

# The Value of Online Dispute Resolution in Family Law

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## Abstract

*Online dispute resolution is an incredibly powerful tool for litigants, particularly in the area of family law. In the United States, courts with flooded dockets in both metropolitan and rural areas have employed various online systems and software programs to help parties better work through issues. While ODR can provide such benefits as a quicker and less expensive resolution, it also presents some concerns which need addressed by the legal community. For example, many who would otherwise benefit from ODR may struggle with access to the necessary technology, or could greatly benefit from advice on how to phrase opinions in a neutral manner, so as not to derail an emotionally charged discussion. Further, while a history of domestic violence among parties necessitates screening, it is possible that they may be able to utilize ODR if counsel is present. Finally, to promote candor and problem-solving among the parties, all ODR platforms should be as secure as possible.*

**Keywords:** online dispute resolution, family law, access to justice, domestic relations cases, online mediation.

With overloaded dockets, societal advances in technology and the spread of COVID-19, more court systems are turning to online dispute resolution (ODR) to handle the workload. In family law, ODR can be a powerful tool for litigants, particularly those appearing *pro se*, to find solutions for the many issues presented in such an emotionally charged conflict. In order to understand how ODR can be a particularly useful tool for family law cases, it is important to first understand what exactly ODR entails, and how it generally operates. ODR is an incredibly useful tool for family courts to utilize, especially in light of the in-person restrictions due to the novel coronavirus, and should be incorporated into court systems across the country. In this article, I will give an overview of ODR and systems used by various courts and explain why it should be used in family courts across the country.

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## 1 Online Dispute Resolution and Its Role in Family Law Courts

Alternative dispute resolution involves non-traditional ways of finding solutions to parties' conflicts and can include mediation, negotiation or other collaborative methods. ODR uses technology to assist and supplement both traditional and online alternative dispute resolution.<sup>1</sup> Initially used to resolve Internet commerce disputes, ODR is now used in private and public spheres around the country to resolve issues in a wide range of subjects.<sup>2</sup>

It is fairly easy to learn how to operate an ODR system. While courts may use different software, there are general similarities among them. The parties can converse with each other via text-based communication. If a mediator is involved, they can engage in the conversation among the parties to enable resolution of the dispute.

In looking to avoid high courtroom litigation costs, parties may turn to mediation to resolve their disputes. Mediation involves a neutral third party who helps the parties reach a resolution through civil, constructive discussions.<sup>3</sup> The mediator's role is to help the parties openly talk about the issues underlying their case and potential solutions. A mediator might encourage parties to share information, be empathetic toward each other, and try to understand the other party's point of view.<sup>4</sup> As stated in the *Journal of the American Academy of Matrimonial Lawyers*:

The goal of mediation is to solve problems by tailoring solutions to the needs of the parties and the children. Numerous divorce attorneys contend that when parties go to battle in court for custody of their children, their focus on the fight does more harm than good. The adversarial system further denigrates the relationship between parties, makes it more difficult for parents to co-parent, and shifts the focus toward personal vindication rather than the child's best interest. However, "[t]he focus on the needs of the children is a hallmark of the mediation process." While the adversary system can promote conflict by driving a wedge between feuding parents, parties in mediation collaborate to brainstorm workable solutions. In this way, mediation can be much more constructive.<sup>5</sup>

In the family law context, ODR has rapidly evolved. The pioneering site *Mediationonline* provided a variety of mediation methods for divorcing parties, which

1 J.E. Grenig, 'Online Dispute Resolution', *Alternative Dispute Resolution*, Vol. 1, 2019, § 2:41.

2 *Ibid.*

3 S. Van Arsdale, 'User Protections in Online Dispute Resolution', *Harvard Negotiation Law Review*, Vol. 21, 2015, p. 107, at 112.

4 *Ibid.*

5 T. Luchs, 'Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence', *Journal of the American Academy of Matrimonial Lawyers*, Vol. 28, 2016, p. 455.

