked them if there was a need for these services. Finally, we asked them about potential barriers to the adoption of mediation and ODR in these cases.

The responding states skewed toward those with statewide ADR offices, arguably a measure of available resources. Fifteen of the 25 responding states have statewide ADR offices. This is 60% of the respondents. In contrast, of the total possible sample of states and district, only 39% (20 of 51) have ADR offices.

The majority of those surveyed operate state court offices of alternative dispute resolution, which support court ADR programs in a variety of ways, such as setting standards for court ADR, determining who is qualified to provide ADR services on behalf of the court, and sometimes financially supporting ADR services. These are natural homes for states’ work with ODR. Others are state court administrators who work with ADR as one of many responsibilities. A few of those surveyed work outside the court, e.g., operating a bar
association’s statewide ADR program or managing a statewide network of community mediation centers that work with the courts, although no one from this group responded to the survey.

The survey asked questions about the background for ADR, such as whether there is state support for mediation, and whether family mediation is mandated, the need for mediation and ODR among those who are thinly resourced, what mediation and ODR services are available, and what the state is doing about ODR.

EXPERT SURVEY
Having assembled our “dream team” of national experts, we solicited their perspectives as to the need for family ODR, both with regard to non-financial and financial issues related to children.

Through open-ended questions, the survey asked those participating in the project to provide their opinion about the following topics:

- The need for ODR
- The kinds of cases for which ODR is suitable and unsuitable
- What barriers to ODR may exist and how to overcome them
- How ODR could be developed and sustained
- What benefits the experts see in ODR
- What concerns the experts have about ODR

All 37 experts completed the survey.

GATHERINGS
A pivotal component in the project was the series of facilitated dialogues among the experts to explore the various issues surrounding family ODR and to build an understanding about how to best serve thinly resourced parents, courts and communities. As informative as their survey responses were, we knew that direct engagement among the experts would generate more refined insights.

A key challenge in designing the gatherings was determining how to most effectively engage the experts. Figuring out when we could even get a majority of the three dozen-plus experts was a logistical challenge. We settled on three 90-minute sessions on dates spread out over a three-week period during October and November of 2020. We wanted to respect the busy schedules of these experts, and also not overtax people’s attention spans, especially given the Zoom format. Once we knew the time that was available, we refined how we would
meaningfully engage all those individuals simultaneously and capture their input in an organized and productive fashion.

We used the characteristics defined in the framework (accessible, ethical, effective, feasible and sustainable) as the overarching themes for the three sessions. The first gathering focused on accessibility, the second on ethicality and effectiveness, and the third on feasibility and sustainability.

Each gathering began with a short introduction to contextualize the discussion for that day. We aimed to limit the time spent lecturing, and to move to the breakout sessions quickly so we could foster dialogue and capture the experts’ input.

BREAKOUT SESSIONS
We assigned the experts to breakout groups of about four people for each discussion. Each group was given a different question to consider. One member of each group acted as facilitator and scribe so that we could capture the rich discussions that took place.

To reap the greatest benefit, we used two approaches. We assigned experts with particular expertise to breakout sessions considering questions that drew on that expertise. At the same time, we tried to balance the breakout sessions by assigning people from different areas, e.g., academia, legal aid, funding, technology and mediation, to each session. So, for example, we assigned people with expertise in intimate partner violence to the sessions that dealt with IPV and also balanced those sessions with experts from other backgrounds.

FEEDBACK SURVEYS
After each gathering, we sent out brief feedback surveys, which enabled us to improve the experience from one gathering to the next. As well as providing other findings, this led us to tweak our format after the first session to allow greater time for participants to collaborate in their small discussion group. Overall, the response to the format was very positive, and many participants felt the gatherings were successful at getting this professionally diverse group to have nuanced cross-disciplinary conversations.

DATA FROM THE GATHERINGS
To turn the facilitators’ notes from the discussions into workable data, we organized the notes on spreadsheets. We then reorganized the data according to themes within the framework and compiled it. Not surprisingly, many of the same issues and suggestions came up in multiple groups.
RSI’S ORGANIZATIONAL EXPERIENCE

At first glance, it might seem a bit unusual to incorporate RSI’s own experience as a component of this report. However, for 26 years RSI has been the only national entity focused solely on improving access to justice by enhancing court ADR. This has resulted in unique expertise. It makes sense, therefore, to bring our experience to this project. This experience can be summed up in three factors: RSI’s work on court ADR, RSI’s work on family ODR and RSI’s expert staff.

WORK ON COURT ADR

RSI has developed unique expertise in court ADR, which is reflected in four areas of work:

Dispute System Design
Some of the steps when RSI engages in dispute system design are:
- Research current situation, e.g., how cases are handled, need for change
- Work with program partners to set goals
- Design an accessible, ethical, effective, affordable system to meet those goals

Operation of Mediation Programs
Some of the activities when RSI operates mediation programs are:
- Select, train, supervise mediators
- Move parties and cases smoothly through the dispute system
- Collect data needed for reporting and evaluation

Research and Evaluation
Some examples of RSI’s research and evaluation are:
- Research issues related to courts, access to justice, and ADR, e.g.,
  - An exploration of the potential for an online tool to screen for intimate partner violence, which deepened our understanding of the dynamics of IPV, the importance of screening for it, and the potential for harm to befall survivors of IPV in mediation or ODR
  - The status of mediation in Illinois
- Evaluate mediation programs
  - In cases such as child protection and foreclosure
  - On factors such as time to resolution and participant experience of procedural justice

Resource Center
Some examples of the resources in RSI’s Resource Center are:
- Searchable database of thousands of resources
- Original content written by RSI experts on topics such as
  - How to design, manage and evaluate a court ADR program
  - Eviction mediation, online dispute resolution and child protection mediation

Some of RSI’s work draws on all these areas. Our work in foreclosure mediation, for example, incorporated dispute system design and program administration, mediator training design and provision, national information collection and dissemination, evaluation design, and monitoring and evaluation.

WORK ON FAMILY ODR
RSI’s work on family ODR during the past several years has developed our expertise in ODR generally and in family court ODR specifically. Much of that expertise has come from our exploration of what it would take to develop and sustain family court ODR for thinly resourced parents, courts and communities in Illinois, which would enable parents to smoothly and expeditiously reach agreement on non-financial parenting issues through ODR.

As part of this effort, we have worked on a multi-tiered ODR system that would help parents reach agreement with limited need for anyone to assist them. See Appendix 8. This work has involved developing workflows, planning how resources would be made available to parents, exploring the needs of potential users of the system, etc. Our exploration of likely costs and potential funding arrangements has proved particularly useful in writing this report. While we have not entered into design or development, and have not sought funding, the solutions we developed and the remaining unanswered questions are part of what prompted us to conduct this project, and they have informed this report.

STAFF EXPERTISE
RSI staff members embody the knowledge of the organization, especially two who have each been with RSI for more than 20 years: Jennifer Shack, Director of Research, and Susan Yates, Executive Director and author of this report. Through RSI’s work developing, operating and evaluating court ADR systems, we have learned about everything from budgeting and staffing to rule writing and working with program partners. We understand the nitty-gritty issues, such as how to track cases, and we have deep expertise in more theoretical areas, such as mediation ethics. RSI’s portfolio of court ADR evaluations is second to none, thanks to Jennifer Shack. Our extensive collection of resources on court ADR informs all our work, as does our informal national network of court ADR professionals. The result is an unmatched depth and breadth of knowledge about court ADR.
ADD IT ALL TOGETHER AND ...

This robust background provides a context for the project that is not available elsewhere. It makes sense to draw on this experience and expertise in exploring the study question and writing this report.
RESULTS & ANALYSIS

The following summarizes the results of our research, surveys,\(^\text{14, 15}\) gatherings and RSI’s experience. Applying the framework developed for the project, we found ample evidence of need for family ODR, and an almost universal opinion that ODR should be accessible to everyone, with few exceptions. We also gathered guidance about what would be required for a program to be ethical and effective. Definitive answers remain elusive as to how family court ODR can be financially feasible and sustainable for those with the greatest need.

NEED

Results from research as well as our national court and expert surveys all point to the need for family ODR. This was most well documented by the administrators who responded to the national court survey.

NEED FOR FAMILY MEDIATION

Our National Survey of State Courts asked whether and how each responding state provided family mediation. Our logic was that if a state could not provide accessible family mediation to thinly resourced parents throughout the state, it would be more likely to need family ODR. Conversely, if a state could successfully provide accessible family mediation to thinly resourced parents throughout the state, we would perceive that state as having less need for family ODR.\(^\text{16}\)

All 25 respondents said there was at least some mediation available in their state, although it ranged from being available in “one or a few” jurisdictions in one state, to statewide in 16 states (64% of respondents). However, that still leaves the question of whether it is economically accessible to all parents.

Respondents from five states and Washington, D.C., said that mediation was available throughout the state and was provided free or on a sliding fee scale so that no parents were denied mediation because they could not pay. That is wonderful for the residents of those states, but it does highlight the question of what happens in the other 45 states.

Although all 25 respondents stated that in-person mediation is available in their state, 13 respondents said there was an unmet need for mediation in their state for parents who are

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\(^\text{16}\) While states with sufficient resources to support family mediation may also have more ability — and therefore be more likely — to provide ODR services, the focus of this project is on those jurisdictions with the least resources.
thinly resourced. Most of these said they lacked the funding and mediators necessary to meet that need. More than half said they also needed program partner buy-in and about half said leadership was needed.

NEED FOR FAMILY ODR

National Survey of State Courts

Twelve of the 25 respondents to the national court survey said there was a need for ODR. Nine were unsure, and four said there was no unmet need. All 12 who said there was a need for family ODR said it was needed for pre-decree, non-financial child-related issues. Ten of these respondents said it was needed for all four case types we asked about (pre-decree divorce, post-decree divorce, never-married parents pre-judgment and never-married parents post-judgment) and all four issues we asked about (non-financial child related issues, negotiation of child support, child support enforcement and division of property). The four who said there was no unmet need for ODR said that they already had video mediation in place.\(^{17}\)

The need for ODR is also apparent in the relatively limited availability of ODR. Although almost all 25 states have either implemented some form of video-conference mediation such as Zoom or are in the process of implementing it, only 12 have made it available statewide. Fewer still have implemented an ODR-specific platform. Between our research and survey responses, we identified seven states in which at least one jurisdiction has implemented a program using an ODR-specific platform.\(^{18}\) None of these is statewide.

The national court survey tells the story of the haves and have-nots. Some states have ADR well in hand, but about half of the 25 who responded see an unmet need for both in-person and online services. They lack the funding and resources to make this happen. Their responses, too, indicate they are interested in providing more services. Thus, it appears the courts need assistance to provide greater access to justice through online dispute resolution options.

Expert Survey

The survey of the experts found that they also believed there was a need for family ODR. Almost all of the respondents (35 of 37) said there is a need for ODR for both financial and non-financial issues related to children. However, a number also cautioned that ODR should not take the place of other dispute resolution processes, particularly in-person mediation.

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\(^{17}\) Recall that in the national court survey, we did not distinguish between video mediation and other forms of ODR that require use of an ODR-specific platform. See “A Definitional Challenge” above.

\(^{18}\) This does not include programs that solely involved child-support enforcement and, therefore, focused more on resolving issues between a parent and the state, not between parents.
The two most common reasons experts cited for pursuing ODR are to increase access to justice and to respond to the restrictions placed on in-person services due to the COVID-19 pandemic. Funding appears to be seen by the experts as the greatest barrier to meeting the need, with eight respondents saying either they have yet to figure out long-term funding or that individual courts were going to have to figure it out.

ACCESSIBILITY

Respondents to the national court survey indicated seeing parents with unmet need for help resolving their conflicts. If ODR is to help meet that need, parents must be able to access ODR. Respondents cited, in particular, funding, technical support, staff time, program partner buy-in, and leadership as barriers to developing ODR and making it accessible. This aligns with RSI’s experience: Access is often the first issue raised when ODR is considered.

In the expert survey responses, the most common reason given for pursuing family ODR was to increase access to justice. Overall, the experts were emphatic in stating that all parents should have access to ODR, regardless of their literacy, disability, access to technology, ability to pay or other potential barrier. Almost all said parents would need to be supported when using the system, particularly if they had literacy or language challenges. Users also would need information provided in multiple formats to help them make decisions.

ACCESSIBILITY — STEP 1: GETTING ONLINE

The first concern the experts had regarding the ability to use ODR is whether parents would have access to the service. They noted that thinly resourced parents may not have access to a device, such as a smartphone, tablet or computer, or access to the internet, whether through a smartphone, home Wi-Fi or publicly available means. It was noted that parents who access the internet through their phones will need any platform to be mobile-friendly. Additionally, those using phones may access the internet on a pay-as-you-go or limited-access basis, in which case parents using ODR might use up their allotted data more quickly than they would if not participating in ODR, potentially jeopardizing their ability to meet other needs. Having a limited amount of data also might make such participants unable to continue with ODR as long as could be necessary to reach an agreement.

The experts suggested courts may allow parties to use computers or tablets in their courthouses and that public libraries could offer access to devices, as well. They also suggested that access to the internet could be provided through court and public law libraries; kiosks in courthouses and other public buildings, such as schools ranging from elementary schools to community colleges; municipalities and park districts.
The need to travel to access the internet could be problematic, however, especially in rural areas with limited internet access and limited public transportation. This travel would reduce the ODR benefit of parents not having to go to a courthouse to resolve their legal issues.

ACCESSIBILITY – STEP 2: USING ODR

The second issue is how to ensure ODR works for people once they access it. One question is cost to the parties. Another is access for people with disabilities that need accommodation, people with limited English language skills, people who are uncomfortable using technology, people lacking reliable information, or people in other circumstances that may form barriers to using ODR.

How courts charge — or don’t charge — parties for family mediation can inform how courts might charge for family ODR. RSI research prior to this project, plus the national court survey that is part of the project, indicate that the ways courts charge for mediation are myriad. They range from providing free services to all parents to expecting that everyone will pay for whatever services they receive. Some courts have an income level that determines whether parties pay for mediation, and others use sliding fee formulas, also based on income. Yet other courts increase their filing fees for particular case types, such as all family cases, to pay for ODR.

When discussing access issues, the experts recommended that every party should be screened through a one-on-one phone or video conversation prior to ODR to determine if any of these potential barriers need to be addressed for the person to participate meaningfully in ODR. The experts also offered ideas about how to address accessibility issues. This recommendation echoes recommendations from intimate partner violence experts we gathered for an earlier project but expands on it to include screening for any issues that might make participation in a technology-oriented process difficult.

Disabilities

The experts offered a range of suggestions, from complying with Web Content Accessibility Guidelines to the ODR platform using human-centered design to make ODR more accessible. They pointed out the importance of considering possible invisible disabilities, such as Crohn’s disease, dyslexia, fibromyalgia, arthritis and ADHD.

20 Web Content Accessibility Guidelines were developed by the Web Accessibility Initiative of the World Wide Web Consortium, which is an international community whose mission is to develop open standards to ensure the long-term growth of the web. Web Accessibility Initiative, WCAG 2 Overview.
In any situation in which disabilities pose a barrier, the experts suggested ODR programs should provide a person to help the party use ODR.

**Limited English Proficiency**
The experts suggested that any party with limited English proficiency would be helped by ODR using visuals when possible. For those who are proficient in languages other than English, the experts suggested the ODR platform be offered in multiple languages with court translation services augmenting access. For those who speak English but have limited literacy, they suggested using videos and graphics, keeping language below a sixth grade reading level, using plain language, defining terms and providing tangible examples.

In any circumstance in which limited English proficiency poses a barrier, the experts suggested ODR programs should provide a person to help the party use ODR.

**Discomfort with Technology**
The experts had a number of suggestions about how to avoid technology issues by making ODR easy to use. For example, they suggested repeated testing of the ODR platform by people like those who would use it, using a platform and a process that operate in a step-by-step manner, and not overwhelming the parties. They also suggested that some parties may make more effective use of a phone mediation.

In any situation in which a party is unable to use technology due to discomfort or lack of basic understanding of technology, the experts suggested ODR programs should provide a person to help the party use ODR.

**Lack of Information**
The experts offered a number of ways to provide reliable information to parties. They suggested there could be content on the ODR platform directly related to each particular topic as the parties are working on it, and there could be links to websites with information. There could also be links to legal services agencies. They also suggested that chat bots could pose a series of questions that determine what information parties need and then provide that information. In any situation in which lack of information poses a barrier, the experts suggested ODR programs should provide a person to help them use ODR.

The experts’ suggestion of one-on-one assistance, which they made at several points in the project, runs counter to the national court survey results. Court respondents consistently pointed to a lack of funds for any additional services, whether they be mediation or ODR.
ETHICALITY

Our research into the literature on court ODR provided helpful perspectives and insights about what is needed to make family court ODR ethical. For example, the International Council for Online Dispute Resolution (ICODR) Standards — which call for ODR to be accessible, accountable, competent, confidential, equal, fair/impartial/neutral, legal, secure and transparent — provided a framework for considering ethicality of ODR. Similarly, Michigan’s Considerations in Implementing Court ODR Systems provided an outline of issues — grouped by topics such as goals, confidentiality and protections — that sparked deeper thinking about ethics.

When we asked the gathered experts about ethical ODR, we defined “ethical” very broadly. In response, the experts covered a wide array of issues, including the need for confidentiality, data security, fairness of process and outcome, procedural justice, impartiality, information and education for parents, informed consent, safety, screening and transparency.

After accessibility, the main concern of the experts was the protection of those who may be vulnerable to potentially being taken advantage of in ODR. These parents may include, for example, those who are self-represented, have survived IPV or have limited English proficiency. (Note, however, that simply falling into one of these categories does not in itself indicate that a parent is vulnerable and in need of additional protection.) Examples of expert recommendations include educating parents about their legal rights and responsibilities, offering them choice among various ADR and ODR processes, and providing assistance while using ODR. In order to determine if some parents need the ODR process to be adapted or perhaps not use ODR at all, potential impediments must be identified. This is where screening comes into play.

SCREENING

Ethical family ODR requires that parties be able to participate fully in ODR. This principle flows from the foundational underpinnings of ADR. Most importantly, in the ODR processes being considered in this project, the parties are the ones who determine if they can reach an agreement and the terms of any agreement, not a judge or arbitrator. This requires that parties be able to exercise self-determination. They must be able to communicate with one

21 Note that while accessibility could be considered an ethical issue, we identified it as a threshold issue within our framework. If an ODR program is not generally accessible, then no matter what other ethical protections are in place, the program is sufficiently flawed that it should not be implemented.

22 International Council for Online Dispute Resolution, ICODR Standards.

23 Doug Van Epps & Michelle Hilliker, Considerations in Implementing Court ODR Systems, Michigan Supreme Court State Court Administrators Office, Office of Dispute Resolution, (Jan. 6, 2020).
another, negotiate in their own interests, and each decide whether a potential agreement meets their needs sufficiently that they will agree to it.

The way to ensure parents have this capacity is to screen all parents for potential barriers prior to participation in ODR.

**Screening for IPV**

Parents who have experienced IPV may be less able, or even unable, to exercise self-determination, which is essential to participation in ODR. They may be unable to negotiate in their own best interests and in what they see as their children’s best interests.

