



MASSACHUSETTS  
ACCESS TO JUSTICE COMMISSION

REPORT OF THE ONLINE DISPUTE RESOLUTION  
COMMITTEE, JULY 2021



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## EXECUTIVE SUMMARY

With an understanding that court-based online dispute resolution (“ODR”) has become an integral part of many state courts systems, the Massachusetts Access to Justice Commission (“Commission”) convened an Online Dispute Resolution Committee (“Committee”) to research and write a report detailing ways to ensure access to justice principles are embedded within any future Massachusetts court-based ODR system.

At its first meeting in August 2020, the Committee was charged by the Commission Co-Chairs, then the late Chief Justice Ralph D. Gants<sup>1</sup> and Attorney Susan M. Finegan, to focus its efforts both on the access to justice opportunities afforded by ODR generally and on the implications of court-based ODR as it impacts self-represented litigants (“SRLs”).<sup>2</sup> Given the increasing prevalence and popularity of ODR in the courts, the key questions, in the Committee’s view, are not whether or if the Massachusetts Trial Court (“Trial Court”) will adopt ODR at some point, but when and how it will happen. The Committee was urged to focus on making sure ODR is implemented in a manner that is both efficient and fair to individuals who have limited resources.

This report focuses on the access to justice principles that the Committee believes are essential in any court-based ODR system. Further, the Committee was directed to focus on how ODR could be implemented in the non-debt collection realm of small claims and possibly civil motor vehicle infractions (“CMVI”) and use them as examples to consider access to justice issues in connection with possible expansion of ODR. After nearly a one-year study, the Committee recommends that Trial Court implement two pilot programs for ODR – one for CMVI and a second for small claims cases other than debt collection (“Small Claims”).<sup>3</sup> The Committee believes that these two pilot programs could make the resolution of these two types of disputes – which now often require physical trips to court and the expenditure of extensive time on the part of parties and court personnel – more efficient and cost effective. The Committee also hopes that these ODR systems will help level the playing field between parties represented by counsel and SRLs and result in more equitable and racially neutral resolution of disputes.

Many definitions have been offered for ODR. The Committee understands it as an online process in which the parties, by themselves or with the assistance of a third party neutral, resolve their dispute to the parties’ mutual satisfaction. It is not simply online mediation or a virtual court

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<sup>1</sup> The late Chief Justice Gants was the impetus for this study but he tragically passed away before its completion.

<sup>2</sup> For purposes of this report, the Committee utilizes the term “self-represented litigants” to refer to those who appear without counsel, whether by choice or because they cannot afford to pay. This term is commonly used and acknowledges the fact that these litigants must represent themselves, and it can be seen as empowering, at least for some. However, the term also implies a voluntary choice to forego an attorney and the ability to represent oneself, whereas many poor unrepresented litigants usually have not voluntarily chosen to represent themselves and too often lack the knowledge to do so effectively. See, e.g., Russell Engler, *And Justice for All-- Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1993 n.23 (1999). For that reason, these litigants are often referred to as “unrepresented” in other contexts.

<sup>3</sup> As discussed further in Appendix B, note 1, the high rate of SRLs and well-known power imbalances in small claims debt collection cases means particular care must be taken to make sure ODR will improve, and not exacerbate, problems with access to justice in such cases. This can best be done after the Trial Court has some experience with ODR in other case types.

hearing, though mediation assistance is often offered as a resource if party negotiations break down. Key features include that it is court-annexed, meaning it is an integral part of the court system; that it is asynchronous, meaning communications do not have to happen at the same time; and that it is technology-based, meaning an internet platform replaces in-person mediations or hearings.

It is a guiding principle of the Committee that ODR be recommended for CMVI and Small Claims cases only if the systems as designed and implemented, both at the pilot stage and upon broader adoption, appear likely to actually improve the chances of SRLs to obtain equal justice. But in addition, recent studies (discussed below) suggest that ODR may eliminate unconscious bias based on race, gender, age and appearance. The proposed adoption of ODR thus represents an opportunity for the Trial Court to make it easier not only for SRLs but also for communities of color and other disadvantaged groups to participate more fully and equally in a system that often is difficult for them to access geographically and for other reasons and makes them feel unwelcome or disadvantaged, for example, when an SRL is dealing with a corporate or individual opposing party represented by experienced legal counsel. The Committee recommends the inclusion in the ODR system of particular incentives and protections for SRLs and communities of color in order to eliminate or mitigate existing disparities in their treatment and outcomes in the courts. With such incentives and protections, the Committee believes that ODR can be a meaningful contribution to a more fair and equitable court system. However, if the design or implementation of a such a system, due to a failure to incorporate such measures, is likely to exacerbate, or even simply perpetuate, existing disparities between white parties and represented parties, on the one hand, and parties of color and SRLs, on the other hand, ODR should not be adopted.

The Committee's discussion of, and recommendations for, ensuring more equitable access to justice for all those confronting legal issues likely to lead to court involvement are addressed in Section IV below, and are set forth here:

- ODR should provide equitable access to justice for all racial and socio-economic groups including SRLs.
- SRLs must be the focus of ODR.
- The design process must involve SRLs and their advocates, as well as other relevant stakeholders, from the earliest stage. This should include a governance structure to ensure that the access to justice principles suggested in this report continue to guide implementation of the Trial Court's ODR programs.
- Fees/costs must not be a barrier.
- ODR must be as widely available to users as possible.
- Technology imbalances should be minimized as much as possible.
  - Mobile phone access should be guaranteed.

- Public access points must be made available.
- ODR should have a familiar look so as to encourage participation.
- No software applications (apps) should be required to access ODR.
- ODR must be language-friendly.
- ODR should be available in multiple languages.
- The ODR systems should use plain language.
- Legal information, assistance, and advice should be readily available to ODR users.

The Committee hopes this report will provide useful guidance to the Trial Court as it moves forward.