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included videoconferencing services.<sup>6</sup> Today, sites like *Up to Parents* start conversations by presenting a proposed settlement agreement, and the parties mark what they agree to adopt.<sup>7</sup> This results in a 'parental contract', which helps the parents see where they are in completing an agreement. Another site, *OurDivorceAgreement*, has crossed the ocean from America to Australia, offering mediation through conference calls, online audio and videoconferencing.<sup>8</sup>

There are several types of software courts might consider when adopting an ODR platform. One software program already popular in many states is *OurFamilyWizard*, which encourages collaboration among separated parents.<sup>9</sup> The software offers a multitude of services for parents:

This program is composed of tools such as an online calendar, access to information centers, address books, notice boards, reminders and access to important documents. After the parties fill out the relevant information, they have a first rate organizational tool that improves the flow of information and communications between them and organizes the daily schedule with respect to childcare and the needs of the children. In this manner, all of the relevant information (school and vacation schedules, the addresses of the children's barbers, dentists, the parents' rotations with respect to tasks involving the children, etc.) is kept together in one place shared by and accessible to each of the parents independently of one another. Beyond making the relationship between the parents 'business-like' and less hostile, there is an additional benefit in that the information is documented in a kind of historic archive, that is easy to view, and which can prevent unnecessary conflicts regarding the occurrence (or non-occurrence) of events, schedule rotations and division of tasks.<sup>10</sup>

While *OurFamilyWizard* provides multiple useful tools for divorcing couples, it does not involve mediation components. For example, while the parties are free to converse with each other on the platform, there is no neutral third party actively engaged in their conversation. It enables the parties to stay up-to-date with each other, but if there is a disagreement, it often results in attorney involvement as the parties are unable to resolve the issue themselves.

As Professor Amy Schmitz explains, family courts around the country have embraced ODR.<sup>11</sup> One such court is the 8th Judicial District Court of Clark County in Las Vegas, Nevada. This Las Vegas court instituted an ODR platform in

6 D. Lavi, 'No More Click? In Here: E-Mediation in Divorce Disputes—the Reality and the Desirable', *Cardozo Journal of Conflict Resolution*, Vol. 16, 2015, p. 479.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 A.J. Schmitz, 'Expanding Access to Remedies Through E-Court Initiatives', *Buffalo Law Review*, Vol. 67, 2019, p. 89.

order to provide efficient and timely justice for those seeking divorces.<sup>12</sup> Rather than navigate through the traditional litigation system with (or without) attorneys, parties using Clark County's platform efficiently resolve issues on their own. Prior to their meeting with a court-appointed mediator, the parents start a step-by-step online negotiation process that – if the matter remains unresolved – a mediator can use as a basis for a subsequent mediation session.<sup>13</sup> While typical mediations would take about 4 weeks to reach resolution, the online cases only take about 6 days, and 85% of those cases are resolved outside court operating hours.<sup>14</sup> The online platform allows the parties to avoid delays in scheduling, eliminates travel time and the need to take time off work and generally makes it easier to interact with the court.<sup>15</sup> If the parties are unable to resolve their dispute online, they still have the ability to appear in front of a judge and plead their case.<sup>16</sup> For a large metropolitan area such as Las Vegas and surrounding Clark County, ODR can be especially helpful.

But ODR in family courts is not limited to metropolitan areas. In fact, more rural areas have utilized platforms to address growing dockets in the court system. In Ottawa County, Michigan, their family court has implemented an ODR system to alleviate the pressure brought by child support cases.<sup>17</sup> That system connects court staff and case managers with both custodial and non-custodial parents over the secure system to encourage communication.<sup>18</sup> A case study revealed that the court addresses about 100 cases each week, resolving issues related to child support payments, parenting time and others.<sup>19</sup> In the first year of implementation, hearings decreased by 27%, failure-to-appear arrest warrants decreased by 36% and courtrooms and docket space have made room for cases unrelated to custody issues.<sup>20</sup>

## 2 Observations from These Approaches

One of the biggest advantages with ODR is that it can provide a speedy decision at a lower cost for the participants. "People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible".<sup>21</sup> Divorc-

12 Joint Technology Committee, 'Case Studies in ODR for Courts: A View from the Front Lines', 29 November, 2017, available at: [https://www.ncsc.org/\\_data/assets/pdf\\_file/0023/18707/2017-12-18-odr-case-studies-revised.pdf](https://www.ncsc.org/_data/assets/pdf_file/0023/18707/2017-12-18-odr-case-studies-revised.pdf).