In some cases involving IPV, an order of protection will be in place. However, in other cases IPV will not have been identified and/or an order will not be in place. Some survivors only come to understand their circumstances in terms of IPV during a screening conversation. If this happens during screening, the screeners would shift the focus of the conversation from ODR to helping the survivor ensure immediate safety and decide what steps to take next. Screeners should also provide resources to access supportive services such as counseling, housing assistance and legal representation, as needed.

It is possible that ODR will be a good option for someone who has experienced IPV, but only once that parent is safe and, if appropriate, the survivor and the screener have worked together to develop a plan for ODR. For example, that plan might involve having someone support survivors as they work through guided interviews or conducting mediations in a caucus-only mode so the two parents are never in the same space, even when that is a virtual space.

Some may think that screening prior to ODR is unnecessary because the parties won’t be together in the same place, so they are safe. However, screening also identifies dangers other than lack of physical safety that could harm a party, such as coercion. Additionally, sometimes ODR involves video communications, which may inadvertently provide personal information about the parent who has experienced violence to the parent who has used violence.

Screening for IPV prior to mediation is a best practice that also applies to ODR because of the similarities in the processes. There are, however, other issues that are related specifically to ODR for which screening is also needed.

**Screening for Other Barriers to ODR**

Screening provides an opportunity to identify issues related to the online environment that may be barriers to participation in ODR. For example, a screener can check to be sure each parent:
• Has access to ODR, including access to a device, to the internet and to enough bandwidth or data to participate
• Has sufficient comfort with technology to use ODR
• Is sufficiently comfortable speaking and reading English (or other languages in which ODR is available) that they can use ODR
• Has access to any accommodations for disabilities necessary to enable their use of ODR
• Is not experiencing mental illness, substance abuse or other issues significant enough to limit their ability to use ODR

If any of these impediments are identified, the screener and the parent can work together to identify ways to overcome them. If that is not possible, the parents will not be able to continue into ODR, and another pathway must be made available.

CHARACTERISTICS THAT INDICATE ETHICALITY

Ensuring ODR is ethical does not stop at screening. We consulted the resources mentioned at the beginning of this section on ethicality, as well as foundational documents for mediation such as the Model Standards of Conduct for Mediators,24 the Model Standards of Practice for Family and Divorce Mediation,25 and the National Standards for Court-Connected Mediation Programs.26 Using these resources, input from the experts and our own experience, we identified characteristics necessary for a family ODR program to be ethical.

Note that how the following characteristics play out in the mediation context has been written about extensively. For example, a search of Social Science Research Network27 for “mediation, confidentiality” on April 3, 2021, brought up 107 papers. The following paragraphs can provide only an introduction to the complex issues related to these characteristics.

24American Bar Association et al., Model Standards of Conduct for Mediators, American Bar Association (Sep. 2005).
26 Center for Dispute Settlement & The Institute of Judicial Administration, National Standards for Court-Connected Mediation Programs.
27 Social Science Research Network.
Confidentiality
Confidentiality is a bedrock of mediation that is critical in ODR, as well. Confidentiality in ODR relates both to what communications from ODR can be shared with a judge (often thought of as privilege) and to what communications from ODR can be shared with others outside the ODR process.

First, confidentiality is essential to processes such as negotiation, mediation and ODR because parties must be able to exchange offers without fear that their offer will be presented to a judge as proof that a party was willing to accept a particular resolution. For example, if parents are negotiating when their children will spend time with each parent, one parent might be willing to accept a particular schedule during the school year if, in return, the other parent also agrees on a particular summer schedule. If the parents are unable to reach agreement on the summer schedule, it would be unfair to tell the judge that the parents had agreed on the school year schedule. This aspect of confidentiality flows from a long-standing tenet in American jurisprudence that it is preferable for parties to work out their own agreements when possible — whether that is in negotiation, mediation or now ODR — and that the promise of confidentiality is essential to the effectiveness of these attempts at settlement.

In practical terms for ODR, this means that judges must not have access to what happens during ODR, other than agreements. To ensure this, ODR and court records must be kept separate, and the ODR process must require that both parties clearly agree on any agreement before it is sent to the judge.

Second, confidentiality can also apply to whether ODR communications may be shared with anyone other than the parents; a neutral, if one is involved; and the parents’ lawyers, if they are represented. In ODR processes, such as video mediation, that mirror in-person mediation, a court ODR program can mirror the confidentiality expectations of in-person mediation. Mediators are typically expected to keep everything they learn in ODR confidential, with some exceptions, which must be explained to the parties. The exceptions usually involve matters of safety, such as threats of imminent harm or information that children are being abused or neglected. Family court ODR programs would be well advised to adopt similar confidentiality policies.

Confidentiality with regard to what ODR participants can say about ODR outside of ODR is a different matter. Sometimes a requirement of complete confidentiality would be impossible to enforce and potentially unhelpful. For example, individuals such as parents’ new partners may be involved in how any resolutions play out. There are situations, however, in which confidentiality would be appropriate (e.g., not sharing sensitive medical information or not communicating about what happens in ODR to particular individuals).
Data Security
Parties need to be able to trust that the data they provide via court ODR will not be shared. This would include, for example, ensuring that their data is not hacked, that the other parent is not able to access their data (except data that is needed to use the ODR platform), and that their data is not sold. Courts with ODR programs must ensure this data security.

Fairness of Process and Outcome
ODR processes must be fair, as must their outcomes. For example, ODR should not offer options that are skewed toward one type of parent over another, e.g., parents who do or do not work outside the home. If there are algorithms and artificial intelligence involved, they must not tilt the process in one direction or another. Parents should be free to exercise self-determination and enter into agreements that may not look fair to outsiders, as long as the parents understand what they are doing and are not being coerced.

Impartiality
Family court ODR must be impartial. Standard IV(A) of the Model Standards of Practice for Family and Divorce Mediation\(^{28}\) provides a handy definition of impartiality, which can be applied to family ODR: “Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.” So, for example, ODR must not inherently favor plaintiffs or female parents in male-female couples. If ODR uses mediators, they must also remain impartial between parties in all cases.

Information and Education for Parents
One of the benefits of ODR is that it can provide informational and educational materials to parents. For example, content on an ODR platform might explain how the ODR process works, describe what the law says about parental rights and responsibilities, or provide examples of parenting plans. Those materials must also remain impartial. When providing parents legal information, care must be taken to ensure that it does not cross the line to providing legal advice.

Informed Consent
Before parents undertake ODR, they should be told how the ODR process works, e.g., what assistance is available to help them access ODR, when they might leave ODR, and how binding any agreements are. Parents also must understand what they have agreed to before any agreement goes to the court and is entered as a judgment. It is the court’s responsibility to ensure that systems are set up to convey this information in a manner that can be understood by the parties.

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\(^{28}\) Model Standards of Practice for Family and Divorce Mediation, supra note 46.
Procedural Justice
ODR must offer parents an experience of procedural justice. Parents must feel not only that any outcome was fair, but also that the process was fair. Examples of elements of procedural justice include:

- Voice — whether parties felt they were given an opportunity to share their perspectives and felt those perspectives were heard
- Neutrality — whether mediators and the platform seemed to be unbiased
- Respect — how much parties felt their concerns were taken seriously
- Trust — whether parties felt the mediators and/or platform genuinely tried to do what was right

Safety
As was discussed above with relation to screening, ODR must not harm participants or offer opportunities for parties to harm one another. Safety in this context includes not only physical safety but also safety from coercion or intimidation.

Transparency
Courts must understand and be able to explain how their ODR processes work. Their ODR policies and results of the ODR program must be readily available to the public. Courts should engage in evaluations and other studies to increase their own and the public’s understanding of the ODR program.

EFFECTIVENESS
From RSI’s experience conducting in-depth evaluations of court mediation programs, we know that the way to measure effectiveness is to evaluate whether a court program has accomplished its goals. In this project, we considered family court ODR in general, not in terms of a specific program, but the following indicators of effectiveness should apply to all programs.

The experts and our research provided valuable direction as to what the goals are for family ODR and what outcomes would demonstrate that the goals were achieved. We also drew on RSI’s 26 years of experience working in court mediation and our recent forays into ODR. From this, we developed the following list of characteristics that indicate effectiveness.

CHARACTERISTICS THAT INDICATE EFFECTIVENESS
ODR is Beneficial for Children, Parents and the Court
For family ODR to be effective, it must benefit those who use it (parents), those about whom decisions are being made (children), and the systems within which ODR operates (courts).

The following characteristics may be helpful to determining if family ODR is beneficial.
RESULTS & ANALYSIS

• Beneficial for children
  o Reduces conflict between parents
  o Protects children's safety and privacy
  o Produces agreements that are safe for children and promote their well-being
  o Promotes relationships that are healthy for children

• Beneficial for parents
  o Results in workable parenting plans with which the parents comply
  o Enables parents to move forward smoothly, reducing delays
  o Improves co-parenting relationships between parents
  o Educates parents, e.g., about legal rights and responsibilities, child development, typical solutions, ramifications of agreement terms
  o Provides opportunities for parents to engage other resources, e.g., legal aid
  o Is cost-effective, e.g., reduces court visits, is free for those who cannot pay, and offers a sliding fee scale for others, as needed
  o Is culturally appropriate to all users, including being provided in various languages
  o Provides a fair space where power imbalances are addressed
  o Takes into consideration emotional aspects of family situations
  o Enables parents to develop custom solutions for their families

• Beneficial for courts
  o Is cost-effective for courts
  o Leads to agreements that are easily reviewed by judges
  o Produces durable agreements that parents will follow
  o Enables parents to complete the process and reach agreement, when possible
  o Narrows issues for judges to resolve, when needed
  o Includes due process
  o Does not increase liability or exposure for courts
  o Enhances the public's view of the courts
  o Is a platform that is comfortable for judges, court staff, clerks, etc. to use

ODR Technology is Effective
For ODR to be effective, the technology at its heart must be effective. ODR should have the following characteristics:
  • Have an attractive, clean design
  • Be clear, streamlined and procedurally sound
  • Be easy to log into, save progress on and edit
  • Enable adaptations for particular families
• Help parents communicate in a constructive manner and avoid toxic or abusive interactions
• Enable parents to fully utilize the platform, not get error messages, etc.
• Have been fully tested by people similar to those who will use the platform
• Enable parties to complete the process in a timely manner without leaving cases in limbo

Dispute System Design is Effective
For ODR to be effective, the entire dispute system that surrounds ODR must be effective. The dispute system design should incorporate the following characteristics:
• Cases flow smoothly from filing, through ODR and to completion
• The ODR platform blends smoothly with traditional court process
• ODR does not increase the workload of court staff
• Agreements are workable, parents will implement them, and they feel reasonably fair
• The process requires fewer in-person court visits than a traditional court process
• There is a smooth flow of systems that surround ODR, e.g., communications about the platform, record keeping by the clerk and any in-court process
• The system complies with all laws and court rules

Neutrals are Effective
When ODR involves neutrals, e.g., mediators, the neutrals must provide high quality services. At a minimum, they must meet applicable standards. These include standards29 and guidance from both in-person mediation and ODR-specific standards and expectations, as available and appropriate. The question of neutral quality in in-person mediation has been written about extensively. For an introduction, see RSI’s Guide to Program Success, Chapter 9, Select and Manage Your Neutrals.30

ODR Systems are Well-Managed and Therefore Effective
Although ODR programs operate on digital platforms, they do not run entirely on autopilot. Someone must be responsible for ensuring their effectiveness. Court ODR programs should keep an eye on the items discussed in Accessibility and Ethicality above. Generally speaking, parties must be able to get online and then make use of ODR once on the platform. Potential barriers, such as limited English proficiency, disabilities, discomfort with technology and lack of information, must be addressed. Parties must be screened for IPV and other potential barriers. ODR must provide confidentiality, data security, fairness of

29 For example, the Model Standards of Conduct for Mediators and the Model Standards of Practice for Family and Divorce Mediation, supra notes 45-46.
30 Resolution Systems Institute, GUIDE TO PROGRAM SUCCESS, Chapter 9: Select and Manage Your Neutrals (2018).
process and outcome, impartiality, information and education for parents, informed consent, procedural justice, safety and transparency. To ensure this, ODR must be monitored regularly and evaluated as needed.\textsuperscript{31}

**FOCUS ON COST-EFFECTIVE ODR**

In the situation being considered in this project — ODR involving thinly resourced parents, courts and communities — the motivation for, and expectation of, cost-effectiveness is great. There are many factors involved in cost-effectiveness of any court program.\textsuperscript{32} Rather than attempt to summarize them all, we focused on those specifically related to family ODR and identified two particular factors. First, there must be sufficient numbers of cases, and second, a sufficient number of cases must reach resolution using ODR. We have repeatedly found these to be “make it or break it” factors in the success or failure of court mediation programs. We extrapolated from that experience to inform how to consider cost-effectiveness in court ODR.

**Number of Cases**

During many years designing, developing and evaluating mediation programs, we have learned that for any program to be effective, it has to be used. This applies to family ODR, too. If there is a need and the program is accessible, ethical and offered free of charge, but no one, or hardly anyone, uses it, it will not be worth the cost to develop and provide it and, therefore, not effective. Parties, the courts and the community will not benefit from it. The court will have expended time, effort and money yet have nothing, or almost nothing, to show for it.

Past RSI research tells us that the number of cases using ODR will be determined in large part by how voluntary the use of ODR is.\textsuperscript{33} Experts have devoted significant attention to the question of whether parties should be required to attempt ODR or if it should be left for them to decide to use it. No definitive conclusion has been reached. Their discussions echo decades of similar conversations about mandatory and voluntary participation in family mediation, but with added considerations as a result of the new context and process of ODR.

\textsuperscript{31} Resolution Systems Institute, *GUIDE TO PROGRAM SUCCESS*, Chapter 15: Evaluate Your Program (2018).

\textsuperscript{32} See, for example, the extensive work by the National Center for State Courts on their [CourTools](https://www.ncsc.org/CourTools). National Center for State Courts, *CourTools*.

The main concern among the experts about mandatory participation was that parents who are unable to participate in ODR (e.g., because of language issues) or who should not participate in ODR for any of a variety of reasons (e.g., IPV) should not be expected or forced to use ODR for fear that they could agree to terms they do not understand or be coerced into unfair settlements. These are important concerns. However, RSI has seen that making all use of ODR voluntary is not the solution. We have seen that leaving parties to decide about whether to participate in mediation often results in extremely low use of mediation. Anecdotally, we have seen voluntary ODR programs used by only a handful of parties. These programs have not involved family issues as of the time of this project, but this idea of sufficient use as an indicator of cost-effectiveness would apply to family cases, too. While consensual processes have a lot of appeal in the theoretical world, once a conflict is in court, parties often want to win, not collaborate.

Contrary to how it may sound, this question of voluntary or mandatory participation is not a binary choice. First, it may apply differently to different parties. For example, in many foreclosure mediation programs, if the homeowner enters the mediation program, the lender is required to participate. Second, even when there is an assumption that parties will use mediation, there may be exceptions. For example, some family mediation cases involving IPV are excluded from mediation when there is no way to adapt the process sufficiently.

Calling a court mediation program “mandatory” means different things in different settings. Rarely, if ever, does it mean that absolutely all cases of a particular category are required to engage in mediation. A court mediation program may be called “mandatory,” but that may mean that a judge can selectively require parties to attempt mediation. Another program may be called “mandatory,” but if the parties can’t afford to pay a mediator, they are not required — or enabled — to participate in mediation.

Similar confusion surrounds the terms “opt-in” and “opt-out.” For example, one court may use “opt-in” to mean that parties must take an action to participate in the program, i.e., they opt to participate in the program by going to a website and registering for it. Another court may use “opt-in” to mean that all parties are automatically expected to participate in the program, or are opted into it.

34 There are examples of such programs being offered in an urban setting and statewide in a rural state; however, we are not naming these programs because they may have been improved since this report was written.
35 Note that ODR can provide an excellent opportunity for collaboration for those who want it.
36 An argument can be made that not permitting survivors of IPV to mediate or use ODR — particularly when they are fully educated about it, prepared for it and will be supported in it — can be another experience of disempowerment for them.
It is important, therefore, to define who is required — mandated — to participate in ODR so as to include as many parties as possible, while carefully considering possible issues so that no one for whom ODR is inappropriate is required to use it.

Resolution Rate
There is no uniformity of opinion among mediators about whether resolution rate should be a factor when considering mediation effectiveness. The argument against it is that considering resolution rate could encourage mediators to pressure parties into agreement. The argument for it is that the point of mediation is to help parties reach resolution and, so, resolution rate should be considered, along with other measures.

Just as it is important to require as many parties as appropriate to participate in ODR, it is equally important that no party be required to reach an agreement. ODR, as it is defined in this project and as it is operating in courts so far, is not an adjudicative process. It is a process centered on the parties exercising self-determination. The definition of self-determination provided in the Model Standards of Conduct for Mediators, \(^{37}\) “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices,” can be applied to family ODR as well.

On the other hand, ODR must resolve enough court cases to make it cost-effective. There is no formula to determine how much resolution is enough, but if almost all the cases that go through ODR also end up going to a full trial on all the issues, ODR would not be cost-effective. Similarly, if almost all cases reach resolution in ODR, a red flag should go up about whether parties are agreeing freely.

Mandatory participation and tracking resolution rate work together to make an ODR program cost-effective. Extrapolating again from mediation, we saw this play out in foreclosure mediation in Illinois. In programs that expected parties to participate in the mediation program, there were more agreements for parties to retain their homes as a percentage of all eligible foreclosure cases.\(^ {38}\)

**FEASIBILITY AND SUSTAINABILITY**

For purposes of this project, we are defining “feasibility” as being able to develop and launch family ODR, and “sustainability” as being able to maintain family ODR once it has been launched. Feasibility and sustainability are all about whether there are sufficient financial, technological and human resources — undergirded by support from program partners and participation of parents — to develop and maintain family ODR. As some

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\(^{37}\) Model Standards of Conduct for Mediators, *supra* note 45.

\(^{38}\) See Shack, Six Programs, Six Models, *supra* note 54, at 40-41.
experts noted, sustainability requires continuing funding to support, for example, fees to vendors, ongoing maintenance, monitoring for quality, updates for rule changes, technical support and user support. Understanding that courts themselves are often thinly resourced institutions, a consideration of feasibility and sustainability should contemplate resources and support from both within the court and outside it.

To collect input on the potential for feasibility and sustainability, RSI drew on two surveys (the National Survey of State Courts and the Survey of Experts) and the gathering of experts. Just as importantly, we drew on our own knowledge about the state of court ODR and our exploration of a family ODR platform for Illinois, as well as our experience in dispute system design, program development, and operation of court ADR programs.

Rather than provide clear guidance about feasibility and sustainability, the experts primarily produced questions about the cost of ODR and how to pay for it. This is understandable because there are few clear answers, and a relatively small number of experts with knowledge of cost and funding participated in this project. Plus, answers to questions about cost and funding are being tackled on a jurisdiction-by-jurisdiction basis, as courts experiment with ODR. There is no national repository of information. Fortunately, RSI’s experience developing, operating and evaluating court ADR programs and our work on a vision for family ODR shed light on questions such as what it might cost to develop and sustain a family ODR program.