## I. INTRODUCTION - WHAT IS ONLINE DISPUTE RESOLUTION (ODR)?

ODR is now widely utilized in the e-commerce sector and is increasingly popular in national and international court systems. In the judicial context, the National Center for State Courts (“NCSC”) defines ODR as “a public facing digital space that allows litigants to resolve disputes by managing a case from start to finish without requiring a user to step foot inside a courtroom.”<sup>4</sup> The Pew Foundation, which has partnered with the NCSC in evaluating and supporting the adoption of ODR in several states across the country, succinctly describes ODR as “[o]nline resources that can manage a case from start to finish and never require users to go into a courthouse.”<sup>5</sup> Earlier formulations of what ODR means in a court setting sometimes suggested that ODR might mean a system where the parties negotiated solely between themselves in an attempt to resolve their disputes<sup>6</sup> but it seems clear that a model that leaves the parties to a dispute entirely to their own resources is inconsistent with the core mission of the courts to ensure justice to litigants through a fair and equitable process that takes into account the disparate situation of the parties. This is reflected in the definition offered by the Michigan courts: “An online process in which the parties, themselves, or with the assistance of a neutral human or machine third party, resolve their issues to the parties’ mutual satisfaction.”<sup>7</sup>

ODR also offers the potential to improve racial equity and eliminate unconscious bias in court dispositions by eliminating considerations like race, gender, and appearance, directing the focus only to the facts relevant to the case. Maximilian A Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 205 (2016). A study which compared face-to-face traffic proceedings with those conducted online through written asynchronous communication by an established ODR vendor revealed that outcome disparities that existed in the traditional setting for minorities and young people – incurring and paying higher fines – were eliminated with the shift to online proceedings where their racial identity was unknown and age less conspicuous. These findings could be attributed to the elimination of implicit bias in judicial decision-making, a phenomenon which courts have been trying to address effectively for some time. But the study also concluded that the elimination of outcome disparities in this case could also stem from the reduction of "structural bias," the impact on members of disadvantaged groups of the shift from real-time

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<sup>4</sup> *Online Dispute Resolution, What Can It Do For Your Court*, National Center for State Courts (Mar. 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0016/41056/NCSC-ODR-Fact-Sheet-for-Courts.pdf](https://www.ncsc.org/_data/assets/pdf_file/0016/41056/NCSC-ODR-Fact-Sheet-for-Courts.pdf).

<sup>5</sup> *Online Dispute Resolution Offers a New Way to Access Local Courts*, The PEW Charitable Trusts (2019), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts>. This definition was adopted by the National Legal Aid & Defender Association (“NLADA”), see page 3 of its report.

<sup>6</sup> ODR is “a digital space where parties can convene to work out a resolution to their dispute or case” (Joint Technology Committee, 2017: 1). This is accurate but omits many features of the systems that have been implemented that seem essential to access to justice.

<sup>7</sup> *Considerations in Implementing Court ODR Systems*, Office of Dispute Resolution, State Court Administrators Office, Michigan Supreme Court (Jan. 6, 2020), <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Resources/ODRConsiderations.pdf>. The reference to a “machine third party” would include such tools as a guide and file form, which assists users in filling out court forms by providing information and asking questions designed to elicit relevant information.

courtroom communication before an authority figure to remote, asynchronous communication, in which parties have time to contemplate their next steps and consult with others, while communicating from the comfort of one's home. Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV., 893 (2020).

In addition to removing racial bias, ODR also has the potential to open the justice system to more individuals since ODR is significantly less expensive than traditional litigation. Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. MARSHALL J. COMPUTER & INFO. L. 81, 89 (2009).

There are many different ODR models, several of which are described in this report, but for our purposes, the essential components of ODR should include the following:

- Court-annexed, meaning it is an integral part of the justice system, whether it is available before or only after filing a lawsuit. “It [ODR] is not a form of private alternative dispute resolution (“ADR”), but instead integrates and extends dispute resolution services offered by the judicial branch into digital space to serve citizens efficiently, effectively, transparently, and fairly.”<sup>8</sup> The close connection to the court ensures that core values of the judicial system will be maintained.<sup>9</sup>
- Asynchronous, or asynchronicity, simply means that events, including conversations and negotiations, do not happen, nor need to happen, at the same time, *i.e.*, they are not simultaneous. This is how you would describe a typical email exchange or response to a post on Facebook or LinkedIn. In a court setting, it means a litigant does not have to be in court with the opposing party, the judge and the clerk to be engaged in communications on their case. The ability to handle a case via asynchronous communications sets everyone free of the constraints inherent in requiring all concerned parties to be in one place at one time.
- Technology-based, meaning that ODR seeks to resolve “civil disputes using court-annexed, internet-based platforms rather than in-person hearings, mediation, or arbitration.”<sup>10</sup> In a world where we can buy anything on Amazon with a click of a button, communicate via Instant Messenger or twitter, and deposit checks from our

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<sup>8</sup> See *What is ODR*, National Center for State Courts, <https://www.ncsc.org/odr/guidance-and-tools>.

<sup>9</sup> See *2020 Civil Justice Committee Report and Recommendation*, Texas Judicial Council, Attachment A, Texas Online Dispute Resolution Policy Framework (Sep. 2020) at 1, [https://www.txcourts.gov/media/1449780/civil-justice-committee-2020\\_0923\\_final.pdf](https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf): “ODR is defined as the use by Civil Courts of an online process in which the parties in civil litigation resolve their disputes to the parties’ mutual satisfaction, using an online portal that complies with the minimum ODR standards and is administered by the court. *It must include court oversight* and may include the assistance of a mediator communicating electronically or in-person with the parties.” (Emphasis supplied.)

<sup>10</sup> *Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona, <https://law.arizona.edu/utah-online-dispute-resolution-platform-usability-evaluation-and-report>; *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona (Sep. 8, 2020), [https://law.arizona.edu/sites/default/files/i4J\\_Utah\\_ODR\\_Report.pdf](https://law.arizona.edu/sites/default/files/i4J_Utah_ODR_Report.pdf).

phones, it should come as no surprise that many people would welcome a technology-based way to resolve their dispute and put it behind them. Pew reports that over 80% of respondents to a survey by the NCSC want more online access to the courts.<sup>11</sup> A study of the Utah small claims ODR system, discussed below, likewise reported that the public is eager for this type of court technology; nearly every participant said they would prefer to use a website over physically going to a courthouse to resolve a dispute if they had the option.<sup>12</sup>

Within this general framework,

ODR can encompass a variety of methods and tools to assist in dispute resolution. It can provide dispute resolution services without necessarily filing a formal complaint. It can support a variety of decision-making aids including discovery exchange; direct party-to-party settlement negotiations; synchronous or asynchronous mediation support; and technology-supported adjudication. When litigants successfully resolve their dispute, the program can populate standard settlement agreement forms that can be automatically filed with the court, if needed to dispose the case. If the litigants are unsuccessful, the program can also provide a seamless entry to the court's traditional dispute resolution by automatically populating and filing necessary court forms.<sup>13</sup>

We will review examples of ODR platforms that employ many of these options in this report.