13 C. Rule, 'Online Dispute Resolution and the Future of Family Law', *Family Lawyer Magazine*, 13 November 2019, available at: <https://familylawyermagazine.com/articles/online-dispute-resolution-and-the-future-of-family-law/>.

14 *Ibid.*

15 'Clark County Court Uses New Technology from Tyler to Resolve Disputes Online', *Business Wire*, 17 April 2018, available at: [www.businesswire.com/news/home/20180417005157/en/Clark-County-Court-New-Technology-Tyler-Resolve](http://www.businesswire.com/news/home/20180417005157/en/Clark-County-Court-New-Technology-Tyler-Resolve).

16 *Ibid.*

17 Joint Technology Committee, 2017.

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 Lavi, 2015.

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ing couples who choose mediation reach resolution in about half the time of couples who choose the traditional litigation route.<sup>22</sup> Online mediation provides an even faster route by getting rid of travel time, coordinating schedules a need for synchronous communication, etc.<sup>23</sup>

ODR can reduce costs by eliminating the need to rent a venue for the mediation and can diminish or eliminate outrageous attorney fees (depending on whether the parties choose to get attorneys).<sup>24</sup> With less of a financial cost looming over them, the parties may use the lessened tension to focus on issues that are most significant, rather than focusing on how much time has been spent in mediation.<sup>25</sup>

There were four main observations from researching the different ODR approaches. First, many potential online users may struggle with access to sufficient Internet resources, or may not be technologically savvy, so courts should have solutions prepared for them. Second, conversation can be interpreted much differently over a text-based platform than it would in person, so participants should be careful of how they phrase their thoughts, especially when emotionally charged issues are involved. Third, screening for domestic violence is important in an online setting, but there may be a way for parties to work around it when the victimized party is represented by counsel. Finally, security continues to be a concern for many, and ODR platforms should ensure that their software is as secure as possible, so the parties are not inhibited from openly discussing all issues and solutions with each other.

### 2.1 Access to Justice

While ODR is a great way to provide access to justice for those who would otherwise have to take time off work to attend a court hearing or mediation, it can also place strain on those lacking Internet skills or capability. Approximately 19.3% of the population in the United States live in rural areas.<sup>26</sup> Many of those Americans are among the 21 million who are unable to access broadband Internet.<sup>27</sup> Access to the Internet is a necessity for participation in ODR.

Although many participants will have access to the Internet in their own homes, not everyone has that resource. For those without a home connection, they could become members of their local library and utilize those computers; millions rely on public libraries as their first or only choice for Internet access.<sup>28</sup>

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 United States Census Bureau, 'Urban and Rural', 2010, available at: [https://data.census.gov/cedsci/table?q=population%20of%20us%20in%20rural%20area&g=0100000US&hidePreview=false&tid=DECENNIALSF12010.P2&vintage=2010&laye r=VT\\_2018\\_040\\_00\\_PY\\_D1&cid=DP05\\_0001E](https://data.census.gov/cedsci/table?q=population%20of%20us%20in%20rural%20area&g=0100000US&hidePreview=false&tid=DECENNIALSF12010.P2&vintage=2010&laye r=VT_2018_040_00_PY_D1&cid=DP05_0001E).