ANSWERS TO THREE QUESTIONS

Three questions provide a structure for exploring feasibility and sustainability: Where will ODR be hosted? What will ODR cost? How will ODR be supported financially?

1. Where Will ODR Be Hosted?

Family ODR may be hosted in a variety of settings. (Note: In this context, “hosting” has a much broader meaning than when the word describes where online a website is hosted. In this project, it refers to the entity responsible for providing the service, maintaining it, updating it, etc.)

Who hosts court ODR depends in part on what kind of ODR is being provided. Currently, most court ODR is provided one of two ways: (1) on a platform dedicated to ODR or (2) on a generic video communication platform that is used for video mediation.

One group of experts described the following options for hosting, to which we added information.

Vendor as Host
When ODR is provided by outside, for-profit vendors, the vendor hosts the platform. At the time of this project, the two main family court ODR vendors are Court Innovations, with its Matterhorn platform, and Tyler Technologies, with its Modria platform. At least one state also was working with Co-Parenter, but it had not launched as of the research stage of this project. There are other ODR vendors, but we found no evidence during the project that they were offering family ODR.

Court as Host
Depending on a court’s resources, the court might decide to develop and host its own ODR-dedicated platform in-house, as the State of Utah did. It developed its own in-house ODR platform for small claims; we do not know of any states that have done that for family ODR. Utah has offered its small claims platform to other states at no cost. This raises the idea of possibly developing a family ODR platform in one state, and then sharing the platform and the cost with others.

The more typical way in which courts host ODR is to use a video platform, such as Zoom, to conduct mediations. The videoconferencing platform itself does not include elements that help guide users to resolution as a dedicated ODR platform does, so there is some disagreement as to whether video mediation is truly ODR. Especially in response to the pandemic, courts are increasingly hosting mediations via video conferencing.

Non-Profit as Host
During the project, the idea of a national non-profit to provide family ODR to thinly resourced parents, courts and communities was raised. This shared cost approach would involve creating a national non-profit to provide a family ODR platform that is supported by multiple states pooling resources.

Another group of experts floated the possibility of a national institution that would create and maintain a basic, functional ODR platform, which any court could use and adapt to their local jurisdiction. Other experts discussed a national organization that would not provide family ODR, but that would set standards, provide support and guidance for courts, create a repository of ODR forms and guidance for courts to use, and share best practices.

2. What Will ODR Cost?
For more than two years prior to this project, RSI had explored how to provide a dedicated ODR platform to thinly resourced parents, courts and communities in Illinois, including what it would cost. The next part of this report provides an overview of some of the costs of

40 See Innovative Parenting Solutions Online — Description, Appendix 8.
family ODR discussed during that effort. It also draws on RSI’s previous work on screening for intimate partner violence and RSI’s work over many years to develop and operate ADR programs. It relies on information about costs from the expert gatherings, as well. The following assessment begins with examples of costs a court will incur no matter what host the court chooses for its ODR service, i.e., time, screening and any mediator costs, if mediators are part of the ODR program. It then looks at how costs vary across models.

**Time**

Every court will need to commit time and talent to consideration of family court ODR. The amount of time will vary greatly based on whether the court is considering an ODR-specific platform or a much simpler video mediation program. This usually involves a team of judges, family lawyers, mediators, court clerks, court administrators, people from the court’s technology staff and others. These program partners will need to:

- Research options
- Make informed decisions about what ODR model is the best fit for a particular jurisdiction
- Articulate program goals
- Write policies (and possibly court rules) for family ODR
- Determine how ODR will meet all its targets for ethicality, such as confidentiality and transparency
- Determine how to promote ODR and educate parents about it
- Decide how to track the program and obtain feedback from users and what regular reports the court will want
- Determine how ODR will be evaluated

**Screening Costs**

Pre-mediation screening of every parent is essential, no matter what ODR model is used, so the court will need to determine how to cover its cost. The cost per screening will depend on many factors, such as the number of cases, whether screening is conducted by court staff or contractors, what characteristics are required of the screeners, the local rate for similar services, and whether it is possible to work with a partner such as a university or social service agency to provide lower-cost screening services.

Screening every parent can add up to a significant cost. Imagine a state like Illinois, which has the sixth-largest population in the country and about 75,000 divorce and separation cases filed per year. About 40,000 of those cases are filed outside Cook County, which has

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41 Slepak-Cherney & Yates, supra note 40.

42 “Model” or “ODR model” in this report encompasses the ODR platform, ODR processes, court ODR system and the wider context within which ODR operates, such as where it is hosted, how much it costs, how it is paid for, etc.
a mediation program in which staff mediators screen all parents. Doing some very rough math, if one-third of those 40,000 cases involved two self-represented parents and 80% of parents were screened, and if each screening cost $50 per person, it would cost more than $1 million per year, just in payments to screeners. It is possible that cost per screening could be reduced if full-time screeners were employed, but some more rough math indicates it would still be more than $500,000 per year in salary and benefits for screeners. Costs to administer these screening efforts, e.g., coordinating with all jurisdictions statewide, contracting with or supervising screeners, and providing the technology to link screening results with ODR platforms, could easily add 30%–50% more.

These are extremely rough figures. Some, such as the numbers of cases and percentage involving self-represented parents, are based on data from the state court and then rounded. Others, such as cost per screening and salary and benefits, are educated guesses. What percentage of parents would participate — even in a mandatory program — is difficult to predict because family ODR is too new to have produced reliable data. If the participation rate was 40% instead of 80%, the staff costs could be about $250,000 to $500,000. And if the participation rate was only 25%, the staff costs could be about $150,000 to $350,000.

Instead of statewide, another way to look at cost is to look at potential costs for a given county. To use a median-size Illinois county as an example, Iroquois County has only 100 family cases filed per year. If three-quarters of these parents are self-represented, that would be 150 parents to screen. If each screening cost $50, the cost would be about $7,500. This may seem like a small number, but in a county with a population of less than 28,000, this could be a significant addition to the budget.

Or, consider Illinois’ second-largest county, DuPage. It has about 3,200 family cases filed per year. If three-quarters of these cases involved self-represented parents, and each screening cost $50, the cost would be about $240,000.

**Mediator Costs**
Mediator costs are determined by the extent to which mediators are required by the ODR process. Some ODR models do not involve mediators. If they do require mediators, there will be costs for recruitment, selection, orientation, training and maintaining quality. Staff will be needed to schedule mediations and manage the mediator roster. In addition, fees for the mediators will be needed if they are not volunteers.
Costs of Various Models
The cost of a family court ODR program varies based on what kind of ODR is offered and where it is hosted, as we learned during RSI’s exploration of the potential for a program in Illinois. That exploration, combined with research for this project, provided insight into the pros and cons of various models, including their costs.

A Court Working with a Vendor
There are benefits to working with an established vendor for a dedicated ODR platform. They have a product they can demonstrate for program partners. They have a set cost. They are responsible for maintaining and updating the platform. They should know how to connect their ODR platform with a court’s case management system.

On the other hand, a court may not be able to adapt the program very much. A court might have trouble getting help once the contract is signed and the vendor is being paid. The cost might be high. And while an inexperienced vendor may charge less, they will be learning while they develop the court’s platform.

Vendors offer various payment arrangements. For example, vendors may charge on a per party basis, (e.g., $25) or a per case basis (e.g., $50) for cases that use the ODR platform, or they may charge for every case of a particular type that is filed (e.g., $5), regardless of how many use ODR. Some charge an initial set-up fee, and others do not. These costs multiply over the years, and what looks affordable for one year may look unreasonably costly over the long term.

A Court Developing ODR In-House
There are benefits to a court that develops a dedicated ODR platform in-house. The court will have control and be able to tailor the platform to exactly what they want.

On the other hand, developing ODR in-house will require extremely skilled information technology (IT) staff and a substantial commitment of court resources. When those skilled IT staff members leave for other jobs, it may be difficult for others to work with a custom platform. A court that develops its own platform will also need to continue to troubleshoot and improve the platform.

A Court Providing Mediation on a Video Conferencing Platform
This project focused on thinly resourced parents, courts and communities that do not already have access to mediators and lawyers, so there would be costs associated with starting a video mediation program. These might include drafting policies and rules;

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46 It is beyond the scope of this report to discuss all the issues that go into selecting and contracting with vendors.
ensuring ODR meets all its targets for ethicality, such as confidentiality and transparency; promoting ODR and educating parents about it; tracking the program, obtaining feedback from users, and producing regular reports; and evaluating ODR. There would be costs for recruitment, selection, orientation, training and maintaining quality of mediators; scheduling mediations; managing the mediator roster; and paying mediators, if they are not volunteers.

A National Non-Profit Providing ODR

The information we developed when we looked into what it would cost to develop and operate an ODR non-profit organization in Illinois allowed us to extrapolate what a national program might cost. Assuming that, as we found, a dedicated, statewide ODR platform would cost between $500,000 and $1 million per year, a national program would be many multiples of that, depending on the number of participating states. There would be some economies of scale if multiple states used the non-profit platform, but there would also be additional costs to adapt the platform for each jurisdiction and maintain the various locations.

A national non-profit provider would operate under the same expectations as private vendors, e.g., the platform would need to be continually updated and improved. However, the non-profit would not be in a position to receive continuing investments to sustain and improve the platform, as a for-profit provider probably would.

3. How Will ODR Be Funded?

The project did not result in a definitive answer to the question of how to fund the development and ongoing provision of family ODR when families, courts and communities are thinly resourced. When the experts discussed how to fund family ODR, there were more questions than answers. They discussed what could be appealing to funders, the need for expertise in funding large endeavors and potential sources of funds.

Providing ODR for thinly resourced parents requires resources. The responses to the national court survey indicated that feasibility and sustainability loom large for courts. When asked what aid they would need to provide mediation, the respondents said the top resources they would require were funding, more mediators and program partner buy-in. Funding was the top need for ODR as well, but the next two top needs were technical support and greater staff time. Furthermore, eight respondents said that despite moving forward with ODR implementation, they have yet to figure out how to fund it.

RSI’s experience corresponds with input from the experts that, in general, court ODR is funded as other court activities are funded. Depending on the jurisdiction, this may be some or a combination of state legislative allocations to courts; county or city funding; and filing fees or other user fees. With courts buffeted by the effects of the housing crisis of the last decade and the pandemic this decade, funding is tight.
In terms of parties paying for ODR, that may be possible — at least in part — for some parents, but not for those with the least resources. Anecdotally, RSI has heard from court administrators that they struggle to provide services when many parties qualify for fee waivers. Courts may adopt sliding fee scales, as some do for family mediation, but this does not answer the question of how to provide services.

Courts also might be able to obtain grants from sources such as the State Justice Institute and from private foundations. It is possible that sufficient funds could be gathered to develop and launch a family ODR platform for thinly resourced parents, courts and communities. However, while these grants can help kick-start a program, RSI’s experience has been that these outside funders are not usually interested in sustaining a high level of funding beyond a period of one to three years.

The experts raised the possibility of developing an income-generating plan to support court ODR. In this approach, the court would charge ODR fees to those who can afford them and use some of those fees to subsidize services for those who cannot afford to pay. Given the extremely high percentage of self-represented parents, it is difficult to imagine how that might work without putting too much of a burden on the paying parents.

Experts also raised the possibility that an outside entity could contract with the court to provide family ODR services and could offer its platform on the open market separate from the court service. Parents who have not yet filed in court could pay to access the platform, use its resources and work out as much of their agreement as they can. It is difficult to imagine why that provider would opt to work with the courts for little income instead of only offering its platform on the open market.

The experts raised the idea of a wealthy individual or corporation being interested in bringing to life the idea of family ODR for thinly resourced parents, courts and communities. There were, however, no suggestions made as to who that might be or a process for identifying that person or entity.

CONCLUSION TO RESULTS & ANALYSIS

Together, these results point to three significant tensions. First, there is a tension between a desire to serve every family and the limited resources available to adapt ODR for every individual situation. Second, there is a tension between the need for voluntary decision-making (to help make ODR ethical) and the need for participation (to help make ODR effective). Third, there is a tension between what ODR would cost and how to pay for it. These tensions are discussed in detail in the next section.
The study question for this project was “How might family court online dispute resolution serve thinly resourced parents, courts and communities?” To investigate that question, we developed a framework that started with need; moved through accessibility, ethicality and effectiveness; and ended with feasibility and sustainability. The characteristics of the framework intertwine with the three issues posed in the title of this report — impediment, improvement or impossible dream.

These issues can be thought of as three hurdles that a court ODR program must clear. First, family ODR must not impede parties’ access to justice. It must be accessible and ethical. Second, family ODR must be effective. It must improve parents’ ability to reach fair, durable agreements that benefit their families. Third, family ODR must not be an impossible dream. It must be feasible and sustainable.

For each issue, a related tension has been identified during the project. Regarding “impediment,” there is a tension between a desire to serve as many families as possible and the impracticality of accessing and using the resources that would be needed to adapt ODR for every family situation. Regarding “improvement,” there is a tension between the need for voluntary decision-making (to help make ODR ethical) and the need for significant participation (to help make ODR effective). Regarding the “impossible dream” scenario, there is a tension between what ODR would cost and the challenge of finding a way to pay for it.

The first step in the framework, “need,” is not discussed here because it is a threshold question any jurisdiction must answer before considering the other steps in the framework. If a court determines that there is no need for family ODR, these other issues are moot. If a court determines there is a need for court ODR, the other issues must be addressed.

**IMPEDEMENT?**

*Family ODR must not impede parties’ access to justice. It must be accessible and ethical.*

To prevent family court ODR from becoming an impediment to justice, it must have a floor below which the ODR program does not fall. The project identified the factors that define the two planks of that floor: accessibility and ethicality.

**ACCESSIBILITY**

If a family ODR system is to be accessible, parents must be able to connect with the ODR platform and be able to use ODR once the connection is established. The former has to do with the disputants’ ability to get online and utilize the system with the device they have
available. The latter means that appropriate access is ensured for individuals with limited English proficiency, parents with disabilities, survivors of intimate partner violence and other groups for which access could be a challenge.

Court ODR programs have a responsibility to identify parents who are experiencing barriers to using ODR, to work with the parents to determine how those barriers can be overcome, and, if they can’t be overcome, to determine together what other steps should be taken. Examples of these barriers are lack of access to a device, the internet, or enough bandwidth or data to participate; insufficient comfort with technology to use ODR; insufficient comfort speaking and reading English (or other languages in which ODR is available); and lack of access to accommodations for disabilities.

ETHICALITY
As a court service, and potentially the primary court-offered method for parents to develop parenting plans and resolve parenting disputes, any court ODR system must be ethical. Here are two necessary aspects of ethicality.

First, a court ODR program must be able to identify parents who have experienced IPV and work with them to determine whether they can exercise self-determination in ODR. Appropriate steps after screening may or may not include using ODR. In terms of ethicality, the experts were clear that it would be unethical for parents who had experienced IPV in their relationship to participate in ODR unless each case was considered individually and a decision was made either that the process could be adapted to meet individual needs or that ODR was inappropriate for the situation.

Second, a family court ODR program must incorporate a set of ODR ethics, including the following:
- Confidentiality
- Data security
- Fairness of process and outcome
- Impartiality
- Information and education for parents
- Informed consent
- Procedural justice
- Safety
- Transparency

TENSION
The driving desire to serve all parents is in tension with the limited resource environment explored in the project. Courts have a responsibility to protect potentially vulnerable
parents and ensure ODR is accessible and ethical. However, courts that are thinly resourced are unlikely to be able to provide a full range of services recommended by some experts to ensure ODR is accessible for all parents. The services recommended by experts include, for example, individualized education for each parent about their rights, personalized counseling for each parent about their best options, and one-on-one assistance while using ODR. Indeed, in our experience working with courts, it is likely that these thinly resourced courts would be looking for ways to reduce their costs by implementing ODR, not to increase costs because of a need for additional services to supplement ODR.

To address this tension, a safe tradeoff can be constructed by drawing on a long-established requirement of in-person family mediation. Prior to mediation, each parent must be screened individually to determine if a party has experienced violence or other coercive behavior in the relationship that would make participation in a typical mediation unwise. This need for screening in in-person mediation is also true for family ODR, as described above in Results & Analysis.

To address the additional concerns about access to ODR, this screening can be expanded to include an exploration of whether the parties are experiencing other barriers to accessing ODR, such as any issues related to language, disability, access to the internet, etc. The screener would assist the parents in finding ways to access ODR (e.g., how to involve a translator) or would excuse them from ODR as appropriate (e.g., in the case of some violent relationships) and help them access other appropriate services.

Screening some parents out of ODR will reduce the number of families that can benefit from ODR. From RSI’s experience, we know that programs must be careful not to categorically exclude particular groups of people and not to exclude so many people that the program is ineffective.

**IMPROVEMENT?**

*Family ODR must be effective. It must improve parents’ ability to reach fair, durable agreements that benefit their families.*

To be effective and improve access to justice, family court ODR must benefit children, parents and courts. To accomplish this benefit, an ODR program must serve a sufficient proportion of families and assist a sufficient proportion in reaching full or partial agreement. The program must also educate the parents who use it.

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47 See also Slepak-Cherney & Yates, supra note 40.
Although “sufficient” is a vague term, in this context we use it to convey the sense that a program must serve enough parents and reach enough agreements to make it cost-effective, while not expecting 100% participation. It is not reasonable to expect that 100% of parents will use ODR or that 100% will reach full or partial agreement. Indeed, if 100% of parents were reaching agreement in a program, that would be a red flag that the program may be coercive.

To be an improvement, programs also must provide for confidentiality, data security, fairness of process and outcome, impartiality, information and education for parents, informed consent, procedural justice, safety, and transparency, as described above in the “Results & Analysis” section, under “Ethicality.”

Each of these criteria can be interpreted and carried out in numerous ways. To make them useful to courts that are developing and operating family ODR programs, the criteria need to be articulated, including definitions, descriptions, guidance and, potentially, metrics.

**TENSION**

There is a tension between the need for voluntary decision-making (to help make ODR ethical) and the need for participation (to help make ODR effective). Indeed, the experts did not come to agreement on this issue of mandatory vs. voluntary participation. There is, however, a way to address this tension.

A safe tradeoff can be accomplished — as in in-person family mediation — by requiring that parents who are not screened out of ODR try an initial ODR step.\(^{48}\) Because this comes after screening, it avoids requiring parents to use ODR who are unable to participate in ODR or who should not participate in ODR for any of a variety of reasons. It also increases the likelihood that a court ODR program will serve enough parents to make it effective by requiring that parents at least try ODR.

This enables parents to see what they can agree on, without any pressure to reach agreement. Engaging in the ODR process will educate them about what they need to resolve\(^{49}\) and let them know where they stand. If they identify some areas of agreement, that would probably encourage them to continue using ODR, as often happens in mediation. Even if they do not continue to use ODR, this step may narrow what they need a judge to resolve.

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\(^{48}\) See “[Focus on Cost-effective ODR](#)” above in “Results” for a discussion of requiring ODR.