At this point, it is also helpful to think about what ODR is not:

- ODR is not simply online ADR or virtual online court, although both technically are dispute resolution that occurs online. Court futurist Richard Susskind has long predicted that online courts in some shape or form are inevitable and is one of many who have noted that the COVID-19 pandemic accelerated acceptance of the idea of remote courts by many years. This new paradigm can only have a beneficial impact on acceptance of ODR as a normal part of court offerings and services.

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<sup>11</sup> *Online Dispute Resolution Offers a New Way to Access Local Courts*, The PEW Charitable Trusts (2019), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts>.

<sup>12</sup> *Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona, <https://law.arizona.edu/utah-online-dispute-resolution-platform-usability-evaluation-and-report>. The JTC bulletin also mentions that “public opinion polls and academic studies demonstrate clearly that the public wants courts to use technology to make court processes not only more efficient, but more understandable, fair, and accessible.” *ODR for Courts*, Joint Technology Committee (Nov. 29, 2017), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf](https://www.ncsc.org/_data/assets/pdf_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf). It should be noted, however, that some people will still want their day in court, to feel like they have been heard.

<sup>13</sup> *International ODR Forum Focuses on Reducing Bias, Considering Ethics*, Institute for the Advancement of the American Legal System (Dec. 3, 2019), <https://iaals.du.edu/blog/international-odr-forum-focuses-reducing-bias-considering-ethics>.

- ODR is not necessarily limited to resolving disputes between private parties. There are many jurisdictions utilizing it to deal with various civil motor vehicle offenses where the state interest in public safety is represented by the police prosecutor.<sup>14</sup>
- Not all use of technology to assist SRLs necessarily falls under the rubric of ODR – there are many ways in which courts can use technology to improve processes that do not involve ODR. For instance, at the Commission’s March 26, 2021 meeting, attorneys from the Massachusetts Department of Revenue’s Child Support Enforcement Division reported on how they use technology and email communications to make participating in virtual case conferences easier and more convenient for the parties during the COVID-19 pandemic.

One other key question is whether there is a particular case type best suited for ODR. Many have described ODR as best suited for high volume, low value cases. But value is not an objective concept; it can only be measured from the litigant’s perspective – to some, a \$100 debt can be significant. And ODR is now being used in matters involving critical family rights, such as child support or parenting time disputes,<sup>15</sup> which have no dollar value but deal with basic human needs. The Florida Supreme Court recently allowed its circuit courts to initiate ODR pilots in civil traffic infractions, small claims and dissolution of marriage in cases not involving children, as well as in other “high-volume and low-complexity” case types as it might approve upon request.<sup>16</sup> This suggests the complexity of the legal matter is another important factor. Given the broad variety of case types using ODR across the country, Massachusetts will decide for itself which case types or common types of disputes it thinks would benefit from ODR.

## II. WORK OF THE ODR COMMITTEE

The Commission has closely monitored the growth of ODR in the courts. The January 2020 Commission meeting included a presentation on ODR by April Kuehnhoff from the National Consumer Law Center and Suzanne Schlossberg, law clerk to the late Chief Justice Gants, who assisted him in staying current with ODR development. This Committee was appointed in the summer of 2020 and its members and advisors represent a microcosm of potential stakeholders affected by any future ODR project. The Committee’s members and advisors include representation from the District Court, including two judges, a clerk magistrate, and the Deputy General Counsel; from the Trial Court, including the Director of Legal Access to Justice Initiatives and the Program Director for eCourts; and representatives from the Office of the Attorney General, the civil legal aid community, private practice and the Pew Foundation, along with a retired Housing Court judge who also previously served as the Trial Court’s Access to

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<sup>14</sup> A few jurisdictions have developed ODR programs which permit criminal defendants to resolve minor – typically misdemeanor – offenses without going to a courthouse.

<sup>15</sup> Kevin Bowling, et al., *Improving Child Support Enforcement Outcomes with Online Dispute Resolution*, National Center for State Courts, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0013/27103/improving-child-support-enforcement.pdf](https://www.ncsc.org/_data/assets/pdf_file/0013/27103/improving-child-support-enforcement.pdf).

<sup>16</sup> *In re: Online Dispute Resolution in the Trial Courts*, Supreme Court of Florida (Mar. 15, 2021), accessible at <https://www.flcourts.org/Administration-Funding/Performance-Accountability/Online-Dispute-Resolution-Resources>.

Justice Initiatives Director. Many of the members and advisors are current or past Commissioners and bring a broad range of experience and perspectives to the Committee.

At its first meeting in August 2020, the Committee was fortunate to hear directly from the Commission Co-Chairs, then Chief Justice Gants and Attorney Finegan, with their charge to the Committee, described above. The Committee was asked to prepare a report that encompassed a brief overview of the current uses of ODR, principles and guidelines to ensure that ODR is implemented with access to justice concerns in mind, and a pilot design for the Trial Court to begin implementing, likely in either non-debt collection small claims cases and/or CMVI. The Committee was also told that the report should be designed to educate stakeholders and bring more people "into the fold" of ODR and what it can do for SRLs and for the courts.