27 P. Flahive, 'Inside the Movement to Improve Access to High-Speed Internet in Rural Areas', *NPR*, 30 September 2019, 5:02 PM, available at: [www.npr.org/2019/09/30/765834528/inside-the-movement-to-improve-access-to-high-speed-internet-in-rural-areas](http://www.npr.org/2019/09/30/765834528/inside-the-movement-to-improve-access-to-high-speed-internet-in-rural-areas).

28 'U.S. Public Library Internet Connectivity', *American Library Association*, available at: [www.ala.org/tools/research/initiatives/plftas/previousstudies/0809/connectivity09](http://www.ala.org/tools/research/initiatives/plftas/previousstudies/0809/connectivity09).

In addition, for those unfamiliar with technology, the ODR platform and interfaces may have a learning curve, requiring additional training for a person to learn how to correctly use it.<sup>29</sup> This could be solved with a tutorial or a separate platform for learning how to navigate the software.<sup>30</sup>

Along with finding ways to improve access to the Internet, there must also be solutions for affordability issues which many *pro se* litigants may face. When a domestic relations court decides to implement an ODR system, it is imperative to keep costs for litigants as low as possible. There are many different types of mediation software available at varying costs.<sup>31</sup> The fees charged by the ODR provider take into account the total cost of operating the service, any external funding available and how remaining costs are divided among disputes and their disputants.<sup>32</sup> By keeping all operations online, and eliminating the need for parties to travel to a courtroom, ODR reduces overall operating costs by dramatically reducing travel and litigation expenses.<sup>33</sup> To ensure its affordability for all who would want to participate, courts should mandate a bilateral user fee model, wherein each party pays a portion of the charges.<sup>34</sup> All fees and costs should be presented up front, so the parties are aware of exactly how much they might pay.

## 2.2 Implications of Text-Based Communication

In the family law setting, text-based ODR platforms can create wholly different environments than parties would find in in-person mediation. Parties' messages via text could be interpreted differently than if they had spoken directly to each other. Confusion could surround the mediator's role when no faces, only texted communications, are visible.

The text-based ODR format may deny parties the use of pace, tone, inflection, gestures and other non-verbal cues that would otherwise be available in a face-to-face conversation.<sup>35</sup> Many commonly addressed issues revolve around the "lack of warmth, empathy, immediacy, rapport and other attitudes and affects that make face-to-face mediation what it is".<sup>36</sup> Additionally, the messages conveyed and read online could be misinterpreted and misattributed and may result in deterioration of trust.<sup>37</sup> Perhaps most importantly, in mediations involving an apology, a party's sincerity could be thrown into doubt.<sup>38</sup>

On the other hand, this could be advantageous in highly emotional family law cases. Whereas rapid response might be integral to an in-person mediation, ODR allows parties to carefully consider their next response to an inflammatory

29 Van Arsdale, 2015.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 R.J. Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab', *Cardozo Journal of Conflict Resolution*, Vol. 18, 2017, p. 717.

36 Noam Ebner, E-Mediation, in M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.), *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, The Hague, 2012, p. 366.

37 *Ibid.*

38 *Ibid.*

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comment.<sup>39</sup> Parties are able to form responses privately, more rationally, enabling them to better consider which proposals to accept and which to reject.<sup>40</sup> This also allows the parties to keep better track of what has been argued as they need only scroll up in the text box. This can help crystalize issues, clarify points of disagreement and minimize redundancy and irrelevant tangents.<sup>41</sup>

A text-based platform can cause a litany of issues for mediators. It may be more difficult for mediators to maintain civility and neutrality in an online space compared to an in-person meeting.<sup>42</sup> When mediations are conducted in person, the parties always have a clear sense of where the mediator is and who they are with. But online, if the mediator is caucusing with one party or communicating asynchronously, it can create suspicion and trust issues among the parties.<sup>43</sup>

But the asynchronous process may be more beneficial for the mediator as it can give them more time to think of an appropriate response and reframe messages.<sup>44</sup> The mediator could caucus simultaneously with the parties, reducing the threat of bias in being absent from one party for too long and saving time.<sup>45</sup> The evenly dispersed private contact can aid the mediator's role of neutrality.<sup>46</sup>

### 2.3 Incorporation of Screening in Domestic Relations Cases

When a family law dispute is referred to a mediation or dispute resolution programme, it is imperative to first determine whether the parties are good candidates for that route. When abuse or domestic violence is involved, those parties will typically be screened out from participation. Because ODR typically involves key elements of mediation, looking at reasons underlying screening for mediation can be helpful.