\(^{49}\) It is reasonable to expect that all parents who use ODR will be offered an easy opportunity to become educated about topics such as their rights and responsibilities and stages of child development. It is not reasonable to expect that all parents will take advantage of the offer.
IMPOSSIBLE DREAM?

*Family ODR must not be an impossible dream. It must be feasible and sustainable.*

To avoid being an impossible dream, family court ODR must be feasible to develop and sustainable to maintain. Ensuring family ODR can realistically be expected to improve access to justice for thinly resourced parents requires both initial and continuing financial support — support that cannot be expected to come entirely from parents, courts or communities when they are similarly thinly resourced.

Taken together, the costs of screening parents and conducting an ODR program are steep, potentially in the tens of thousands of dollars for small jurisdictions and into the millions for larger ones. And those costs do not include the amount of time ODR requires of court staff and judges in the development stages.

Today, a patchwork of programs is developing in which a few jurisdictions are trying out family ODR. However, the jurisdictions are typically those that also have the resources to operate court mediation programs; the courts operating ODR programs are not the courts with the least resources. This is not intended to imply that these courts are resource-rich. Some courts with very limited resources have identified sources of support to launch ODR. Some said in their national court surveys that they did not know how they would continue to provide ODR services.

TENSION

This project identified a tension between the cost of accessible, ethical, effective family court ODR and what thinly resourced parents, courts and communities are able to pay for it. In some jurisdictions, it is more than a tension: It is a chasm.

The project pondered ways to resolve that tension. A national non-profit to provide these services might be feasible to launch, but we did not identify a way to sustain it over time. We considered platforms homegrown by courts and those provided by vendors. Both have ongoing costs, whether ongoing maintenance and development costs for homegrown platforms or fees to vendors.

In the end, this tension could not be resolved. The project was unable to identify a feasible, sustainable path by which family court ODR could be provided nationwide to parents who need it via courts that cannot afford it. Family court ODR may not be an impossible dream, but for now, it is certainly a dream, not a reality.
CONCLUSION TO TENSIONS

The study question for this project was “How might family court online dispute resolution serve thinly resourced parents, courts and communities?” In the end, the project answered much of the study question. It identified ways to make a family court ODR program accessible. It outlined what is needed for family court ODR to be ethical. It described what makes a family court ODR program effective.

However, the project did not find an answer to the question of where resources would come from to enable thinly resourced parents, courts and communities to make use of family court ODR. The project did not identify a model or a source of funds that would enable family court ODR to be sustainable for those with the least access to resources.

After all the work and creativity that went into exploring how to make family court ODR accessible, ethical and effective, this conclusion about feasibility and sustainability can be disheartening. Nonetheless, the results and analysis offer valuable guidance to family courts that are able to operate ODR programs about how to do so, and the findings and recommendations below provide a blueprint for next steps for family court ODR.
FINDINGS & RECOMMENDATIONS

The following findings and recommendations respond to the study question “How might family court online dispute resolution serve thinly resourced parents, courts and communities?” They address the need for ODR, for ODR standards, for screening prior to engaging in ODR, for mandatory as compared with voluntary participation in ODR, and for support to develop and sustain ODR.

NEED

Finding: There is a need for family ODR
The project found that there is a need for family ODR to serve thinly resourced parents, courts and communities. Only six state courts reported that they provided ODR using an ODR platform, and those platforms were not available in most parts of the states. While 21 states offer video mediation in part or all of the state, that brings with it the requirement that courts provide mediators, which is not without cost, as well as the burden of requiring all parties to participate at the same time.

We considered the possibility that family ODR is not being provided because family mediation is meeting the same need; however, only six states reported that mediation was available throughout the state and was provided for free or on a sliding fee scale, with no parents denied services because they couldn’t pay.

RECOMMENDATION ONE: Support family ODR
There should be nationwide support for providing family ODR to thinly resourced parents, courts and communities. The recommendations that follow describe how that would be accomplished.

NATIONAL STANDARDS

Finding: National standards are needed
The depth and sophistication of the conversations among the experts highlighted the need to provide guidance to those providing family court ODR. Input from the many elements of the project identified characteristics that should be included in standards for programs that serve any parents, including those who are thinly resourced. Such standards should provide definitions; descriptions; guidance and, potentially, specific measurable criteria.

RECOMMENDATION TWO: Develop national standards for family court ODR
National standards for family court ODR should be developed and promoted. The standards should articulate how to ensure family ODR is accessible, ethical and
RECOMMENDATION THREE: Consider how to assess whether family court ODR meets the standards
During the development of the standards, the question of how to assess whether court programs and vendors meet the standards should be addressed. For example, if such an assessment were to be developed, who would conduct the assessments? What would be the impact of any finding by the assessment? Might programs and vendors either be approved as meeting the standards or given guidance on how to meet them?

The following chart describes how the standards might be organized by contextual issues and by what happens before, during and after ODR.

SCREENING FOR IMPEDIMENTS TO ODR
Finding: Not everyone should participate in ODR
The project found that there are situations in which some parents should not participate in ODR. One essential group to consider in family matters is those who have survived intimate partner violence. Experiencing IPV can, among other results, create unsafe situations for
survivors and their children, and it can leave survivors unable to negotiate on their own behalf or in the best interests of their children. Screening parents prior to ODR enables courts to adapt ODR to provide safe, consensual processes; to assist parties in accessing other needed services; and to waive participation in ODR when appropriate.

There are other potential barriers to using ODR, such as access to a device and to the internet; sufficient comfort with technology; sufficient proficiency with English (or other languages in which ODR is available); access to accommodations for people with disabilities; and any mental illness, substance abuse or other issues significant enough to limit the parents’ ability to participate meaningfully in ODR.

**RECOMMENDATION FOUR: Every participant in a family case should be screened via a live conversation prior to using ODR**

Every parent should be screened via a live telephone or video conversation, by a screener approved by the court, prior to using ODR. They should be screened for intimate partner violence, access to ODR, comfort communicating in a language in which ODR is offered, comfort with ODR technology, any mental illness or substance use issues that prevent them from participating in ODR, and any disabilities that may need to be accommodated.

If any of these barriers exist, the screener would inform parents of their other options and work with them to determine next steps. In the case of IPV, the screener would work with the party to ensure their safety and then identify resources to assist the survivor. Although filling out a questionnaire online prior to screening can help make the process more efficient, there is currently no online program that is capable of reliably identifying IPV without live interaction with a person.

**RECOMMENDATION FIVE: Investigate the potential for a national program to conduct screenings**

Parents are not routinely screened prior to all family mediations across the country, and we foresee the same practice developing with family ODR. The need is even greater in ODR because of the potential for additional barriers caused by technology. A program is needed to offer screening that is affordable (including no charge when needed) for thinly resourced courts across the country. This would be a valuable service to those courts that cannot afford to hire screeners for ODR and potentially for mediation. The idea came up late in the project. It needs further exploration.
MANDATORY OR VOLUNTARY PARTICIPATION IN ODR

Finding: A family court ODR program should be mandatory, subject to certain limitations
There were differences of opinion among experts during the project about whether courts should mandate that parents use ODR or make its use voluntary. The answer is found when this question is considered not as a binary choice between mandating that all parties use ODR or leaving it up to every parent, but in a more nuanced and contextual framework.

First, parents should only be required to use ODR after pre-ODR screening does not identify insurmountable barriers, as described above. Such screening will ensure that only cases that are not inappropriate for ODR make use of it. Second, as many parents as possible should use ODR in order to produce a high enough level of participation to make the program effective. Third, the mandate should only require that parents take a first step in ODR. It should not require agreement. This first step should provide education to parents about their rights and responsibilities, indicate sources for additional help, and help parents identify their areas of agreement.

RECOMMENDATION SIX: Every parent who is not screened out of ODR should be required to make an initial attempt to use ODR to identify areas of agreement with the other parent. This will provide an ethical combination of screening out of, and mandating into, ODR. It will encourage the maximum number of parents to try ODR, thereby increasing the opportunity for effectiveness, but not require parents who are unsuited to ODR to use it.

Requiring only the initial step should prevent parents from being required to reach agreement using ODR. The experience of trying the initial step can also encourage parents to keep using ODR if they find it to be easy to use and helpful.

SUPPORT FOR ODR

Finding: Courts need three kinds of support to provide quality family ODR services: guidance, evaluation and funding
The project found that there is currently no clear pathway to developing, evaluating and sustaining family court ODR for thinly resourced parents, courts and communities.

50 This double negative is used to indicate that screening only removes certain types of cases that are not appropriate for ODR. It does not ensure that only appropriate cases get to ODR. For example, there may be some parents who will not voluntarily reach agreement no matter what, so they could be considered inappropriate, but that could not be identified in screening, and they would not be screened out.
RECOMMENDATION SEVEN: Provide guidance to courts in developing their ODR projects

To develop and operate court ODR programs, courts need guidance in two forms: written guidance and expert assistance implementing that guidance.

Reliable, curated resources presented in an accessible format can help prevent courts from having to reinvent the ODR wheel. These resources could include, for example, guidance on how to determine what ODR processes and platforms to use, what standards to apply, how to select a vendor, and what best practices are, along with samples of processes and documents. Both Resolution Systems Institute and the National Center for State Courts provide collections of resources about court ODR.

Courts, especially those that are thinly resourced, also need assistance from experienced, knowledgeable experts to put those resources to work. As this report demonstrates, family court ODR requires a plethora of decisions to be made. It is important not only to make resources available in a passive manner, e.g., on a website. In addition, courts and communities with the least resources should be actively contacted, made aware of the resources, helped to assess whether there is a need for family ODR in their jurisdiction and, if there is a need, encouraged and guided as they implement family ODR.

RECOMMENDATION EIGHT: Enable courts to assess and improve their family ODR services

Because family court ODR is in its early years, any program could be considered an experiment. This creates a need for courts to regularly evaluate how an ODR program is functioning and whether it is meeting its goals.

Fortunately, ODR platforms generally can provide regular statistical reports with information on how ODR is functioning. Courts may need assistance determining which reports they need and how to draw useful information from the reports. Courts using video mediation will not have reporting mechanisms built into the video platforms. They will need to devise other ways to collect critical data.

Courts also need to ensure parents are experiencing procedural justice when they participate in ODR. For courts using ODR platforms, this will likely require the insertion of surveys into the ODR system or the adaptation of surveys provided as part of the ODR platform. Courts using video mediation will need to communicate with parties another way, e.g., by email or text, after mediations to survey parties about their experiences.

51 RSI, Online Dispute Resolution, supra note 18.
52 NCSC, ODR, supra note 11.
It is incumbent on the courts to review reports and make adjustments to their ODR systems as necessary. These changes may be to the ODR platform or to the wider system in which ODR operates. This kind of regular analysis and iteration is standard in the world of technology, but it may require somewhat of a culture shift in some court settings.

Additionally, courts should participate in comprehensive program evaluations, when possible. They should share those results with other courts and with ODR providers to inform other ODR programs.

**RECOMMENDATION NINE: Investigate the potential for a national family court ODR provider**

Although the project did not identify an entity that would be able to establish and sustain a national provider of family ODR, it is still possible that a resource-rich home for family ODR exists somewhere. Individuals and entities that are concerned with services to thinly resourced parents, courts and communities should explore whether there is a deep-pocketed funder who would commit to a multi-year national program. A powerhouse initiative would be needed that has the status and connections to seek and find an individual, corporation or foundation that would commit millions of dollars over the next decade or more to a national family ODR service.

This kind of search was beyond the resources of RSI and the project. It is possible that such a supporter exists, but it would require a thorough exploration led by individuals who could open doors and make high-level connections.

**CONCLUSION TO RECOMMENDATIONS**

Exactly who might implement these recommendations remains to be seen. This report provides a foundation upon which anyone can work on any of the recommendations.
CONCLUSION

So, what is the answer to the question posed in the title of this report? Is family court ODR for thinly resourced parents, courts and communities an impediment to justice, an improvement in making justice accessible, or an impossible dream that will not be realized? This project found that family court ODR can be an impediment to access to justice if not provided in an appropriate manner. However, if it is provided in a manner that is accessible, ethical and effective, family court ODR can improve access to justice. Doing so will require standards for family court ODR, as well as resources to support the provision and evaluation of ODR. It will also necessitate comprehensive screening of all parents prior to ODR, which will enable courts to require that all parents attempt at least an initial stage of ODR. On the other hand, whether family ODR can be provided nationwide to parents who need it, despite limited court resources, may not be an impossible dream, but a path to determining how to sustain family court ODR services is not yet clear.
APPENDIX 1
PRIMER: FAMILY COURT

In 2020, Resolution Systems Institute (RSI) conducted a project to consider whether family online dispute resolution (ODR) might serve thinly resourced families, courts and communities, and if so, what would be required to make ODR accessible, ethical, effective, feasible and sustainable. As part of this project, RSI conducted research, surveyed states about their ODR efforts, and engaged experts from across the country using surveys and three virtual gatherings.

Because the experts who participated in the project came from many different areas of expertise, RSI developed this Primer to offer some explanations and terminology related to family court and alternative dispute resolution or ADR. This Primer was intended to give experts a common language during the project and to provide a rudimentary understanding of family court for those with no experience in it.

FAMILY COURT

Terms used in relation to family court can vary widely across the country. For example, courts that deal with family issues go by many names, e.g., children and family court or domestic relations court. For this project, we are calling them family courts. These courts may deal with a broad array of cases from adoption to parentage. They may be combined with other parts of the court, e.g., probation, or be part of a larger grouping, e.g., civil cases.

For the project, we focused on what happens in family court when parents split up, whether or not they were married. There are groups of legal issues involving family members that the project did not address — even though family courts may address these matters.

For example:

- Courts that determine what will happen when children are abused or neglected, often called child dependency or child protection courts
- Courts that determine what will happen when children break the law, often called juvenile justice
- Courts that determine when someone other than children’s parents have responsibility for the children, often called guardianship

The project was funded by the JAMS Foundation.
SEPARATION AND DIVORCE
We use the informal term “split up” to indicate that the project discusses what happens to families whether or not parents have been married to one another. We use the generally recognized term “divorce” to indicate the end of a marriage, even if some jurisdictions may call it something else, e.g., “dissolution.” We use the term “separation” to indicate the end of a relationship that did not include marriage. Courts may call this “parentage” or “paternity,” so we use the term “separation” to indicate that the issues are broader than determining who the parents are.

WHAT HAPPENS WHEN PARENTS SPLIT UP
Broadly speaking, a determination must be made as to non-financial issues (e.g., parenting time, decision-making) and financial issues (e.g., child support, paying for schooling). Parents who were married must also address issues not related to children, such as dividing assets and debts. Parents who were not married must also obtain a finding of parentage. The focus of the project was primarily on non-financial child-related issues.

The following chart roughly describes the issues for married and never-married parents.

PARENTING PLANS
For the purposes of the project, we used the term “parenting plan” to refer to the non-financial child-related issues — primarily parenting time and decision making. Parenting plans may include additional terms covering issues such as communication between the
parents or what happens if one parent moves. These vary from jurisdiction to jurisdiction, but this statewide form from Illinois is a good example of what is typically included. Parenting plans may have other names, e.g., custody and visitation plans, in some jurisdictions.

**PARENTING TIME**

“Parenting time” refers to when the children spend time with each parent. The term reflects an underlying assumption of both parents being involved with the children, as compared with “visitation,” which implied one parent was the primary parent and the other a secondary parent. Typical parenting time issues include weekly or bi-weekly schedules, holidays, vacations, etc.

**DECISION-MAKING**

“Decision-making” refers to how parents will decide on matters such as medical care, education, extracurricular activities and religious upbringing. It provides flexibility for parents to allocate decision making responsibilities, as compared to “legal custody,” which gave authority on all issues to one parent or to the parents jointly.

**OTHER ISSUES**

Depending on the jurisdiction and the individual family, a parenting plan may address additional issues. Among others, these might include how the parents will communicate with the children when they are with the other parent, how the parents will communicate between themselves, what will happen if one parent plans to move, and what the parents will do if they have conflict with one another. In some jurisdictions, parenting plans include financial matters, such as child support.

**CONFLICT AFTER A COURT JUDGMENT**

As children grow and families move forward after a divorce or final judgment of parentage, parents will likely need to make changes in their parenting plan. These shifts are often dealt with informally. However, when parents can’t agree, they return to court. When parents can afford lawyers, they may choose to return to court even when they agree in order to obtain an enforceable court order expressing their changed terms. Depending on the law, court rules and terms of their parenting plan, parents may be required to attempt mediation before they can move their case to trial.

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54 Illinois Statewide Form — Approved — Divorce with Children — Parenting Plan.
For the purposes of the project, when parents encounter conflicts after they are divorced, these are considered “post-decree” matters. When parents who were not married encounter conflict, these are considered matters “following a judgment.”

**ADDITIONAL TERMINOLOGY**

**MEDIATION**

In family mediation, a neutral third party, the mediator, assists parties in coming to a voluntary, un-coerced agreement. To maintain their neutrality, mediators must avoid doing or saying anything that potentially conveys partiality. Mediation is confidential, with a signed agreement typically the only communication shared outside the mediation. Confidentiality enables parties to speak openly without fear that their words will be conveyed to the court. (There are limited exceptions to confidentiality intended to ensure safety.) Another fundamental value in mediation is party self-determination, which requires that each party be able to make free and informed choices and be able to negotiate on their own behalf.

**OTHER FORMS OF FAMILY ADR**

Arguably, family courts have developed the most robust ADR programs among all court ADR programs across the country. Family mediation was typically the first court ADR process to be adopted and is mandatory in many jurisdictions now. Family courts continue to innovate and many now use additional approaches, such as early case assessment and parenting coordination.

**SELF-REPRESENTED LITIGANTS**

For purposes of the project, we are referring to people in family court who are not represented by lawyers as self-represented litigants, or SRLs. We also call them self-represented parents. Courts may use additional terms, such as pro se or pro per.

**INTIMATE PARTNER VIOLENCE**

This definition of intimate partner violence (IPV, also known as domestic violence) from the Women's Center and Shelter of Greater Pittsburgh gives a good sense of the breadth of IPV behaviors: “IPV is a pattern of assaultive and coercive behaviors that operate at a variety of levels -- physical, psychological, emotional, financial, or sexual -- that one parent uses against the other parent. The pattern of behaviors is neither impulsive nor ‘out of control,’ but is purposeful and instrumental in order to gain compliance or control. It can include assault, destruction of property, isolation, and acts or threats of abuse against the victim parent, children, and pets.”
Not surprisingly, IPV is of particular concern in terms of ADR and ODR for family cases. The first concern, of course, is physical safety. But when parents are engaging in a voluntary conflict resolution process (such as mediation and most ODR processes), coercive control is also a significant concern. One parent’s use of the behaviors in the definition can render the other parent unable to negotiate on their own behalf. Their ability to exercise self-determination may be sufficiently limited that they should not participate at all in a voluntary process. In some situations, however, supports can be built into the process so that someone who has experienced coercive control can participate.