Since that first meeting in August 2020, the Committee has met regularly. The Committee first focused on educating itself about the current system for court handling of small claims and CMVI cases, including a presentation by Committee member Tallulah Knopp, at the time a staff attorney at Volunteer Lawyers Project, who has considerable experience representing debtor defendants in Small Claims cases. Thanks to the ease of Zoom meetings, the Committee was fortunate to have presentations from Stacey Manware, Deputy Director of Operations, Connecticut Superior Court, on the Connecticut traffic ODR system; MJ Cartwright, the founder of Matterhorn, one of the leading ODR vendors; Doug Van Epps and Michelle Hilliker from the Michigan Office of Dispute Resolution about MI-Resolve; Shannon Salter, the Executive Director of the British Columbia Civil Resolution Tribunal; and April Kuehnhoff, who updated the Committee on recent research by the National Consumer Law Center on the use of ODR in consumer debt collection cases. Various Committee members also reached out to state court officials working on ODR projects around the country, attended relevant webinars, and participated in a conference call convened by the NCSC for those working on ODR projects in several states.

### **III. BRIEF REVIEW OF ODR EXPERIENCE IN OTHER JURISDICTIONS**

**Introduction.** Many other jurisdictions in the United States and internationally have begun the process of implementing court-annexed ODR operations, with varying degrees of success. As of 2019, sixty-six jurisdictions in twelve states in the United States had adopted some form of ODR.<sup>17</sup> In the past few years, the utilization of ODR systems has increased even more, as jurisdictions have witnessed ODR pilot programs that have led to “fewer default judgments, greater defendant engagement, and reduced clerk time.”<sup>18</sup> This section will describe a few such programs that have been implemented by other jurisdictions in the United States and Canada and discuss what lessons can be learned from these attempts. Additional information is set forth in Table 1, which presents basic information about other ODR programs in the United States.

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<sup>17</sup> An interactive map of these programs is available at <https://datawrapper.dwcdn.net/TAM4u/1/>.  
[https://www.americanbar.org/groups/centers\\_commissions/center-for-innovation/online-dispute-resolution-in-us/](https://www.americanbar.org/groups/centers_commissions/center-for-innovation/online-dispute-resolution-in-us/).

<sup>18</sup> *Online Dispute Resolution, What Can It Do For Your Court?*, National Center for State Courts (March 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0016/41056/NCSC-ODR-Fact-Sheet-for-Courts.pdf](https://www.ncsc.org/_data/assets/pdf_file/0016/41056/NCSC-ODR-Fact-Sheet-for-Courts.pdf).

**A. Connecticut.** Parties involved in small claims may opt into a pilot ODR program launched in late 2020.<sup>19</sup> The program only hears small claims that involve a dispute concerning \$5,000 or less in damages. The program manager said that the program encompasses, for example, consumer debt collection matters, damages to a motor vehicle, and minor injuries from an accident. The chief court administrator of the state judiciary said they implemented this program during the COVID-19 pandemic to better serve the public and lower costs for the judiciary.<sup>20</sup> In this program, the parties exchange evidence, and may not object to the evidence presented by the other side. The court reviews the evidence submitted for relevance and reliability, and then parties must participate in mediation through a mediator provided free of charge by the state.<sup>21</sup>

In addition to an ODR program for small claims, Connecticut has a statewide online program, launched in 2018, where individuals who received traffic infractions can resolve their cases without stepping foot in court. The program, the Online Ticket Review Program, is an online portal where individuals with infractions can either pay their fine or plead not guilty. If the defendant pleads not guilty, the defendant can provide a narrative and upload evidence, which a prosecutor reviews later. Upon review, the prosecutor can make an offer, dismiss the case, or transfer the case to court. In the first nine months of the program's initiation, over 20,000 cases were processed through the program.<sup>22</sup> The NCSC noted that the program has reduced the average number of days from citation to adjudication from more than 180 to less than 60.<sup>23</sup> The NCSC stated Connecticut's platform allows the prosecutor to take the necessary time to review information thoroughly. (The Connecticut traffic ODR program is discussed further in Appendix A, dealing with the proposed CMVI pilot program.)

**B. Michigan.** The Supreme Court of Michigan Office of Dispute Resolution ("MODR") is responsible for coordinating alternative dispute resolution services throughout the state. In coordination with MODR, Michigan implemented a cost-free online dispute resolution tool, called MI-Resolve, that operates statewide and allows parties to resolve disputes traditionally filed in small claims, such as landlord-tenant matters, contract matters and neighborhood disputes.<sup>24</sup> The Michigan Supreme Court implemented MI-Resolve in August

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<sup>19</sup> The program is only available to small claims filed in three judicial districts in Connecticut. Each of these judicial districts had a growing backlog of small claims cases prior to the release of the pilot program.

Daniel Tepfer, *No More Waiting: Small Claims Cases to go Online Rather Than to Court*, CTPOST (Nov. 18, 2020), <https://www.ctpost.com/local/article/No-more-waiting-Small-claims-cases-to-go-online-15736448.php>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> As of August 2019 – nine months since the program launched statewide – prosecutors made proposals to defendants in 50 percent of cases, with 80 percent of defendants accepting the offer. In 20 percent of cases, prosecutors entered nolle, and the remaining 30 percent of cases were transferred to court. *Connecticut Judicial Branch's Online Ticket Review Program Receives National Award*, State of Connecticut (Aug. 29, 2019), [https://www.jud.ct.gov/HomePDFs/JB\\_Online\\_Ticket\\_ReviewAward.pdf](https://www.jud.ct.gov/HomePDFs/JB_Online_Ticket_ReviewAward.pdf).

<sup>23</sup> *Case Studies in ODR for Courts*, Joint Technology Committee (Jan. 28, 2020),

[https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/16517/2020-01-28-odr-case-studies-v2-final.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/16517/2020-01-28-odr-case-studies-v2-final.pdf).

<sup>24</sup>The MI-Resolve website notes that the service is most helpful for disputes between two people that are unrepresented by counsel. *Resolve a Dispute Online with MI-Resolve*, Michigan Courts, <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/MI-Resolve.aspx>.

2019 and its chief justice noted that increasing access to justice is especially important during the COVID-19 pandemic. The office within the state supreme court that implemented MI-Resolve emphasized the distinction between “disposing a case” and “resolving a dispute.” They believe that the service should be limited to instances where parties subjectively believe they are resolving a dispute. They noted the separate and independent progression of court functions that result in a case disposition, such as court hearings, conferences, and trials conducted online.