In a setting outside the courtroom, abusers are more likely to enjoy an unbalanced power dynamic, and the abused party could be in fear of their personal safety.<sup>47</sup> This power imbalance can inhibit constructive mediation.<sup>48</sup> While online mediation could resolve the problem of an abused party being physically close to the abuser, it could still be a traumatic experience for the survivor and cloud their judgment.<sup>49</sup> Of paramount concern is that the survivor may fear the abuser so much that they will agree to anything, even something that goes against their best interest or the interests of their children to avoid retaliation.<sup>50</sup> A high percentage of divorce disputes include some component of domestic violence, and there is growing concern that forcing such parties into online mediation will

39 Condlin, 2017.

40 *Ibid.*

41 *Ibid.*

42 Ebner, 2012, p. 365.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 *Ibid.*

47 Luchs, 2016.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

make survivors participate in something that is not in their best interests.<sup>51</sup> Because of the multitude of issues facing parties involved in domestic violence, many courts automatically screen them out of the alternative dispute resolution process.

However, some evidence suggests that ODR may be an appropriate avenue for divorces involving violence.<sup>52</sup>

Some users have defined the online environment as less pressuring and threatening, even lowering animosity, in comparison with face-to-face dispute resolution. One positive implication of the online environment in divorce cases involving violence is that distance is likely to mitigate, and even eliminate, the sense of fear on the part of the victim.<sup>53</sup>

In cases where domestic violence is a major issue, one solution could be for the abused party to be present in an e-mediation with his or her attorney, so that aggressive tactics on the abuser's part are less likely to prevail.

#### 2.4 *Maintaining Security in Online Mediation*

Confidentiality may be a primary concern for parties wishing to move to an online platform to resolve their domestic relations dispute. In online as well as in-person mediations, mediators are bound by confidentiality obligations.<sup>54</sup> For example, the mediator cannot reveal what a party said in caucus without explicit permission to do so. But there is an added confidentiality concern in online mediation: programmes for ODR must do everything possible to safeguard their users' confidentiality and data.<sup>55</sup>

Most ODR service providers are secured (except where transmission of e-mail is concerned) according to a comparative study.<sup>56</sup> Because family law cases often involve deeply personal and highly emotional issues, steps should be taken for service providers to improve security around their software.<sup>57</sup> Parties and their attorneys should be cautioned against sending confidential information over e-mail.

### 3 Conclusion

In order for court systems to successfully incorporate ODR systems, several criteria should be taken into account. The software should be easy to navigate, come with tutorials and be as accessible as possible. In addition, parties should be given

51 Lavi, 2015.

52 D. Lavi, 'Till Death Do Us Part?: Online Mediation as an Answer to Divorce Cases Involving Violence', *North Carolina Journal of Law & Technology*, Vol. 16, 2015, p. 253.

53 *Ibid.*

54 Lavi, 2015.

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*



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information on where to access free public computers and Internet, like at the local library. A screening process should exist which automatically disqualifies potential cases involving domestic violence or parties who feel there is no chance of being able to properly communicate.

ODR can have a profound impact on its participants and the court system. It is incredibly convenient as parties can access it any time of day or night, and with free computers and Internet at public libraries, it should be accessible to those who are interested in utilizing it. Especially for family law cases, ODR can provide a calm, civil environment to discuss often-emotional issues such as child custody, child support and visitation. In an unprecedented time when many cannot leave their homes due to health concerns, ODR can be an excellent way for people to settle issues.