In order to know whether parents can exercise self-determination, all parents must be screened for IPV. This will enable the person experiencing violence to seek assistance, as these individuals may not see themselves as experiencing IPV. It will also enable the providers of mediation, other ADR or ODR to determine what measures, if any, should be implemented to enable parties to communicate safely while exercising self-determination.
APPENDIX 2

PRIMER: ONLINE DISPUTE RESOLUTION

In 2020, Resolution Systems Institute (RSI) conducted a project to consider whether family online dispute resolution (ODR) might serve thinly resourced families, courts and communities, and if so, what would be required to make ODR accessible, ethical, effective, feasible and sustainable. As part of this project, RSI conducted research, surveyed states about their ODR efforts, and engaged experts from across the country using surveys and three virtual gatherings.

Because the experts who participated in the project came from many different areas of expertise, RSI developed this Primer to offer some explanations and terminology related to online dispute resolution, ODR. This Primer was intended to give experts a common language during the project and to provide a rudimentary understanding of ODR for those with no experience in it.

WHAT IS ONLINE DISPUTE RESOLUTION?

Online Dispute Resolution (ODR) refers to a broad set of technologies meant to either supplement or replace ways in which people have traditionally resolved their disputes. ODR shares and builds upon the foundational characteristics of alternative dispute resolution (ADR), emphasizing easier and more efficient methods of addressing conflict.

ODR is used in both the private and the public sectors. During the COVID-19 pandemic, private sector mediators have been making extensive use of platforms such as Zoom to conduct video mediations. Private ADR providers, such as JAMS and the American Arbitration Association, offer ODR platforms. Large retailers, such as eBay and Etsy, use ODR to resolve disputes between buyers and sellers. And there are some providers, such as It’s Over Easy, that were built specifically to serve a target market who would prefer to work out their conflicts online.

In the public sector, courts are piloting ODR for small claims, traffic and family issues. The National Center for State Courts defines court-related ODR as “a public-facing digital space in which parties can convene to resolve their dispute or case.” A few jurisdictions, notably the state of Utah, have developed an ODR platform in-house, while the majority of other jurisdictions contract with private providers such as Tyler Technologies and Court Innovations.

55 The project was funded by the JAMS Foundation.
to provide ODR platforms. The following information in this primer relates primarily to ODR being used — or that may be used — by courts.

**HOW DOES ODR WORK?**

ODR makes use of various technologies and dispute resolution methods. In court ODR, typically parties are referred to the ODR platform, which the disputant generally accesses as a website (or sometimes a mobile application). Because ODR will be a new experience to many participants, an overview may be provided either prior to or at the start of using the platform. The overview explains to the user what the steps of the process are, how the user will interact with the other party and the court, and what is expected of the user.

Typically, users will be led through some level of a guided interview (see the definition in the Core Concepts section below). If you have ever used the TurboTax software or a troubleshooting guide for a piece of technology or appliance, or read a choose-your-own-adventure book, you will be familiar with this experience. Essentially, users walk through the various issues they need to address, and input selections into the platform along the way.

![Figure 1 - Example of guided interview from Tyler's Modria platform for Family ODR. (c) Tyler Technologies](image)

Some ODR platforms build legal information or resources into the experience. The most common case types for ODR, such as small claims and traffic, tend to serve large volumes of self-represented litigants. Linking to legal information sites or embedding their content, or
providing the websites and/or phone numbers for legal assistance organizations, can help self-represented litigants make better use of ODR.

Some ODR platforms support an exchange of chat messages between parties. They could convey demands and offers using the platform. This could happen synchronously or asynchronously. A mediator may or may not be involved; they may be present acting as an active referee or only participate if requested by one or more parties.

On some ODR platforms, parties might participate in something that is more like a traditional mediation but is conducted via video conferencing with a mediator controlling who talks with whom and when. Depending on the platform, the parties may be able to jointly draft settlement language and access other documents during the mediation.

For court-connected ODR, it is an essential feature to have the platform report agreements (or the lack thereof) back to the court. Many courts have a preference for ODR technology that can integrate into their existing systems, such as case/docket management software.

**CORE ODR CONCEPTS AND TOOLS**

In the rapidly evolving field of ODR, the terminology is also evolving. The items marked with an * represent the four main ODR processes considered during this project.

**ACCESS**

In ODR, “access” is analogous to access considerations in other forms of dispute resolution. There are, however, certain distinctions, including access to the technology (e.g., computers, internet), language (both with regard to literacy and languages other than English), and visual impairments or other disabilities.

**ARTIFICIAL INTELLIGENCE (AI)**

An oft-cited justification for the implementation of ODR is that it presents savings in terms of human resources. AI is one of the primary mechanisms by which these savings occur: It is the process by which computers mimic human thinking and ultimately automate functions that used to be performed by humans. If AI is implemented thoughtfully and carefully, it can also present other benefits, such as greater freedom from biases and user error.

- **Algorithms**, a notable subset of AI, are the finite, computer-implementable instructions that govern the software. For example, we can imagine an algorithm that could take inputs such as each parent's scheduling preferences; both parents' schedules of work,
school and other commitments; the child’s school and extracurricular schedule; and the locations of each party, their places of work, the school, and extracurricular activities to generate a possible parenting schedule.

- *Machine learning* is a process by which these algorithms automatically improve over time. To continue the above example, as the algorithm generates proposed parenting schedules, whether parents accept or reject the schedules, and with what modifications, could inform how the algorithm adjusts, e.g., whether distances should be given more or less weight.

**ASYNCHRONICITY**

Asynchronicity is the ability for parties to complete the dispute resolution process, or parts of it, at different points in time. The term is also sometimes used to refer to use of ODR at times outside of traditional court operating hours.

**CHAT MEDIATION**

In a chat mediation, a mediator and the parties communicate via an ODR platform by writing messages back and forth. The mediator in chat mediations can message certain parties or everyone at once. People are notified when others post new messages directed to them on the platform. For purposes of this project, when we discuss chat mediation, it can be a synchronous or asynchronous process.

**CHATBOT**

An example of artificial intelligence, a chatbot is an automated tool that is programmed to help triage and provide brief assistance and information to users. Using natural language processing, the chatbot resembles a real person by messaging with the user, either providing the user with prompts or asking the user to input text to which the chatbot responds.

**CONFIDENTIALITY**

Just as in traditional mediation, it is imperative that parties be allowed to freely negotiate with one another. Comparatively, and a bit ironically, however, ODR actually can have more of a “paper trail” associated with it. Forms saved on the system, documents submitted for evidence, and written communications generated within or outside of the platform all carry the risk to compromise that confidentiality. ODR platforms, therefore, must take measures to secure these documents, and also ensure that the parties understand what can and cannot be shared with the court. It is also worth bearing in mind that parties, particularly those who
have a prior relationship, may communicate via text, email, or some other communication outside of the platform.

Sometimes neutrals also email parties outside of the platform. Whether these external communications are protected by confidentiality may vary from jurisdiction to jurisdiction, and in any event, should be a consideration for courts as they implement ODR.

**DOCUMENT CREATION, EDITING AND SUBMISSION**

ODR systems can give parties a way to collaboratively work on an agreement. If you’ve used Google Drive or Dropbox, or an office intranet such as SharePoint, it is a similar experience.

Some ODR systems will also allow parties to upload documents to use as supporting evidence in their claims.

**GUIDED EXCHANGE OF CHATS**

In this form of ODR, a platform asks a series of questions designed to assist the parties in negotiating between themselves. For example, in a landlord-tenant case about a security deposit, the platform might ask how much the tenant is seeking, how much the landlord is holding, and how much each one is offering or would accept to settle the case. The parties may also be asked for brief explanations. Each party is notified when the other has posted a new message on the platform. This process is asynchronous, and requires no human involvement from non-parties (such as a neutral or a case manager).

**GUIDED INTERVIEWS**

In guided interviews, a platform walks each party through a series of predetermined questions. For example, in a parenting case, a parent would be asked about topics such as what weekly, holiday and vacation parenting time schedule they would prefer. Then, the other parent would either review the first parent’s responses and indicate what they do and do not accept, or they would answer the same questions and the platform would compare the parents’ responses. This is typically an asynchronous process with little or no human involvement.

**TRANSPARENCY**

A key concern with regard to ODR is whether the software is equitably built to serve all participants regardless of age, gender, race, religion, sexual orientation or socioeconomic background. In-depth reporting on outcomes and explanations of how algorithms function within the software can help provide this transparency, but it is important to understand that
private providers are unlikely to want to share the intellectual property involved with the algorithms that drive their platforms.

TRIAGE
Users may access an ODR system not fully informed of what services they need. Triage can be an important step of the process to ensure the user is directed to the proper access point, e.g., legal services, court clerk or social services.

*VIDEO MEDIATION
This involves conducting mediations on video conferencing platforms such as Zoom, Skype or WebEx. It is what mediators often imagine when they first learn about ODR, but there are important differences between video mediation and other types of ODR that do not rely on mediators, can be used asynchronously and may use an ODR-specific platform.
APPENDIX 3

READING LIST

ACCESSIBILITY

David Larson, *Digital Accessibility and Disability Accommodations in Online Dispute Resolution* (2019),
https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1462&context=facsch

COURT ODR


EVALUATION


FAMILY ODR


Gabrielle Davis & Tracy Shoberg, *Online Dispute Resolution and Domestic Violence*, Ass’n of Fam. and Conciliation Cts. eNews newsletter (May 2020),
ODR ETHICS

International Council for Online Dispute Resolution, *ICODR Standards*,
https://icodr.org/standards/.


ODR POST-MORTEMS

David Allen Larson, Designing and Implementing a State Court ODR System: From Disappointment to Celebration, 2019 J. Disp. Resol. 77 (2019),
https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1838&context=jdr.

Roger Smith, Rechtwijzer: Why Online Supported Dispute Resolution Is Hard to Implement, Law, Technology, and Access to Justice (Jun. 20, 2017),

PSYCHOLOGY AND ODR

Jean R. Sternlight, *Pouring a Little Psychological Cold Water on Online Dispute Resolution*,
2020 J. Disp. Resol. 1 (2020),

ADDITIONAL RESOURCES


Resolution Systems Institute, *Online Dispute Resolution Special Topics*, (2019),
https://www.aboutrsi.org/special-topics/online-dispute-resolution.
APPENDIX 4

NATIONAL SURVEY OF STATE COURTS – QUESTIONS

BACKGROUND QUESTIONS

a. Does your state court administrative office have staff dedicated to ADR?
   a. Yes, part-time
   b. Yes, at least one full-time person
   c. No
   d. Not sure

Comments

b. How does your state court administrative office provide financial support for family ADR to individual jurisdictions?
   a. It provides ongoing financial support
   b. It provides seed funding for projects or programs
   c. Other
   d. It does not provide any support
   e. Not sure

Comments

c. Which best describes how your state handles mediation of parenting time and decision-making authority issues (i.e., physical and legal custody)?
   a. **State statute or statewide court rule mandates mediation throughout the state** for cases involving disputes about parenting time and decision-making authority, with the option to opt-out
   b. **State statute or statewide court rule permits individual jurisdictions to mandate mediation** for all cases involving disputes about parenting time and decision-making authority, with the option to opt out
   c. **State statute or statewide court rule allows judges to order mediation** at their discretion
   d. **There is no state statute or statewide court rule** regarding mediation of parenting time and decision making issues
   e. Other: __________________________________________
   f. Not sure

Comments
d. If it is mandatory in your state for courts to provide mediation (or other ADR) for parenting plans, who pays the costs for the mediation programs?
   a. The state court administrative office pays any financial costs
   b. The local courts pay any financial costs
   c. The state court administrative office and local courts each provide part of the financial support
   d. It is not mandatory

Comments

MEDIATION AND ODR IN YOUR STATE

a. Setting aside COVID-19, is there an unmet need for face-to-face family mediation (or other face-to-face ADR processes) in your state for parents with limited resources?
   a. Yes
   b. No
   c. Not sure

Comments

b. IF YES: For which situations is face-to-face family mediation (or other face-to-face ADR processes) needed for parents with limited resources? (Check all that apply)
   • Divorce – Pre-decree
   • Divorce – Post-decree
   • Never-married parents – before final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   • Never-married parents – following final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   • Not sure
   • Other

Comments

c. IF YES: For which issues is face-to-face family mediation (or other face-to-face ADR processes) needed for parents with limited resources?
   • Non-financial child related issues (e.g., parenting time, decision-making authority)
   • Negotiation of child support between the parents
   • Child support enforcement
   • Division of property and other financial issues
   • Other: ____________
   • Not sure
d. IF YES: What would courts in your state require in order to meet the need for face-to-face mediation (or other face-to-face ADR processes) for parents with limited resources? (Check all that apply.)
   - Funding
   - Leadership
   - Greater staff time
   - More volunteer mediators
   - Stakeholder buy-in
   - Technical support
   - Other: ____________________________
   - Other: ____________________________
   - Not sure

Comments

e. IF NO: Please let us know why there is no unmet need for face-to-face family mediation (or other face-to-face ADR processes) in your state.

f. Is there an unmet need for family ODR (e.g. video-conference mediation, ODR platform) in your state?
   a. Yes
   b. No
   c. Not sure

Comments

g. IF YES: For which situations is family ODR needed? (Check all that apply in your state.)
   a. Divorce – Pre-decree
   b. Divorce – Post-decree
   c. Never-married parents – before final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   d. Never-married parents – following final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   e. Not sure
   f. Other: ____________________________

Comments

h. IF YES: For which issues is family ODR needed? (Check all that apply in your state.)
a. Non-financial child related issues (e.g., parenting time, decision-making authority)
b. Negotiation of child support between the parents
c. Child support enforcement
d. Division of property and other financial issues
e. Other: ____________
f. Not sure

Comments

i. IF YES: What would courts in your state require in order to meet the need for family ODR? (Check all that apply.)
   • Funding
   • Leadership
   • Greater staff time
   • More volunteer mediators
   • Stakeholder buy-in
   • Technical support
   • Other: ____________________________
   • Other: ____________________________
   • Not sure
   Comments

j. IF NO: Please let us know why there is no unmet need for family ODR in your state.

k. During the 5-10 years preceding the onset of the COVID-19 pandemic, how had support (e.g., budget, staffing) changed in your state for family dispute resolution?
   a. Support had increased
   b. Support had remained stable
   c. Support had decreased
   d. Unsure
   Comments

l. Prior to COVID-19, which dispute resolution services were available to court users in your state for family cases?

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<tr>
<th></th>
<th>Available statewide</th>
<th>Available in most jurisdictions</th>
<th>Available in some jurisdictions</th>
<th>Available in one or just a few jurisdictions</th>
<th>Not available</th>
<th>Not sure</th>
</tr>
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<td>In-person mediation</td>
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<td><em>Video-conference mediation using software, such as Zoom or Skype</em></td>
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<tr>
<td><em>ODR using an ODR platform, such as Modria (Tyler) or Matterhorn (Court Innovations)</em></td>
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<td>Other ADR or ODR: specify</td>
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**Comments**

*m. Since the onset of COVID-19, which of the following has been implemented by courts for family cases in your state?*

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<th></th>
<th>Statewide</th>
<th>In most jurisdictions</th>
<th>In some jurisdictions</th>
<th>In one or just a few jurisdictions</th>
<th>Not available</th>
<th>Not sure</th>
</tr>
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<tr>
<td><em>Video-conference mediation using software, such as Zoom or Skype</em></td>
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</table>
QUESTIONS ABOUT MEDIATION PROVISION

a. [IF MEDIATION IS PROVIDED] For what case types is mediation available to court users? (Check all that apply in your state.)
   a. Pre-decree divorce
   b. Post-decree divorce
   c. Never-married parents – before final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   d. Never-married parents – following final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   e. Not sure

b. [IF MEDIATION IS PROVIDED] For what issues is mediation available to court users? (Check all that apply in your state.)
   a. Non-financial child related issues (e.g., parenting time, decision-making authority)
   b. Negotiation of child support between the parents
   c. Child support enforcement
   d. Division of property and other financial issues
   e. Other: __________________________
   f. Not sure

Comments
7. Other: __________
8. Not sure
Comments
d. If mediation is provided at no-cost to the parents, who takes on the expense of mediation? (Check all that apply in your state.)
   1. The court pays staff or private mediators
   2. The court pays mediators a portion of the cost
   3. Mediators provide the service at no-cost
   4. Other: _______________
   5. Not sure
Comments

QUESTIONS ABOUT ODR PROVISION

For the following questions, please keep in mind that we are particularly interested in ODR for parents who are:
   • poor or low-income
   • self-represented
   • don't have access to lawyers and mediators for other reasons, such as living in a rural area

a. [IF ODR IS PROVIDED] For what case types is family ODR provided? (Check all that apply in your state.)
   1. Divorce – Pre-decree
   2. Divorce – Post-decree
   3. Never-married parents – before final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   4. Never-married parents – following final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
   5. Not sure
Comments

b. [IF ODR IS PROVIDED] For what issues is ODR provided? (Check all that apply in your state.)
   1. Non-financial child related issues (e.g., parenting time, decision-making authority)
   2. Negotiation of child support between the parents
   3. Child support enforcement
   4. Division of property and other financial issues
   5. Other: _____________
6. Not sure
Comments

c. [IF ODR PROVIDED] What is done if parents cannot afford ODR? (Check all that apply in your state.)
   1. All parents can participate in ODR at no cost regardless of their ability to pay
   2. Parents who can’t afford to pay can participate in ODR at no cost
   3. Parents are offered a sliding scale payment schedule, with some participating at no cost
   4. Parents are offered a sliding payment scale, with everyone paying something
   5. Parents can negotiate their fee with the online mediator
   6. ODR is not required if parents can’t afford to pay
   7. Other: _____________________
   8. Not sure
Comments

THE FUTURE OF MEDIATION AND ODR IN YOUR STATE

a. Once the pandemic has abated, what do you expect will happen in your state regarding in-person mediation of parenting plans for parents with limited resources?
   1. Availability will increase
   2. Availability will remain stable
   3. Availability will decrease
   4. Not sure
Comments

b. Once the pandemic has abated, what do you expect will happen in your state regarding mediation of parenting plans via video-conference (such as Zoom or Skype) for parents with limited resources?
   1. Availability will increase
   2. Availability will remain stable
   3. Availability will decrease
   4. Not sure
Comments

c. Once the pandemic has abated, what do you expect will happen in your state regarding ODR platforms for parenting plans (such as Matterhorn or Modria) for parents with limited resources?
   1. Availability will increase
   2. Availability will remain stable
3. Availability will decrease
4. Not sure

Comments

d. [IF NO STATEWIDE ODR in MATRICES] What is the status of family ODR in courts that have not yet implemented ODR?
   1. Our state judiciary is working on ODR
   2. One or more courts are looking into implementing family ODR
   3. One or more courts are in the process of developing a family ODR program
   4. Courts in my state aren’t pursuing family ODR
   5. Other
   6. Not sure

Comments

e. [IF Q28 is not Courts in my state aren’t pursuing family ODR] Has COVID-19 played a part in court decisions to implement family ODR?
   1. Yes
   2. No
   3. Not sure

Do you have any further comments about this?

f. Follow Up to Answers to Question 28
   [If d is selected in Q28] What are the reasons courts in your state are not pursuing family ODR?