The office stated that the scarcity of resources that evaluate ODR systems is a challenge in considering the merits of ODR. Similarly, the office noted that it is unclear what functions are critical and which are desirable in ODR systems.<sup>25</sup> The office stated that courts likely have to assess the effectiveness of their own ODR systems but suggest courts can review the success of e-commerce disputes, such as one involving a defective product that was shipped on eBay, as a guidepost. The office noted that e-commerce disputes typically begin with party-to-party negotiation and ultimately result in an “arbitration-like award to one party with no means of judicial appeal.” There are additional ODR systems in use in Michigan in different counties involving different case types than MI-Resolve, including traffic violations, child support, parenting time and landlord tenant disputes.

**C. Utah.** Utah was the first state in the United States to launch ODR as a tool for small claims cases. Since implementing ODR in small claim matters, Utah has seen a fast and sizable drop in defaults among eligible small claims cases. Prior to launching ODR, seventy-one percent of cases resulted in a default. Now, that number is down to fifty-three percent, with officials noting that the majority of these cases are related to debt collection.<sup>26</sup>

In Utah, ODR begins with online communication between the parties. Both parties and the facilitator<sup>27</sup> can see everything that is typed in the message screen. However, nothing a party types will be used in a potential court case without the party’s permission. When a message is posted, an email or text message notification is sent to the other party. After both parties have signed into ODR, a facilitator will join the communication. The facilitator is provided by the court at no cost to assist in either settling the case or preparing for a court date. If the parties come to an agreement, they can create a settlement agreement, either with or without the help of the facilitator. When both parties have signed the settlement agreement and the facilitator has submitted it to the court, the ODR process is complete. If a party does not comply with the settlement agreement, the opposing party can ask the court for judgment if one is not already entered. A judgment entitles the party to the money amount stated in the judgment. The party can

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<sup>25</sup> The office identified several design components that may be desirable or critical, such as: ability to file documents through the system, confidential management of information, identity checks, and mediation conducted directly through the system.

<sup>26</sup> Zack Quaintance, *Utah, ‘Pajama Court’ and Resolving Cases Online*, GOVERNMENT TECHNOLOGY (Mar. 11, 2019), <https://www.govtech.com/civic/sxsw-2019-utah-pajama-court-and-resolving-cases-online.html>; see *Judicial Perspectives on ODR and Other Virtual Court Processes*, Joint Technology Committee (May 18, 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0018/42912/2020-07-27-Judicial-Perspectives-002.pdf](https://www.ncsc.org/_data/assets/pdf_file/0018/42912/2020-07-27-Judicial-Perspectives-002.pdf).

<sup>27</sup> Facilitators in the Utah ODR system undergo intensive in-house training but are not formal court employees.

ask the court to have the other party's non-exempt property seized and sold or can garnish the other party's earnings.

If the dispute is not settled within two weeks, the facilitator will assist in preparing the parties for a court hearing. If the parties cannot come to an agreement, the facilitator will create a Trial Preparation Document that states both parties' positions on the issues in the case and will submit the document to the court. The trial will be scheduled approximately one to three weeks after the Trial Preparation Document is submitted. When the facilitator submits the Trial Preparation Document to the court, the ODR process has ended.

If a party fails to register for an ODR account within seven days of filing a claim, the court will dismiss the claim without prejudice. If, after registering for an ODR account, the party fails to respond to the facilitator within ten days, the facilitator will inform the opposing party of the ability to ask the court to dismiss the case without prejudice. If the opposing party does not register for ODR or request an exemption from the ODR process within the required timeframe, the filing party may ask the court to enter a default judgment for the full amount of his or her claim. In essence, this ODR system is mandatory for claims within the system's jurisdiction, with limited opportunities for litigants to opt out.

In September 2020, the State of Utah partnered with the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law to conduct an intensive usability testing of the state's ODR platform, focusing on functionality and usability. This study is considered groundbreaking in the realm of ODR because prior to this study's publication, no research had explored "whether the litigants for whom ODR is intended are able to successfully and satisfactorily navigate ODR platforms."<sup>28</sup> Using observation-based usability testing, the research team designed a testing process that sought to engage low-income communities "in the review and redesign of Utah's ODR platform."<sup>29</sup> The report ultimately suggested five actionable recommendations for the State of Utah to adopt to improve the ODR platform's usability, which are detailed below.

**D. British Columbia.** British Columbia created the Civil Resolution Tribunal (CRT) as part of its public justice system, and it is the first online tribunal in Canada. The CRT was created through legislation as an administrative court of limited jurisdiction. Because the CRT was a new administrative tribunal, its goals from the beginning focused on what people needed, what people could reasonably handle, and how to bring the justice system to everyone. It was important to the program to implement a fair, quick, affordable, and relatively simple process. The CRT started with as few human resources as possible and added human interfaces as necessary. The CRT is not a judge-centered model and utilizes a horizontal structure.

The CRT utilizes a human-centered design in order to provide a variety of people with the best experience. For example, all documents available through the CRT are written at a grade 6 reading level, which is the average reading level in Canada (and is considered best practice

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<sup>28</sup> *Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona, <https://law.arizona.edu/utah-online-dispute-resolution-platform-usability-evaluation-and-report>.

<sup>29</sup> *Id.*

elsewhere). The CRT also utilizes a “responsive design” to create a user-friendly interface. This “responsive design” allows web pages to render well on a variety of devices and screen sizes. Litigants can easily use the CRT website on their phones without downloading an application. Further, the CRT uses a simple fee waiver process to avoid the typical onerous process low-income litigants often face when attempting to obtain a waiver, requiring litigants to fill out a simple one-page form which notifies the CRT of the reason the litigant requires a fee waiver.<sup>30</sup>

The CRT presently has jurisdiction over small claims matters under \$5,000 (about forty percent of which are debt collection matters), certain motor vehicle personal injury disputes,<sup>31</sup> and some condominium matters. The CRT found this process to work fairly well for consumer debt collection lawsuits, and the program administrators have worked hard to mitigate against power imbalances. Inclusivity is at the core of the CRT process and in order to be accessible to everyone, the CRT asks for feedback for constant improvement, offers free telephone services, offers mental health training for staff, seeks input from advocates, offers multiple ways to connect, and accommodates for special needs.

Costs to use the system exist, but they are minimal in the early stages of the progress and increase as the litigant progresses through the system, because there is more human involvement at that point. The CRT is responsible for service of process to the respondents, which has helped reduce the default rate. Further, in addition to online services, the CRT offers mail-based service, telephone-based service, and some in-person access points for those who encounter difficulty utilizing the online platform. Ninety-nine percent of litigants use online services. Early in the online process, a litigant is asked whether he or she requires special accommodations which the system works to accommodate. The CRT also contracts with a third-party translator service, which charges the system based on cost per minute and is available in more than two hundred languages. The CRT absorbs that price and does not charge the litigant for translator services.

Participation in the CRT is mandatory for the case types within its jurisdiction, but litigants can seek an exemption. Within the CRT process, the negotiation phase is voluntary and lasts about two weeks while the system lines up a mediator. Five to ten percent of cases settle at that stage. The mediation phase is mandatory – and requires the litigant to participate in good faith – before the litigant may move on to the adjudication phase. The mediators are either full time or part time staff members employed by the CRT. Mediations generally take a total of two to three hours and mediators attempt to assist litigants reach an agreement, which is then turned into a tribunal order. If the litigants want to move to the adjudication phase after attempting mediation, this phase includes mostly written hearings, but video/oral hearings are also available. An independent CRT member acts as adjudicator; while many CRT staff members are licensed attorneys, they are not required to be licensed to act as an adjudicator.<sup>32</sup> The outcome of the

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<sup>30</sup> Further information about the fee waiver process utilized by the CRT is available on its website. *Fees*, Civil Resolution Tribunal, <https://civilresolutionbc.ca/resources/crt-fees/#what-if-i-cant-afford-crt-fees>.

<sup>31</sup> The scope of the CRT’s jurisdiction is currently the subject of litigation. *See Updates on the CRT’s Motor Vehicle Injury Jurisdiction*, Civil Resolution Tribunal, <https://civilresolutionbc.ca/resources/where-can-i-file-a-claim-for-a-vehicle-accident-injury/>.

<sup>32</sup> For reference, *see Terms of Employment*, Civil Resolution Tribunal (2020), [https://civilresolutionbc.ca/wp-content/uploads/2020/05/Disclosure-of-Member-Remuneration\\_YE\\_Mar\\_31\\_2020.pdf](https://civilresolutionbc.ca/wp-content/uploads/2020/05/Disclosure-of-Member-Remuneration_YE_Mar_31_2020.pdf).

adjudication is enforceable as a court order. Litigants who are unhappy with the outcome may appeal the CRT's decision.

As of January 2021, eighty-six percent of participants would recommend the CRT process to others. Annually, the CRT takes about five to six thousand cases out of the court system and saves \$2.5 million per year in court costs. The CRT resolves contested small claims in a median of fifty-seven days and non-contested small claims matters in approximately twenty-four days, compared to the average of one year for court resolution. Less than one percent of resolutions are appealed.<sup>33</sup>

We note that the system established in British Columbia, while undoubtedly successful, is an administrative tribunal created by the legislature. As such, British Columbia was able to design a system from scratch that is generally recognized as one of the best ODR platforms. In those ways, it differs from the approach contemplated in Massachusetts. Nevertheless, the experience in British Columbia, especially when viewed from the user's perspective, is instructive. The British Columbia CRT has a standing advisory committee to ensure that the ODR system evolves in response to ODR user feedback,<sup>34</sup> provides useful legal information and assistance at the beginning of the ODR process, includes standardized materials, and offers the ODR user the full range of dispute resolution methodologies. These best practices are readily implemented in Massachusetts, notwithstanding the structural differences between the CRT system and the Trial Court.

**E. Lessons Learned.** It is clear, based on the research available to us, that each jurisdiction that has implemented an ODR program has experienced unique challenges as well as distinct successes. Therefore, while it is difficult to make generalizations about the collective experiences of all of these ODR programs, Massachusetts can learn from each of them and should take full advantage of their experience.

Based on our research as to the use of ODR in other jurisdictions, the Committee is recommending the creation of two ODR pilot programs in the realms of CMVI and Small Claims. Connecticut, Michigan, and Utah, among a growing number of other locales, all utilize ODR in some form in small claims matters, and each has reported success; however, for reasons discussed elsewhere in this report, the Committee recommends beginning with a pilot ODR program in non-debt collection Small Claims only. Connecticut's traffic program has proved very popular and has led to a significant reduction in the time it takes to resolve a case, and we believe the lessons learned from that program could translate well to one established to resolve CMVI cases in Massachusetts. We also learn from these ODR programs that, in implementing an initial pilot program in the ODR sphere, it is simplest to begin with introducing a voluntary, opt-in system which permits litigants to choose whether to engage in the ODR system and benefit from its flexibility, but also permits litigants to rely on a more traditional route if they so choose. This is preferable because it permits the court system to test out the ODR platform and make

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<sup>33</sup> 2019/2020 Annual Report, Civil Resolution Tribunal, <https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf>.

<sup>34</sup> Personal communication, Hon. Dina Fein (ret.) and Shannon Salter, Chair, CRT, February 1, 2021.

necessary changes on a smaller scale, while also ensuring that those litigants who choose to participate in the system are more likely to be fully engaged and are willing to accept the challenges of a new system for handling their legal problem.

#### **IV. THE CRITICAL ROLE OF ACCESS TO JUSTICE PRINCIPLES**

ODR systems must be structured to incorporate access to justice principles. If properly designed with input from stakeholders who are often excluded from or disadvantaged by the existing judicial system, ODR has the potential to provide more equitable access to court resources and enable them to obtain more favorable results against more experienced litigants or represented parties than they currently receive. However, the Committee believes it is imperative that any ODR system be constructed in such a way as to provide for more, not less, equitable treatment and outcomes. The NCSC succinctly stated this most fundamental rule: “The design and implementation of court-related ODR programs should not diminish due process or access to justice for program users.”<sup>35</sup> Increasing, and never diminishing, access to justice should be a driving concern at every stage of planning, design and implementation of ODR in Massachusetts, including an analysis of equity, inclusion and cultural competency. In this section we address the principal ways in which ODR must be viewed, designed and implemented to assure maximum equity and fairness no matter what the personal characteristics or circumstances of the litigants may be.<sup>36</sup>

##### **A. ODR should provide equitable access to justice for all racial and socio-economic groups including self-represented litigants (SRLs).**

The Committee believes strongly that one of the principal objectives of new ODR systems should be to make the dispute resolution process more fair and equitable across the racial and socio-economic spectrum and in particular that SRLs be able to utilize the systems so as to give them as much parity as possible with opponents represented by attorneys.<sup>37</sup> It is critical that from

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<sup>35</sup> *What is ODR*, National Center for State Courts, <https://www.ncsc.org/odr/guidance-and-tools>.