   [IF b or c is selected in Q28] When do you think courts in your state might launch family ODR?

   g. If answer a, b, or c, is selected in question 28, follow up with:

   1. What led courts in your state to decide to develop family ODR?
   2. How are courts in your state funding the development and long-term maintenance of family ODR?
   3. What else would you like to add about your state’s experience with family ODR?

   h. Anything else you would like to say about family ODR?
APPENDIX 5

EXPERT SURVEY – QUESTIONS

Name: ______________________________

- Do you think there is a need for parenting plan ODR? to serve parents and courts with limited resources
  Parenting plan ODR is for non-financial child-related issues, which generally include parenting time (also known as visitation, or physical custody) and decision-making authority regarding such topics as medical care, education and religious upbringing (also known as legal custody),?

  Remember that we are defining ODR as an opportunity for parents to reach resolution using technology such as video mediation, negotiation or mediation by exchanging written communication on an ODR platform, and guided online interviews that enable parents to compare their preferences for resolution.

- Yes
- No
- Not sure
  (If No, do not show questions 5 - 11.)

Please explain your answer.

- Do you think there is a need for ODR to resolve financial issues, such as child support and division of property, to serve parents and courts with limited resources?
  - Yes
  - No
  - Not sure

Please explain your answer.

- Which of the following case types are suitable for family ODR? (Click all that apply.)
  - Pre-decree divorce
  - Post-decree divorce
  - Never-married parents — before final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
o Never-married parents — following final judgment for allocation of parental responsibilities (parenting time and decision-making authority)
o None of the above
o Not sure

Is there more you would like to say about this?

• For which of the following is family ODR NEVER suitable? (Click all that apply.)
• Cases involving allegations of intimate partner violence
• Cases involving a high conflict relationship
• Cases in which at least one party does not have the literacy skills to participate
• Cases in which at least one party does not have the cognitive capacity to participate
• Cases in which one parent has a lawyer and the other does not
• None of the above
• Other: __________________________________________
• Not sure

Is there more you would like to say about this?

THE NEXT QUESTIONS FOCUS ON ODR FOR NON-FINANCIAL CHILD-RELATED ISSUES (PARENTING PLAN ODR)
ODR for non-financial child-related issues generally includes parenting time (also known as visitation and addressing such topics as the weekly schedule, holidays, vacations), decision-making (also known as custody and addressing topics such as medical care, education and religious upbringing), and related issues. Here we are using the term “parenting plan ODR” for ODR related to these issues.

• If parenting plan ODR were developed, what would courts need to make it accessible financially to parents with limited resources?

• If parenting plan ODR were developed, what would be needed to ensure that its user interface is comprehensible to all parties, including those with disabilities or limited literacy?

• If parenting plan ODR for parents and courts with limited resources were developed, how could it be designed to address ethical considerations, such as privacy, confidentiality, transparency competency, or any others?

• What would need to be done for courts and other stakeholders to embrace the adoption of parenting plan ODR for parents and courts with limited resources?
• If parenting plan ODR for parents and courts with limited resources were developed, how could its development and long-term maintenance be supported financially?

• What benefits would you expect would come from ODR for parents and courts with limited resources?

• What concerns do you have about ODR for parents and courts with limited resources that you haven't already mentioned?

• What else would you like to add?
APPENDIX 6

GATHERINGS OF EXPERTS – TOPICS

The following are the topics assigned to small groups during the three gatherings of experts.

ACCESSIBILITY

1. Parties having access to a device with which to participate in ODR
2. Parties getting online to participate in ODR
3. Parties who have limited technical literacy
4. English-speaking parties who have limited literacy
5. Parties whose first language is not English who have limited English literacy
6. Challenges faced by individuals with disabilities
7. Challenges faced by thinly resourced parents/courts
8. Challenges faced by people who have experienced intimate partner violence (IPV)

ETHICALITY

1. Confidentiality
2. Data security
3. Neutrality and impartiality
4. Self-determination and procedural justice
5. Transparency in family ODR
6. Safety in family ODR
7. Fairness of process and fairness of outcome

EFFECTIVENESS

1. How we would know that ODR is beneficial to parents (two groups)
2. How ODR is beneficial to parents
3. How we would know that the technology was good (two groups)
4. How we would know that the dispute system design was good

FEASIBILITY AND SUSTAINABILITY

1. How to fund family ODR
2. Who should provide family ODR

56 We used the term “good” as an intentionally vague signifier. We left it to the experts to decide how to define it.
3. What to do if there were no human resources available to work on ODR
4. To what extent ODR should be required or voluntary
5. What characteristics are absolutely necessary for a family ODR program
6. What courts would need to adopt ODR
APPENDIX 7

GATHERINGS OF EXPERTS – RESULTS

We used the framework we developed for this project — need, accessibility, ethicality, effectiveness, feasibility and sustainability — to organize the questions we posed to the experts during the gatherings. This appendix, therefore, also uses the framework to present a summary of the experts' input. There is one additional section at the end of this appendix: Design. It is separate because it presents a set of ideas that overlapped elements of the framework.

Note: The experts covered a wide array of issues, an overview of which is discussed below. This appendix presents the experts’ brainstormed ideas with limited changes from the way the facilitators noted them during the gatherings. The experts were not asked to reach agreement on their suggestions, so some ideas may conflict with others, and not all experts support all these ideas. This appendix is intended to provide an idea of the breadth of the discussions and perspectives. It is not a transcript, and we have not added explanations here, so some ideas may stand on their own more readily than others.

ACCESSIBILITY

During the gatherings of experts, they discussed the following issues related to accessibility:

- Parties having access to a device with which to participate in ODR
- Parties getting online to participate in ODR
- Parties who have limited technical literacy
- Parties who have limited English proficiency (or any other language in which ODR is offered)
- Challenges faced by individuals with disabilities
- Challenges faced by thinly resourced parents/courts
- Challenges faced by people who have experienced intimate partner violence (IPV)

Experts said ODR should adhere to the following guidance, with regard to accessibility:

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57 For more, see the Framework section of the report.
58 Experiencing intimate partner violence, also called domestic violence, can result in unsafe situations for survivors and their children, and it can leave them unable to negotiate on their own behalf. For more, see Screening, in the Findings and Recommendations section of the report.
PARENTS SHOULD:
- Have free access to Wi-Fi at multiple locations
- Be screened to identify any barriers related to intimate partner violence, disability, literacy, and access to and comfort with technology

WITH REGARD TO DISABILITY, ODR SHOULD:
- Follow universal design and the Web Content Accessibility Guidelines
  - Use an uncluttered design
  - Ensure screen readers can work
  - Take color blindness into consideration

WITH REGARD TO LITERACY, ODR SHOULD:
- Use plain language that is easy to read, going no higher than a sixth-grade reading level
- Offer a glossary of terms, with examples of legal and other terms
- Use graphics and ensure information is visually consumable
- Provide services in multiple languages or translate ODR using court language-access services or machine language translation

IN GENERAL, ODR SHOULD:
- Work on phones, tablets, laptops and computers
- Be affordable
- Offer information in many forms, e.g. video, audio, written word

ETHICALITY
When we asked the gathered experts about ethical ODR, we defined “ethical” very broadly. We posed questions related to the following topics:
1. Confidentiality
2. Data security
3. Neutrality and impartiality
4. Self-determination and procedural justice
5. Transparency
6. Safety
7. Fairness of process and fairness of outcome

Experts said that ODR should adhere to the following guidance, with regard to ethicality:
CONFIDENTIALITY

- Guidelines, policies, rules or other documents clearly explain what is and is not confidential or privileged in ODR
- Procedures to protect confidentiality are in place

DATA SECURITY

- Guidelines, policies, rules or other documents clearly explain data security, e.g., all data encrypted while in transit
- Parents are educated about data security, and limits to it
- One parent cannot find out information about the other parent, e.g., address, contact information

FAIRNESS AND PROCEDURAL JUSTICE

- Courts work with ODR hosts to ensure that ODR provides fairness and procedural justice

FAIRNESS OF OUTCOME

- Agreements are reviewed by judges before they are finalized
- Parents have time to review draft agreements with whomever they choose before finalizing
- Parents clearly understand they can say no to any recommendation from artificial intelligence or otherwise in ODR
- Results are fair for children

FAIRNESS OF PROCESS

- Power imbalances are addressed
- Screening questions provide for a fair process
- Both parents are comfortable with process and feel competent to engage in it
- Parents are not penalized for not using ODR with extreme measures such as losing their case or having their case dismissed

PROCEDURAL JUSTICE

- Parents feel heard, e.g.:
  - They had a voice
  - The forum felt fair
  - They felt they were treated in an even-handed manner
  - They felt they were treated with dignity
• ODR has a human feel to it
• Parents are asked their opinion of ODR
  o That input is analyzed regularly, and changes are implemented based on it

IMPARTIALITY
• ODR is impartial, whether or not a person is involved
  o Policies support impartiality
  o Language is balanced
  o Information for both parents is provided
• ODR is perceived as impartial, e.g., branded as a court site
• ODR educates parents about:
  o How the ODR process will work
  o What will and won't be shared with the court
  o How data will be used and not used
• ODR is culturally competent so it does not inadvertently send an unbalanced message

INFORMATION AND EDUCATION
• ODR is clear about which entity, e.g., court or vendor, is responsible for which aspects of ODR information and education
• Information and education are available prior to and during use of ODR
  o During use of ODR, information is related to topics a parent is working on
• Information and education are provided in many ways, e.g.:
  o Content on the site
  o Tutorial for parents
  o Chatbot on the site
• ODR links to other sites
  o Child support calculators
  o Legal services that provide legal assistance
    ▪ Unbundled legal services
    ▪ Lawyer referral service
    ▪ Legal aid when available
  o Legal information
• Information and education cover a wide array of topics, e.g.:
  o Parenting
  o Parents’ rights and responsibilities
  o Children’s needs
  o How ODR works and its features, etc.
  o Impact of conflict on children
Child development and age-appropriate parenting plans
Info on how other parents have solved similar problems

Information is impartial
Parents are not overwhelmed with too much information
Time required for education is balanced with likely limited time parties have available to use ODR
Information and education do not assume what parents already know

INFORMED CONSENT
Parties receive a clearly visible explanation/disclaimer at the beginning, which is transparent about what data is collected, how it is managed and related risks
Parties have access to legal information, and IPV survivors can choose whether to participate or not
Parties are informed of:
The limits and benefits of ODR
The extent to which ODR is confidential and/or there is a privilege for ODR
How voluntary or mandatory participation in ODR is and any timelines and potential consequences if they are not met
What happens if agreement is or is not reached

SAFETY
Every parent is screened via a live telephone conversation prior to using ODR to determine whether they can safely participate in ODR and exercise self-determination in ODR
Screening also identifies other potential barriers to effective use of ODR and ensures each parent:
Has access to ODR, including access to a device, to the internet and to enough bandwidth or data to participate
Is sufficiently comfortable speaking and reading English (or other languages in which ODR is offered) that they can use ODR
Has access to accommodations for disabilities as needed to enable their use of ODR
Is not so impeded by mental health or substance abuse issues that they are unable to use ODR

TRANSPARENCY
ODR is transparent and makes available:
Monitoring reports
Evaluations
o Data privacy policies
  o Ethical guidelines
  o Information on how data is retained, managed and secured
  o Information on who is operating ODR
  o Information on what data ODR captures
  o Information on who owns the data
  o Results of judicial review of agreements
  o A document listing all the questions that are asked on ODR platform
  o A document listing all the information that is provided on ODR platform
  o Information on how ODR algorithms function

EFFECTIVENESS

The gathered experts had wide-ranging discussions about what would indicate family ODR is effective. In these discussions, the experts considered effective ODR mostly in terms of how it would benefit parents, children and courts. They also said ODR should be monitored and evaluated regularly, including asking parents for feedback, to determine effectiveness.

Experts said the following would indicate that ODR is effective:

ODR IS BENEFICIAL FOR PARENTS WHEN IT:
  • Enables parents to move forward smoothly, reducing delays and limbo
  • Improves co-parenting relationships between parents
  • Results in workable parenting plans with which the parents comply
  • Is cost-effective, e.g., reduces court visits, is free for those who cannot pay and offers a sliding fee scale for others as needed
  • Is culturally appropriate to all users, including various languages
  • Provides a fair space where power imbalances are addressed

ODR IS BENEFICIAL FOR CHILDREN WHEN IT:
  • Reduces conflict between parents
  • Produces agreements that are safe for children and promote their well-being
  • Promotes relationships that are healthy for children
  • Protects children's privacy

ODR IS BENEFICIAL FOR COURTS WHEN:
  • It is cost-effective for courts
  • Parents use ODR, completing the process and reaching agreement when possible
• It narrows issues for a judge to resolve (when needed)
• Agreements reached in ODR are easily reviewed by judges
• ODR due process is the same as, equivalent to or acceptable to the court
• It does not increase liability or exposure for courts
• It provides quality neutrals (when they are involved)
• It benefits the public's view of the courts

FEASIBILITY AND SUSTAINABILITY

When the gathered experts discussed feasibility and sustainability, we posed questions about the following topics:

1. Who should provide family ODR
2. How to fund family ODR
3. What to do if there were no human resources available to work on ODR
4. To what extent ODR should be required or voluntary
5. What characteristics are absolutely necessary for a family ODR program
6. What courts would need to adopt ODR

The experts’ discussions of these topics fell into one of two categories: who should provide family ODR and how family ODR should be funded.

PROVIDING ODR

The gathered experts had wide-ranging discussions about which provider might be the right home for family court ODR. They discussed:

Underlying Beliefs

• If there is a justice floor, family ODR would be a reasonable/expected plank in that floor
• If ODR is something like another form of court ADR, it would require:
  o Oversight, quality and a payment scale ranging from free to below-market pay

Potential Models

The posited four potential models:

• Model One: Stay completely out of implementation, and focus on setting standards
  o Vendors will embrace standards, and align their product with them, to remain competitive
  o A national institute could create repositories of forms and guidance for self-use, but largely, the vendors would provide services
• Model Two: Vendors, if they wish to participate, must offer some baseline service for free
  o They can offer add-ons for their profit
• Model Three: Courts will not need to be directly involved
  o Vendors can create parenting plans and generate division of asset forms to submit to the court, all as a private-sector, for-profit service
• Model Four: A national institution creating and maintaining a basic, functional, ODR platform
  o Any court could use it and adapt to local jurisdiction to some extent

Pros and Cons of Vendors
• Much of the activity has been vendor driven, which has been beneficial to kicking off processes
• However, it also comes at a cost/with limitations
  o Working with specific vendors limits the range of ideas and opportunities to the limitations of their software, business plan, etc.
• Utah is positive example of independent development
  o Developed its platform as open code
  o Can be used and improved by partner state systems

National, State or Local
• ODR must have local credibility, but there is also value in national leadership, which might develop standards and best practices.
• A balance is needed among national, state and local involvement
  o A national-level entity (institution, agency, NCSC or similar entity, or a collaboration among several groups endorsing agreed-upon frameworks) could provide support and guidance
  o State-level implementation and operation to stay focused on relevant areas, and:
    ▪ Address the diversity of the state in terms of economics and needs
    ▪ A homegrown system to meet the state’s requirements would be more acceptable
    ▪ If state has a good IT department, homegrown ODR would work better
  o Individual counties wouldn’t have much of a reach
    ▪ Not as appealing to funders
    ▪ Could be available statewide, with individual counties signing on
When the gathered experts discussed how to fund family ODR, they offered some guidance and posed some questions; for example:

**Big Picture**
- Funders are more likely to fund development than maintenance.
  - Big challenge will be sustainability, e.g., IT support, screeners for IPV, payroll, etc.
- Funders are interested in a project that is replicable in other places:
  - Needs to be portable from state to state, not rebuilt for each state

**Funding Strategies**
- Need input from people who are skilled in public and private financing who know how to put together financial structures to do this in a significant way

**Cost to Parents & Courts**
- If court system is thinly resourced, who pays?
  - Cost should not be passed on to users/parents when they are also thinly resourced
- How does the court absorb cost of waived fees?
- Are parent education programs a model?
  - Most parents pay something, but fee can be waived

**Potential Sources of Funds**
- JAMS Foundation
- Legal Services Corporation
- State Justice Institute
- Professional organizations
  - E.g., bar associations and foundations, American Association of Matrimonial Lawyers
- Big tech and other big corporations
  - Especially those that interface with legal systems, e.g., Microsoft, Salesforce, Westlaw, Lexis/Nexis
- State legislatures
  - Would need a champion
- Courts
  - Filing fees are already high, so unlikely source
  - Line item in budget, but courts are often thinly resourced
AN ADDITIONAL THEME: DESIGN

A new theme that emerged from the discussions among the experts was design. We defined this term very broadly to capture ideas ranging from dispute system design to user testing. The experts’ ideas about design do not fit neatly into one part of the framework, so recommendations are collected here.

EXPERT INPUT REGARDING DESIGN

One overarching comment about design was that it should be elegant and centered on the public good. Experts discussed the following characteristics — in three categories — that ODR should include.

Pre-Design
- ODR goals, ethics, guardrails, etc. are clearly defined
- Developers and designers understand and work based on what is expected of them
- Court understands how ODR operates
- There is no assumption that “if you build it they will come”

Design Stage
- Engage in human-centered design
- Involve a user experience researcher
- Include game industry experts on design team
- Include all stakeholder groups in design
- Test ODR with individuals like those who would use ODR
- Conduct user testing prior to and after implementation

Usability
- Easy to use
  - Step-by-step process
  - Easy to get information and other resources
- Easy to understand
  - Language and design are geared toward average user
  - ODR is multilingual or able to include an interpreter
  - Communications use visual and auditory modes, not just text
  - ODR understands voices with a variety of accents
- Positive experience
  - Parents are acknowledged and encouraged as they work through ODR
  - Language is non-coercive
- Beneficial timing
Timelines for achieving milestones in ODR are reasonable and keep the case moving.
ODR is asynchronous whenever possible to broaden the time period when ODR is available, e.g., during evenings and weekends.

- Flexible agreements
  - Parents are able to reach partial agreements
  - Parents are able to tailor agreements
APPENDIX 8

INNOVATIVE PARENTING SOLUTIONS ONLINE — DESCRIPTION

This appendix is a concept paper, describing an idea developed by RSI for online dispute resolution of non-financial parenting issues between self-represented parents in Illinois. The concept has not been developed or implemented.

THE NEED

When parents split up — whether married or not — decisions must be made about non-financial matters involving their children, such as holiday schedules, weekly schedules, and how the parents will make decisions about issues such as education, health care and religious upbringing. When faced with these decisions, the result is often stress, confusion and conflict.

TOUGH ON CHILDREN

Research has shown that ongoing parental conflict can lead children to be aggressive and violent, or withdrawn and depressed. They can become irritable, regress in language and have sleep disturbances.

DIFFICULT FOR PARENTS

Parents often do not have access to lawyers to guide them and help ease the conflict. For example, in 70% of family cases in Illinois, at least one parent doesn’t have a lawyer, and in 30% of cases, neither parent does. This is not unique to Illinois. This high proportion of self-represented parents means they often don’t know:

- what they need to agree on
- what the law says
- what parents usually do

CHALLENGING FOR JUDGES AND LAWYERS

Because judges cannot offer legal advice and the parties are often quite emotional, the cases in which parents are representing themselves can be particularly challenging. Family cases are especially demanding for lawyers who are representing one parent when the other is not represented.
THE RESPONSE — HISTORICALLY

Recognizing this need, and the efficacy of mediation to help parents reach agreement, the Illinois Supreme Court has long mandated mediation of disputed non-financial matters (as have other states across the country). Unfortunately, availability of affordable mediation varies greatly across judicial circuits. The Circuit Court of Cook County is the only judicial circuit employing full-time staff mediators who are available for all cases. Other counties use a combination of pro bono, sliding scale and court-subsidized approaches to provide mediation when they can. One Illinois county (Peoria) has contracted with a vendor to pilot online dispute resolution services.