<sup>36</sup> There are two valuable resources that should be consulted in this context. First, the Guiding Principles for Post-Pandemic Court Technology (including ODR) were adopted by the Conference of Chief Justices and the Conference of State Court Administrators (CCJ/COSCA), see *Guiding Principles for Post-Pandemic Court Technology*, National Center for State Courts (Jul. 16, 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf](https://www.ncsc.org/_data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf). These are intended to ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies. Second, Texas has adopted a statewide ODR policy framework to “integrate minimum standards that align with the efficiency and integrity of the court process.” See *2020 Civil Justice Committee Report and Recommendation*, Texas Judicial Council, Attachment A, Texas Online Dispute Resolution Policy Framework (Sep. 2020) at 2, [https://www.txcourts.gov/media/1449780/civil-justice-committee-2020\\_0923\\_final.pdf](https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf). Among other things, Texas requires that any ODR pilot must be reviewed by the state court administrator for compliance with the framework before it is implemented.

<sup>37</sup> As documented in the Commission’s 2020 Annual Report, in many case categories involving families’ and individuals’ essential legal needs in Massachusetts, navigating the court system and the law without representation by a lawyer has become the norm. For example, in the Housing Court, nearly 64 percent of all litigants and nearly 89 percent of defendants were unrepresented in Fiscal Year 2019; in the Probate and Family Court, at least one party lacks counsel in the majority of cases; and in consumer debt actions, data from 2017 suggests that less than 1.5 percent of defendants are represented by a lawyer See *Annual Report on Activities August 2020*, Massachusetts

the outset of the planning process, the architects of the systems focus on both a design process and substantive elements of the ODR systems so as to help ensure these access to justice imperatives are met.

### **B. SRLs must be the focus of ODR.**

Any ODR system implemented by the Trial Court should be designed intentionally for SRLs given the inherent imbalance of power between SRLs and represented parties. The NCSC<sup>38</sup> identified that one of “the essential components of ODR is that it is explicitly designed to assist litigants in resolving their dispute or case, rather than a technology platform to support judicial or court staff decision-making. Dispute resolution inherently includes the potential to challenge the validity of claims or to raise affirmative defenses; court-related ODR is not merely a platform for defendants to negotiate a payment schedule to satisfy debts.”

Designing specifically for SRLs is necessary to ensure that the court system does not institutionalize, within the next generation of technology tools, any actual or perceived divide between access afforded to those with and without attorneys. If the principles and best practices presented in this report are incorporated into any Massachusetts ODR system, SRLs should be able to receive the same support in ODR as they would by attending court in person. In addition, SRLs are most likely to need and benefit from the accommodations associated with ODR, including the ability to engage the system after work hours and without needing to make childcare arrangements; avoid any anxiety associated with appearing in person in a public courtroom; and proceed at one’s own pace, seeking help when needed. Furthermore, building an online system that works well for SRLs should also increase efficiency within the courts. Finally, by definition, a system that is accessible to SRLs would be accessible to lawyers and their clients, while the opposite is not necessarily true.

### **C. The design process must involve SRLs and their advocates, as well as other relevant stakeholders, from the earliest stages through all stages of implementation.**

Design and Development. In order to ensure that any ODR system is fully accessible, SRLs and their advocates must be engaged in the design process from the outset. Other jurisdictions, such as British Columbia and New York, both of which have ODR programs for small claims and certain motor vehicle cases as contemplated here, incorporated this principle into their design processes. In British Columbia, for example, the stakeholders who were initially involved in developing the ODR process leaned heavily towards lawyers and court-connected individuals, resulting in a program design that was not sufficiently accessible to SRLs in terms of language, process, and other features. When the current Director of the CRT, Shannon Salter, was appointed, she purposefully reconstituted the advisory group overseeing design and development so as to include SRLs or their advocates, and thereby ensure a significantly more accessible program. In addition, the CRT regularly invites feedback from its users, and modifies its

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Access to Justice Commission, at 5, <https://massa2j.org/wp-content/uploads/2020/08/Access-to-Justice-Commission-Annual-Report-August-2020.pdf>.

<sup>38</sup> See *What is ODR*, National Center for State Courts, <https://www.ncsc.org/odr/guidance-and-tools>.

program as necessary based on that feedback to ensure it functions optimally for the “unsophisticated” user.

Similarly, in designing its small claims pilot, New York enlisted legal aid advocates to assist in designing a process that would be accessible to the constituencies they represent. Nevertheless, far along into the development of a pilot that included consumer debt cases, a consumer debt advocacy group interjected significant concerns about the power imbalance inherent in that case type, such that the pilot was re-conceptualized to exclude consumer debt cases.<sup>39</sup> The New York experience sounds a cautionary note about designing an ODR program without including SRLs or their proxy advocates.

Along with SRLs and/or their advocates, it is important to include stakeholders in the design process who represent individuals with limited English language proficiency (“LEP”) and those with disabilities, so as to ensure that their needs are thoughtfully accommodated in the ODR system.

In light of the foregoing considerations, the Committee recommends a design process that includes the following stakeholders at a minimum:

- court service center and law library staff, and their users
- front-line court staff
- language access staff
- Americans with Disability Act coordinators
- legal aid lawyers
- the Commission
- lawyers who regularly appear against SRLs, *e.g.*, those who represent landlords
- social service providers.

Additional stakeholders may be advisable depending on the case type, *e.g.*, public safety officials have a strong stake in the outcome of CMVI matters.