THE ANSWER — INNOVATIVE PARENTING SOLUTIONS ONLINE

Evolving technology now offers the possibility of assisting parents to resolve their conflicts using an online dispute resolution (ODR) platform. ODR can help unrepresented parents smoothly and expeditiously reach agreement on non-financial parenting issues. These include holiday schedules, weekly schedules and how the parents will make decisions about issues such as education, health care and religious upbringing. Imagine TurboTax for parenting, but with the added feature/challenge of helping two people who are probably in conflict reach agreement.

THE ONLINE DISPUTE RESOLUTION PROCESS

Following best practices, each parent would be screened individually for intimate partner violence, also known as domestic violence, via telephone prior to using the platform. Screeners would also ask whether each parent has a device and online access to the platform, as well as whether there are any other potential barriers to using ODR, such as literacy issues, disabilities that need accommodation, discomfort with technology, lack of access to reliable information, or other circumstances that may form barriers. Additional assistance, workarounds, or excusal from ODR would be determined for those encountering barriers.

The parents would begin to use the platform by proceeding through initial, asynchronous steps that would require no human intervention. To make the platform easy to use, it would pose bite-sized questions, one on each screen. Parents would click to select among options, thereby reducing the need for parents to write out what they want.

The platform would educate parents about what they need to resolve by guiding them step-by-step through the issues. It would offer access to legal information and information about what similarly situated parents typically do for each issue as they work through it.
If parents do not reach agreement, they could proceed to virtual mediation with a live mediator. At any point in the process, when parents reach agreement, they could forward their agreement to the court for review and approval.

ASYNCHRONOUS STEPS

- To find the low-hanging fruit, the platform would:
  - Guide each parent through the issues
  - Ask their preference for each issue
  - Compare the preferences
  - Produce a report identifying areas of agreement and disagreement

- To facilitate negotiation, the platform would:
  - Identify issues on which the parties are close to agreement
  - Enable them to communicate via the platform (which would feel similar to texting) and see what they can resolve

- To develop a draft parenting plan, the platform would:
  - Guide parents through each area of disagreement and ask them to indicate how strongly they feel about their position on each issue
  - Use machine learning to derive the plan from the parents’ agreements, their preferences, their school and work schedules, and data from similar users of the platform

SYNCHRONOUS MEDIATION STEP

- If there are parts of the draft parenting plan the parents still don’t agree on, they would be offered the opportunity to participate in a synchronous video mediation with a live mediator.

At any point in the process, when the parents reach agreement, it will be sent to the court for approval.
PILOT AND SCALABILITY
The idea is to pilot this process in three to four jurisdictions in Illinois, ranging from densely to sparsely populated, with courts mandating that self-represented parents at least try the first asynchronous step to see what they can resolve. The pilot would enable RSI to work out any issues with the platform, iterate improvements and demonstrate to all counties throughout Illinois that the platform could work in their jurisdictions. From Illinois, it could be adapted and scaled to other states.

CONCLUSION
The COVID-19 crisis demonstrated the need to think innovatively about how society functions. This should include exploring the potential for technology to reduce conflict between parents that can be so damaging to children.

RSI’s decades of experience improving access to justice by developing, operating and evaluating court alternative dispute resolution has demonstrated the need for Innovative Parenting Solutions Online. Now is the time to take advantage of new technology and turn this family ODR concept into reality — a reality that would provide a new way to address abiding problems in society.
APPENDIX 9

NATIONAL SURVEY OF STATE COURTS — RESULTS

BACKGROUND

This survey is part of a larger project exploring the potential for online dispute resolution (ODR) to help thinly resourced parents to resolve their disputes, particularly in courts and communities that have limited resources. The purpose of the survey is to understand the landscape of family ADR and ODR in the states, to learn about their efforts to provide ODR and, for those who had implemented ODR, to gain insights from their experience.

The survey was sent to court or ADR administrators in 36 states and Washington, DC. People from 24 states and Washington, DC, completed the survey. The responses are skewed toward those with statewide ADR offices, as 14 of the 24 states represented in the survey have statewide ADR offices (and the District of Columbia has a districtwide office). This is 60% of the respondents. In contrast, of the total possible sample of states (and DC), only 39% (20 of 51) have ADR offices.

For the survey, we defined ODR broadly, as both video-conference mediation such as Zoom and formal platforms, such as Modria and Matterhorn. We also asked the respondents to concentrate on family dispute resolution for parents and courts with limited resources. That is, we asked them to focus on parents who are not able to pay for dispute resolution services and courts that lack the resources to provide these services at no cost.

OVERVIEW

All but two of the responding states have at least one staff person dedicated to ADR part-time. However, having an ADR office makes it more likely that the state court administrative office has full-time staff dedicated to ADR. Ten of the 15 states with an ADR office have at least one full-time person dedicated to ADR; only three of the ten states without an ADR office have full-time staff dedicated to ADR.

In the majority of represented states, the state provides some form of funding. However, these states range from minimally supporting to fully supporting ADR for court users. As with staffing, those states with ADR offices are more likely to provide some support for ADR programs. All but one of these fund ADR in some way, with ten providing ongoing funding. In contrast, only six of the ten states without ADR offices provide any funding for ADR in the courts. Of these, two provide ongoing support.
Face-to-face (or in-person) mediation is available in all states represented in the survey, although it is available statewide in only 63% of them. With the need to adjust to COVID-19, states have made the switch to video-conference mediation, with almost half providing this statewide. Text-based platforms are much less widely used. Only seven states have such a service, and none has made it available statewide.

While face-to-face mediation is available in all states, more than half of the respondents said there was an unmet need for mediation in their state for parents with limited resources. Most of these said they lacked the funding and mediators necessary to meet that need. More than half said they required stakeholder buy-in, and about half said leadership was needed.

Almost all states have either implemented ODR statewide (in the form of video-conference mediation such as Zoom) or are in the process of implementing it. The two most common reasons for pursuing ODR are to increase access to justice and to respond to the restrictions placed on in-person services as a result of the COVID-19 pandemic. Funding appears to be the tricky spot for them, with eight respondents saying either they have yet to figure out funding for long-term maintenance or that individual courts were going to have to figure it out.

Despite the increased availability of online services, almost half of the respondents said there was an unmet need for family ODR, with an additional third saying they weren’t sure about the need for ODR in their state. Those who said there was an unmet need said that to meet that need their state needed funding, staff time and technical support, followed closely by leadership, stakeholder buy-in and mediators.

**STATE SUPPORT FOR ADR**

State support for family ADR varies greatly across the respondent states. Some have extensive staff dedicated to ADR; others have none. Some fully fund family ADR, allowing parents to participate at no cost. Others provide no funding at all. The majority have at least one full-time person devoted to ADR and provide at least some ongoing funding to support family ADR. In almost half of the responding states, support has not changed over the past five to 10 years, and in almost a third, support has increased.
Almost all states represented in the survey had staff dedicated to ADR. Having an ADR office makes it more likely that the state court administrative office has full-time staff dedicated to ADR, but staffing level varies significantly.

In the 15 states with ADR offices:
- Ten have at least one full-time staff person dedicated to ADR
- Four have more than one part-time person
- One has only one part-time person dedicated to ADR

Some respondents provided more detail about how much staff is dedicated to ADR in their state. The staff numbers ranged from two full-time people dedicated to ADR to three dozen full- and part-time staff.

In the ten states without ADR offices:
- Three have at least one full-time person dedicated to ADR
- One has more than one part-time person working on ADR
- Three have one part-time person
- In two states, no one works on ADR

At least two states do things a little differently. In one, the state ADR office oversees mediation in all civil contexts, including family financial issues, but not parenting plan mediation. Parenting plan mediation is under the aegis of the Administrative Office. Thus, responsibility for family ADR is divided between two agencies. In another, the state bar association has taken on responsibility for certifying mediators.

<table>
<thead>
<tr>
<th>Yes, at least one full-time person</th>
<th>56%</th>
<th>14</th>
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</thead>
<tbody>
<tr>
<td>Yes, more than one staff member works on ADR part-time</td>
<td>20%</td>
<td>5</td>
</tr>
<tr>
<td>Yes, one part-time person</td>
<td>16%</td>
<td>4</td>
</tr>
<tr>
<td>No</td>
<td>8%</td>
<td>2</td>
</tr>
</tbody>
</table>

| 25 |
FINANCIAL SUPPORT FOR FAMILY ADR

In the majority of represented states, the state provides some form of funding. However, these states range from minimally supporting to fully supporting ADR for court users. As with staffing, those states with ADR offices are more likely to provide some support for ADR programs. Among states with ADR offices, all but one fund ADR in some way, with ten providing ongoing funding (two of these fund non-profit organizations that provide mediation for the courts) and two paying for mediators for custody mediations. Two others provide seed funding for programs or projects (with one also providing free training to mediators).

In contrast, only six of the ten states without ADR offices provide any funding for ADR in the courts. Of these, two provide ongoing support, two have state statutes that allow for the collection of filing fees earmarked for family ADR, and two provide seed funding. One state that doesn’t fund ADR does provide free mediator training.

Funding sources and recipients vary in some states. When asked whether the administrative office of the courts provided funding, a few respondents noted that the funding source was not the administrative office, but instead was a judicial commission, a line item from the legislature, or a public university. In a few states, the funding flowed to non-profits, such as community dispute resolution centers, that provide ADR services.

<table>
<thead>
<tr>
<th>Support Type</th>
<th>Percentage</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>It provides ongoing financial support</td>
<td>48%</td>
<td>12</td>
</tr>
<tr>
<td>It provides seed funding for projects or programs</td>
<td>16%</td>
<td>4</td>
</tr>
<tr>
<td>It does not provide any support</td>
<td>20%</td>
<td>5</td>
</tr>
<tr>
<td>Grants to non-profits</td>
<td>8%</td>
<td>2</td>
</tr>
<tr>
<td>Provides for filing fees to be collected</td>
<td>8%</td>
<td>2</td>
</tr>
</tbody>
</table>

SUPPORT FOR ADR IN THE PAST 5–10 YEARS

According to the respondents, state support for ADR remains level or is rising. In almost half of the states represented, support has not changed. Support has risen in about one-third of them. Even so, in half of those states with stable or rising support, the respondents said there was an unmet need for mediation.
MEDIATION OF PARENTING TIME AND DECISION-MAKING AUTHORITY

Nine states mandate mediation for parenting time and decision-making authority issues. However, this does not always mean that mediation is available throughout the state. In at least one state with mandatory mediation, because courts must bear the cost of mediation, some rural courts have not implemented it. This has left parents in those jurisdictions without access to mediation.

Five states allow courts to mandate mediation for all cases involving contested parenting time and decision-making authority issues. An additional six states authorize judges to order mediation at their discretion. For this latter group of states, referral to mediation varies. This variation can be significant. For example, in one state, “Some courts do not refer at all; some localities have no nearby mediators available to mediate in person.”

Only one of the 25 respondents does not have a state statute or statewide court rule regarding mediation of parenting time and decision-making authority issues. That state does, however, have an administrative order for those judges who want to refer cases to mediation. Use of this order varies from county to county and judge to judge. In another state, by statute, mediation cannot be mandatory.

| State statute or statewide court rule mandates mediation throughout the state for cases involving disputes about parenting time and decision-making authority, with the option to opt out | 44% | 11 |
| State statute or statewide court rule permits individual jurisdictions to mandate mediation for all cases involving disputes about parenting time and decision-making authority, with the option to opt out | 20% | 5 |
| State statute or statewide court rule allows judges to order mediation at their discretion | 28% | 7 |
| There is no state statute or statewide court rule regarding mediation of parenting time and decision-making issues | 4% | 1 |
| Mediation cannot be mandated | 4% | 1 |
| Totals | 25 |
UNMET NEED FOR FACE-TO-FACE MEDIATION

In addition to asking whether face-to-face mediation was available, respondents were asked whether that availability met the needs of parents and courts in their state. If respondents said there was an unmet need, they were then asked for which case types that need was unmet and for what issues. They were also asked what resources would be required in order to meet that need. More than half of the respondents said there was an unmet need. The need was for all case types and all issues, and the resource most needed to meet the need was funding.

OF THE 13 RESPONDENTS WHO SAID THERE WAS AN UNMET NEED FOR FACE-TO-FACE MEDIATION, almost all said the need was for each of four case types: pre-decree divorce, post-decree divorce, never-married parents pre-judgment and never-married parents post-judgment. They also said there was a need for all issues involved in family mediation: non-financial, child-related issues; negotiation of child support; child support enforcement; and division of property. One person said the need was tied more to geography than case type, with rural areas not being served at all. Another said the issue was less about supply and more about demand — parents needed to be aware of the services being offered to them.

In response to the question of what would be needed to meet the need, the 13 respondents said the following:
- 10 — funding
- 9 — more mediators or more volunteer mediators
- 9 — stakeholder buy-in
- 7 — greater staff time
- 5 — leadership
- 4 — technical support

It is unclear why four people thought technical support was needed in their state in order to provide greater access to face-to-face mediation. One possibility is that they see the need for technology to support face-to-face mediation, such as for case management or roster maintenance. Another possibility is that the term face-to-face was confusing to some, who may have seen video mediation as being face-to-face as well. (Indeed, two respondents indicated this confusion.)

Six people said there wasn’t an unmet need. All six said the same thing — that mediation was available throughout the state and was provided for free or on a sliding scale, with no parents denied because they couldn’t pay. Finally, five said they were unsure whether there was an unmet need for face-to-face mediation.
UNMET NEED FOR FAMILY ODR

The respondents were asked the same series of questions for ODR as for face-to-face mediation. Their responses were similar as well, with almost half saying there was an unmet need for ODR, and almost all of those saying it was needed in all case types and for all issues. Funding was again the resource most needed in order to meet the need.

Almost all of the 12 respondents who said there was an unmet need for family ODR saw that need to be general in nature, across all case types and issues. All said that ODR was needed for pre-decree, non-financial child-related issues. All but two said it was needed for all four case types and all five issues.

In response to the question of what would be needed to meet the need, these 12 said the following:

- 9 — funding
- 9 — technical support
- 8 — greater staff time
- 8 — stakeholder buy-in
- 7 — leadership
- 6 — more volunteer mediators
- 3 — other, including education and time
- 1 — not sure

All four of the people who said there was no unmet need for family ODR said they already had video-conferenced mediation in place. One of these four said they also have phone mediation when parents don’t have access to technology, and another of the four said they planned to go back to in-person mediation when it is safe to do so. Finally, nine said they were unsure whether there was an unmet need for family ODR.

STATUS OF ADR AND ODR IN THE STATES

The respondents were asked two questions about the status of ADR and ODR in their states:

- Prior to COVID-19, which dispute resolution services were available to court users for family cases?
- Since COVID-19, which dispute resolution services are available to court users for family cases?

DISPUTE RESOLUTION SERVICES AVAILABLE FOR FAMILY CASES PRIOR TO COVID-19

Prior to COVID-19, face-to-face mediation was available in at least one jurisdiction in each of the responding states. In almost two-thirds of the responding states, it was available statewide. Video-conference mediation was available in at least two-thirds of the states, with
24% providing it statewide. ODR using an ODR platform was available in a few jurisdictions in six states.

<table>
<thead>
<tr>
<th></th>
<th>Available statewide</th>
<th>Available in most jurisdictions</th>
<th>Available in some jurisdictions</th>
<th>Available in one or a few jurisdictions</th>
<th>Not available</th>
<th>Not sure</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Face-to-face mediation</td>
<td>16</td>
<td>5</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>64%</td>
<td>20%</td>
<td>12%</td>
<td>4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Video-conference mediation</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>24%</td>
<td>8%</td>
<td>16%</td>
<td>16%</td>
<td>16%</td>
<td>20%</td>
<td></td>
</tr>
<tr>
<td>ODR using an ODR platform</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>6</td>
<td>15</td>
<td>4</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>24%</td>
<td>60%</td>
<td>16%</td>
<td></td>
</tr>
<tr>
<td>Early neutral evaluation</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td>8</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>8%</td>
<td>4%</td>
<td>8%</td>
<td>16%</td>
<td>32%</td>
<td>32%</td>
<td></td>
</tr>
<tr>
<td>Parenting coordination</td>
<td>3</td>
<td>1</td>
<td>6</td>
<td>2</td>
<td>6</td>
<td>7</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>12%</td>
<td>4%</td>
<td>24%</td>
<td>8%</td>
<td>24%</td>
<td>28%</td>
<td></td>
</tr>
</tbody>
</table>

In addition to the services described in the table, settlement conferences by court attorneys are available statewide in one state and “parenting time expeditors” are available in most jurisdictions in another state.

DISPUTE RESOLUTION SERVICES IMPLEMENTED BY COURTS FOR FAMILY CASES SINCE THE ONSET OF COVID-19

Since the onset of COVID-19, there has been a dramatic increase in the use of video-conference mediation, with almost 90% of responding states implementing it in at least one jurisdiction and half of them providing it statewide. The use of formal ODR platforms increased as well, but not as significantly, with six states implementing platforms in at least one jurisdiction. None provides access to an ODR platform statewide.
In addition, a respondent for a state that relies on individual practitioners to provide mediation said that those individuals have implemented video-conference mediation throughout the state.

**REDUCED-COST MEDIATION OR ODR**

All states have some provision for parents to access mediation at a reduced cost. In all but two states, at least some parents can obtain free mediation services. In nine states, parents are offered a sliding fee scale, with some receiving mediation at no cost. In an additional six states, parents can have their fees waived. In eight states, all parents are provided mediation at no cost. The responses were similar for ODR.

**IMPLEMENTATION OF FAMILY ODR**

Respondents were asked what states are currently doing to implement ODR. Five said ODR has been implemented statewide already. These were all states that implemented statewide video-conference mediation. Eight others said their states were pursuing implementation. Three said they were not.
Our state judiciary is not pursuing family ODR 13.0% 3
Other (write-in required) 8.7% 2
Not sure 21.7% 5
Total 23

REASONS FOR DEVELOPING FAMILY ODR
The most common reason the respondents gave for their state deciding to develop family ODR was to increase access to justice. This was followed closely by the need to respond to the restrictions placed on in-person services as a result of the COVID-19 pandemic. Other reasons included court modernization efforts, court efficiency and that it’s what the courts want in their state.

One person mentioned that the lack of mediators in some parts of their state led to the adoption of ODR so that mediators weren’t confined by geography when it came to the cases they could handle.

REASONS FOR NOT PURSUING FAMILY ODR
The three people who said their states are not pursuing family ODR pointed to lack of funds and lack of interest as the reasons:

“The state doesn’t see it as necessary or useful”
“Funding for the platform and lack of interest from stakeholders. Also, we would need proof that it will work. We have tried pilots with ODR in the past, with very little success to show for it.”
“There is currently no funding to purchase an off-the-shelf ODR system or staff to build a platform for statewide use.”

FUNDING TO DEVELOP AND MAINTAIN FAMILY ODR
Seventeen respondents provided insights into their funding strategies for ODR. The most common response was that they hadn’t yet figured out the funding. Others found funding through general funds or grants. Three were passing the cost to the parties either through fees for service or filing fees.

<table>
<thead>
<tr>
<th>Funding is to be determined</th>
<th>29.4% 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funding is up to the local court</td>
<td>17.6% 3</td>
</tr>
</tbody>
</table>
Others who responded did not refer to the source of funding. Two said funding was not required, one said not enough funding was available, and one said there were resources in place for the expansion of ODR.

### ADDITIONAL COMMENTS ON FAMILY ODR EXPERIENCE

Eleven people provided additional comments, with somewhat different perspectives. Five talked about how participants in video-conference mediation responded to their experience. Two said it was well received, with one saying it was there to stay and the other that it was as good as in-person. Two said pretty much the opposite. One said there was a mixed response from parties and mediators and that there wasn’t as much appreciation of video-conference mediation as they had anticipated. The other said that in-person was preferred over video-conference, and that they were already reverting back to in-person. A fifth person said there was initial resistance to Zoom mediations among attorneys and parties, which has evolved into acceptance, but not embrace, of the process.

Regarding court interest in ODR, again, two people gave opposite assessments. In one state, the respondent said there is growing interest. In the other, the respondent said few courts have requested assistance for developing ODR.

Two people said their experience with ODR was that it was a long process that takes time. One contrasted the large amount of time and effort to develop a formal text-based ODR platform with the ease of transferring mediation to Zoom. The other said initial resistance from the mediation community was tough to overcome. Consistent good results and education about cases for which ODR is appropriate have helped to change that. Another person said text-based ODR on an ODR-specific platform has not increased the court’s productivity. Virtual hearings, on the other hand have been very helpful and provided many benefits.

Other comments focused on what their states are doing:

<table>
<thead>
<tr>
<th>Source of Funding</th>
<th>Percentage</th>
<th>Number of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>General funds</td>
<td>17.6%</td>
<td>3</td>
</tr>
<tr>
<td>Grants</td>
<td>11.8%</td>
<td>2</td>
</tr>
<tr>
<td>Parties pay</td>
<td>11.8%</td>
<td>2</td>
</tr>
<tr>
<td>Filing fees</td>
<td>5.9%</td>
<td>1</td>
</tr>
<tr>
<td>Repurposing of staff</td>
<td>5.9%</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>17</td>
</tr>
</tbody>
</table>
• "We are trying to pilot Co-Parenter in child support establishment cases through the Child Access and Visitation Grant, which will allow parents to agree to parenting time before they arrive (virtually or physically) at their first Child Support Services meeting. The idea is to create the perception that using this app is part of the CSS establishment process and then the parents can use the app as work schedules change/schools close/open and parties want a quick way to come to agreements about parenting time with or without referral to a mediator."

• “My statewide team immediately developed instruction guides for parties/attorneys on preparing for ODR mediation which helped move the process along immensely.”

• “The ADR Commission...created a Technology Committee to review the ODR options and make recommendations for any rule changes or other training requirements for mediators that might be necessary as ODR continues to expand in the state.”

CONCLUSION

The surveys tell the story of the haves and have-nots. Some states have everything in hand when it comes to ADR, but about half of those who responded see an unmet need for both in-person and online services. They lack the funding and resources to make this happen. Their responses, too, indicate that they are interested in providing greater access to services. Thus, it appears that there is a need for assistance to the courts in providing greater access to justice through online dispute resolution options.
SURVEY OF EXPERTS — RESULTS

BACKGROUND
This 2020 survey of experts is part of a larger project exploring the potential for online dispute resolution (ODR) to help thinly resourced parents to resolve their disputes, particularly in courts and communities that have limited resources. The purpose of the survey was to inform the discussion topics for the gatherings of experts. All 37 experts who agreed to participate in the gatherings took the survey.

For the survey, the definition of ODR was deliberately kept broad for the purposes of the survey. The experts were told it included:

- Video mediation, such as mediation conducted via Zoom, Skype, WebEx, etc.
- A web-based platform that helps parents to negotiate or mediate by exchanging written communication on the platform
- A web-based platform that uses guided online interviews to enable parents to determine their preferences for resolution and compare them with the preferences of the other parent

Throughout the survey, the experts were instructed to think about how ODR could best serve parents and courts with limited resources.

OVERVIEW
Almost all of the 37 experts who responded to the survey are in agreement that ODR would be a welcome addition to the options available to parents, at least in some form. And almost all have reservations as well. A number explicitly stated that it shouldn’t take the place of other dispute resolution processes, particularly in-person mediation. Almost all said the parents would need to be supported when using the system, particularly if they had literacy or language difficulties. They also would need information to help them make decisions that should be provided in multiple formats.

The experts’ big message appears to be that ODR should be accessible to everyone, regardless of literacy, competence, disability or IPV status. This is seen in their comments about the situations in which ODR is never suitable. Many experts made comments that echoed one person’s statement that “never is too absolute,” noting instead that each case
should be assessed individually. The message is seen as well in their responses about the benefits of ODR, for which many said it has increased access to justice, and in some experts’ concerns that some parents would not have access to the process.

Another theme was many experts’ belief that sustainability requires not only sufficient funding, but also requires ongoing maintenance, monitoring for quality, updates for rule changes, technical support and user support. Thus, any ODR project will require significant inputs for its entire lifetime.

One final note: It is clear that some experts were responding with video-conferenced mediation in mind and others were responding with text-based ODR in mind. One respondent noted a few times that it was difficult to answer the questions because the answers were different depending on whether ODR was video or text-based.

**NEED FOR FAMILY ODR**

The experts were asked two questions about whether there is a need for ODR for family cases:

- Do you think there is a need for parenting plan ODR to serve parents and courts with limited resources?
- Do you think there is a need for ODR to resolve financial issues between parents?

**NEED FOR PARENTING PLAN ODR**

Parenting plan ODR was defined as ODR to resolve non-financial child-related issues, include parenting time (also known as visitation, or physical custody) and decision-making authority regarding such topics as medical care, education and religious upbringing (also known as legal custody).

Of the 37 experts, 35 said there was a need for parenting plan ODR for families and courts with limited resources. The other two were unsure. Almost half (16) added comments to their response. Their comments are discussed below.

**Caveats**

Almost half of the experts included caveats to their agreement that there is a need for parenting plan ODR for parents with limited means. The most common caveat, stated by five experts, was that ODR should not supplant other dispute resolution methods, but should instead be one of the options offered to parents. Two of these experts said ODR should not
supplant in-person mediation. Another said ODR should be voluntary and its use should be based on the parents’ informed decision.

Three other experts were concerned about the type of ODR that would be adopted. One thought written communication might be a barrier to some in the target population, while another thought that different methods — particularly different ways to conduct a guided interview — should be tested to determine which was the most effective. A third said the need for ODR depends on the community context. Further, she said that phone mediation should not be discounted and that some forms of ODR may be more suitable than others.

One expert noted the need for safeguards, particularly in the context of intimate partner violence. Another said there is a need for more access to dispute resolution, but that ODR may not be the right tool.

Wider ODR need suggested
Meanwhile, providing another perspective, three experts said the need was too narrowly defined. Two said ODR should be open to all parents, not just those with limited resources. The other said ODR should not be limited to parenting plans and suggested that parents would be more likely to use a process in which they could resolve all their issues.

Benefits of ODR
Three experts noted the benefits of ODR. They mentioned increased access to justice, the ability to triage cases, and the opportunity to help mediators pinpoint areas of agreement and disagreement prior to starting mediation. Another simply said that ODR for parents and courts with limited resources was a “critical need.”

NEED FOR ODR TO RESOLVE FINANCIAL ISSUES
The experts had the same opinions about the need for ODR to resolve financial issues as they did about the need for parenting plan ODR, with 35 of 37 saying it was needed and two not sure.
Comments
Those experts who had qualified their answers to the previous questions about parenting plan ODR had the same reservations for ODR for financial issues. Six, however, saw ODR in this context a little differently than ODR for parenting plans. Those who did weren’t necessarily in agreement.

One expert who viewed ODR for financial issues differently than ODR for parenting plans said that when there is a state formula for child support, it makes more sense for parents to complete the process online rather than to go to court just to complete a spreadsheet, indicating that in these instances, at least, coming to terms would be almost rote. Another thought ODR could be calmer than addressing financial conflicts in person and could lead to better communication. On the other hand, another thought that ODR for property division would be more challenging than parenting plans.

A couple of experts noted that ODR would be beneficial for financial issues. One of these indicated that those parents with limited resources often had the most need of assistance in resolving conflicts surrounding financial issues because they had “the greatest worry about survival regarding financial separation.” In contrast, another expert said that ODR for parenting plans should be the priority, although ODR for financial issues is needed.

SUITABILITY OF ODR
The experts were asked two questions about the suitability of ODR for family cases. The first asked them which types of cases were suitable for family ODR. The second asked for which situations family ODR was never suitable.

CASE TYPES FOR WHICH ODR IS SUITABLE
Almost all of the experts said that ODR was suitable for all four types of cases presented to them: pre-decree and post-decree divorce, and never-married parents before and after final judgment for allocation of parental responsibilities. They were least likely to say ODR was suitable for post-decree divorce cases; however, this was relative, with 86% saying these cases were suitable.

The ten experts who commented on this question all said the same thing — that ODR would be good for all cases regardless of the timing. A subset said that other factors were more important. These included having access to technology and the internet, that ODR be
voluntary, and that the parents are able to effectively participate (that is, they are free from coercion, abuse and threats and can exercise good judgment about their children).

**SITUATIONS IN WHICH ODR IS NEVER SUITABLE**

The experts were more divided when it came to which situations made cases unsuitable for mediation. The only two situations in which they thought ODR was never suitable were when at least one party didn’t have the cognitive capacity to mediate (83%) and when at least one party didn’t have the literacy skills needed to use ODR (66%). Fewer than half thought that other situations made ODR unsuitable: cases involving allegations of intimate partner violence (40%), cases involving a high-conflict relationship (17%), and cases in which only one party has a lawyer (14%). Five were unsure.

Seven respondents checked “other.” Their responses related to four areas, with no more than two responses fitting into each:

- When people have low technology skills
- When people have no access to technology
- When one or both parties don’t want to use ODR
- When there are issues of mental health or substance abuse

The main theme among the 19 who commented was that the term “never” as used in the survey question is too absolute and that there should be a priority in providing access rather than denying it. There were two reasons given for this. One was that whether parents should be referred to ODR depends on the particular situation in each case; no one should be categorically denied the opportunity to use the process. The second was that the referral process should be set up to either allow all parents access or give those who want it the tools to use it. This includes safeguards and screening, as well as some form of assistance if needed, including legal assistance.

Two talked about the need for self-determination. One of these noted the tension between self-determination and competence, but noted that any exclusion can’t be categorical. The other said that courts shouldn’t make decisions for parties; parties should be given info to make informed decisions.

One each said the following:

- Domestic violence is a concern, as well as comfort with technology. Also, concern about people who [are] hearing/sight impaired or speak other languages being able to participate
- Data from Utah indicates that ODR may be more beneficial than in-person for parents with limited English proficiency
- ODR should include high-conflict couples
WHAT IS NEEDED TO MAKE FAMILY ODR WORK

The experts were asked a series of questions about how to make parenting plan ODR for parents and courts with limited resources accessible, ethical, feasible and sustainable.

What would courts need to make parenting plan ODR accessible financially to parents with limited resources?

Most of the experts thought of financial accessibility in terms of fees for using the ODR service or the cost of the technology to access it. The 16 experts who talked about fees said ODR should be provided either for free, on a sliding scale or for a nominal fee. Presumably, in order to do this, courts would need funding or technical assistance, as five mentioned.

On the technology side, 13 experts said technology resources should be made available to parents either at the courthouse or elsewhere in the community. Suggestions include providing computer stations and Wi-Fi at the courthouse, the library, a community center or
a school. In addition, a few said that the platform needs to be mobile friendly. Seven experts said parents should have access to services when accessing ODR, such as a helpline, help desk, legal service lawyers or mediators.

*What would be needed to ensure that the ODR user interface is comprehensible to all parties, including those with disabilities or limited literacy?*

The experts had a number of suggestions for making the user interface comprehensible to all. Many focused on the ways in which ODR could be developed to allow everyone to effectively participate. In order of most to least cited, their ideas are:

- Use plain language
- Make sure the platform is translated into multiple languages, or, for video, that there is simultaneous translation or an interpreter available
- Provide additional information to help them make informed decisions and create agreements that will hold up in court
- Provide instructions in a number of different ways — written, video, voice, FAQs
- Ensure disability access through screen readers, closed captioning
- Offer voice activation

A few mentioned ways in which this can best be done:

- Use UX design for the platform
- Consult experts in design, disabilities, cultural competence and best practices
- User testing

A few others thought access should include active assistance to the parents. The solutions included in-person, phone and live-chat assistance by court staff; a navigator; technical support; and conflict coaching.

*How could parenting plan ODR be designed to address ethical considerations, such as privacy, confidentiality, transparency competency, or any others?*

The experts as a group were least clear about how to address ethical considerations, with nine saying they didn’t know how to respond or not answering the question. The most common responses were to consult experts or adopt already developed standards. Standards include those developed by The International Council for Online Dispute Resolution and National Center for Technology & Dispute Resolution, as well as those being developed by Pew Charitable Trusts and the National Center for State Courts.

Almost as many said that confidentiality and privacy policies should be developed and the participants should be clearly informed of them. Some noted that participants should be
made aware of risks as well as policies, and should be able to make an informed decision as to whether to opt out.

Other suggestions were:
- Adding some form of controls so that mediations can’t be recorded and text communications can’t be printed out
- Requiring confidentiality agreements
- Securing the platform with passwords, encryption, etc.
- Providing ongoing monitoring/support for the platform
- Auditing the platform regularly
- Reporting aggregated data on usage and outcomes to maintain transparency

A few pointed out that it would be extremely difficult to guarantee confidentiality and privacy. There is no way to check who is in the room with the participants, for example, and it may be difficult for some participants to find a private space.

*What would need to be done for courts and other stakeholders to embrace the adoption of parenting plan ODR for parents and courts with limited resources?*

By far, the experts were most likely to say that promotion of the benefits of ODR would be the best way to induce the courts and other stakeholders to embrace the process. Their thinking is that if ODR could be shown to have benefits for courts and parties, courts would be more likely to adopt it. For many, this meant piloting ODR in some courts, studying its impact and then promoting its successes. Along the same lines, a few suggested ODR would be embraced if the program was of high quality, and two said it would help that users’ safety was ensured.

Additionally, a few said courts might embrace ODR if they were provided sufficient resources to handle it, such as funding, staffing, training and technical support. Education of users and attorneys was cited by a few as well. Other responses included engaging stakeholders in the design process, finding a champion to get behind it, leadership and help centers.

Two said ODR wouldn’t be embraced unless the process was voluntary. Note, however, that two others were concerned that if the process was voluntary, people wouldn’t use it. Three said there would be no need to take action to get courts and stakeholders to embrace ODR because it’s already so popular.
How could the development and long-term maintenance of parenting plan ODR be supported financially?

The experts focused on three ways to finance and support ODR for parents and courts with limited resources. Sixteen thought that ODR could be supported at least partially through tax dollars, either through federal programs, the state legislature or by inclusion in the court’s budget. A couple noted that funding through the legislature or court budget would be more probable if ODR could be shown to save courts money. Thirteen said that ODR could be supported through user or filing fees. Grants and/or private investment were other popular ideas.

Other possibilities experts mentioned were to partner with a private entity or school, reduce costs by getting students to do some of the work, or ask mediators to provide free services.

BENEFITS AND CONCERNS

The experts were asked what benefits they expected to come from ODR for parents and courts with limited resources and what concerns they have about ODR for this population.

BENEFITS

The benefits to parents that experts most commonly cited were increased access to dispute resolution, cost savings, flexibility in the time and place for resolving their disputes, and reduced anxiety or other emotions when dealing with their disputes. These respondents thought it would benefit parents to be able to resolve their disputes without having to go to the court, which would reduce their costs and hassle for resolving their issues. If they didn’t have to go to court, they could deal with their dispute without having to take time off from work, find child care, pay for parking, etc. Some also said going to court is intimidating and can increase parents’ anxiety.

Other benefits noted by the experts were:
- Better communication between the parents
- Reduced conflict and negative emotions
- The ability to get help throughout the process
- Time to consider options
- Better outcomes

The experts who wrote about benefits to the courts were almost unanimous in expecting courts to see greater efficiency and cost savings through ODR. A couple also noted that offering ODR could improve the public perception of the court.
What concerns do you have about ODR for parents and courts with limited resources that you haven't already mentioned?

Sustainability was the major theme among those who wrote of their concerns about ODR, although it was cited by only a handful of experts. If an ODR platform is developed, it needs ongoing monitoring, maintenance and technical support, they said. Another concern was that ODR might reduce access to justice by precluding some from participating, such as those without access to technology or those in rural areas who don’t have access to the internet. Other concerns were:

- ODR would supplant other options, rather than be one option offered to parents
- Improper screening
- ODR’s inability to deal with power imbalances or abuse of process
- ODR can’t address issues such as the digital divide due to age, cognitive incapacity and physical disability
- ODR will reduce communication between parties
- It could be a process in which parties would be negotiating on their own, without a third-party neutral
- Improper assumptions might be built into the process if artificial intelligence is involved
- The focus will be on reducing the courts’ caseloads rather than increasing access to justice
- Courts with limited resources will be left out as a product is developed for better-resourced courts
- Courts won’t be ready for a long implementation process
- Voluntary programs won’t be used

What else would you like to add?

In response to a request for final comments, a few experts pointed to the need for human assistance and guidance for the parents. They noted the need for customer support, third-party neutrals and human intervention from mediators or lawyers. Comprehensive guidance and assistance with court forms will also be needed.

Aside from three people who said it was “an important project,” should be a “top priority” for courts, and was “valuable for non-financial child-related issues,” there was no other consistent theme in the responses to this question. The other responses were:

- No other project has included consumer-driven design or feedback for improvement
- Jurisdictional variability will be a hurdle to overcome
• Evaluation is necessary in order to garner future support. Also, start small and build support
• It is difficult to respond to the questions because video-conferencing is very different from a text-based platform. Also, what about phone?
• ODR is complicated for DV survivors
• We need to keep in mind that this may not work. Further, need to be able to triage cases out if necessary before damage is done.

CONCLUSION

The experts were enthusiastic, but cautious, about the possibilities for ODR. They see it primarily as a possible vehicle for increasing access to justice by reducing costs and stress to both parents and courts. However, they also see potential pitfalls that could limit ODR’s promise. ODR must be made safe, private and available to all. It must provide enough assistance that those with disabilities, low literacy, language barriers and limited access to technology can participate fully. Funding and sustainability are the biggest barriers to making ODR available to all parents and courts, not just those that can afford it.