Work by others in the field supports this approach. For example, the National Legal Aid & Defender Association (“NLADA”) conducted focus groups so it could report on the civil legal aid community response to ODR. For the study of the Utah small claims program, the research team interviewed personnel from Utah’s Administrative Office of the Courts, members of the

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<sup>39</sup> Personal Communication, Hon. Dina Fein (ret.) and Diana Colón, Assistant Deputy Counsel, New York State Unified Court System, February 22, 2021.

state judiciary, members of Utah’s legal aid community, volunteer ODR platform staff, and potential defendants.<sup>40</sup>

Implementation and Evaluation. There should be ongoing assessment and reporting to evaluate, among other things, whether ODR is addressing the access to justice principles discussed above. The Committee recommends that a mechanism for feedback from users be built into the ODR system. This is discussed further in the next section on additional design considerations, but the essential concept is that there should be continuous and regular opportunities for evaluation of the user experience. The Trial Court should also commit to a process for continuous improvements based on lessons learned. The Utah user experience study is leading to continuing improvements. Other states have reported adding features that were not initially available, like more language access.

Governance Structure. The Committee recommends that a governance structure, either a committee or perhaps ultimately an ODR staff or office, be established within the Trial Court to ensure that the access to justice principles suggested in this report continue to guide implementation of the Trial Court’s ODR programs, including by establishing standard practices and uniformity across the state. The governance structure would ensure that focus on SRLs is maintained, that user feedback is consulted regularly and that modifications to the ODR system are made where appropriate. This structure could also supervise court employees or volunteers who interface with users of the ODR system, including mediators or possibly facilitators (as used in the Utah ODR system). Users are likely to have many questions and it will be important for them to have resources for getting answers. The clerk’s offices may be able to answer many of these, but likely not all, nor do we know if they will have time. Tech questions should be able to go to the ODR vendor. But there may be a gap that should be addressed. The governance structure could also ensure adequate resources for ODR to make sure that features such as providing information and advice for SRLs navigating the ODR system are available. *See 2020 Civil Justice Committee Report and Recommendation*, Texas Judicial Council, Attachment A, Texas Online Dispute Resolution Policy Framework (Sep. 2020) at 8, Section 5.g.ii, [https://www.txcourts.gov/media/1449780/civil-justice-committee-2020\\_0923\\_final.pdf](https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf) (support for court staff and users). The British Columbia ODR system described above has an advisory council that, at least in part, performs these functions.

#### **D. Fees/costs must not be a barrier.**

Court fees and costs, even minimal ones, can be barriers to participation in the court process for persons with limited incomes. Fees and costs should not be interposed as obstacles that preclude parties with limited incomes from seeking or receiving justice. At the outset, the Committee recommends the creation of an ODR system in Massachusetts which does not impose an additional fee on the litigant wishing to opt into ODR; to encourage litigant participation in the system, such a fee should be borne by the court system.

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<sup>40</sup> Stacey Butler, et al., *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona at 5, [https://law.arizona.edu/sites/default/files/i4J\\_Utah\\_ODR\\_Report.pdf](https://law.arizona.edu/sites/default/files/i4J_Utah_ODR_Report.pdf).

Even with that premise, there are several places at which fees or costs can pose a barrier for parties of limited means. The first is at the outset of the case, when the plaintiff's costs include filing fees and the cost of service of process. A second step at which costs might be implicated is the decision to seek or accept the involvement of an ODR mediator. A third step at which such costs might be imposed is the decision to forego or move beyond mediation to a judicial resolution. A final step is at the conclusion of the case, where in many instances a losing litigant faces imposition of so-called "costs," in addition to the underlying financial award and interest, in favor of the winning party. Each of these types of fees and costs may serve legitimate functions in the existing system. But if ODR is to achieve success in attracting parties and providing fairness, the Trial Court needs to address the issue of fees and costs, including possible modification of existing rules.

Plaintiffs' filing fees are a significant source of revenue for the Commonwealth.<sup>41</sup> Some observers may also view filing fees as a necessary filter to deter parties from filing frivolous or duplicative lawsuits. However, for an indigent plaintiff with a legitimate claim – for unpaid wages, or a consumer deposit wrongfully not returned – the filing fee may prevent the person from even seeking, let alone recovering, financial redress. Any ODR system should include either no or very minimal filing fees or an easy process, with straightforward explanations and simple requirements, for parties with limited means to receive a waiver of the fees through proof of indigency. There are practical, as well as equitable, reasons for eliminating or reducing filing fees and for making waivers relatively easy to accomplish. It is anticipated that a well-functioning ODR process will reduce overall costs for the court system by enabling some of the work of the court to be accomplished online, lessening reliance on expensive, labor-intensive filing systems for hard copy pleadings and leading to more out-of-court settlements with less involvement on the part of clerks and judges. Therefore, eliminating or reducing filing fees, and providing for waiver in many cases, may be economically feasible even in the absence of other forms of court financing for ODR.

As discussed below in Section V.A, given that the Committee believes recourse to ODR mediation should be one element of the Committee's proposed system and is intended to be a draw, rather than a barrier, the Committee strongly recommends against imposing fees or costs either when parties agree to use a mediator, decline to use a mediator or refuse to accept the mediator's settlement recommendation. Parties should be free to seek mediation without paying an additional cost, in the case of a plaintiff who already has paid filing fees, or an initial cost, in the case of a defendant. Similarly, it would place an unfair burden on an indigent party to have to pay a fee to move on to judicial resolution if the party refused to accept the mediator's

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<sup>41</sup> A 2011 study published by the RAND Institute for Civil Justice suggested that the Commonwealth of Massachusetts raised approximately \$110 million in fiscal year 2011 from court system fee and fine revenue. Greenberg, Michael; McGovern, Geoffrey, *Who Pays for Justice? Perspectives on State Court System Financing and Governance*, RAND Institute for Civil Justice at 16, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR400/RR486/RAND\\_RR486.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR486/RAND_RR486.pdf).

recommendation – because the party may be forced to accept an unreasonably low settlement proposal rather than pay a fee to move on to a judicial resolution.<sup>42</sup>

Finally, in instances where there are court fees, the fee waiver process should be user friendly. The Supreme Judicial Court has held that "[i]f the affidavit 'appears regular and complete on its face,' [this] indicates that the affiant is indigent . . . and [the clerk shall grant] requests [for] a waiver of 'normal fees and costs,' . . . forthwith without hearing and without the necessity of appearance of any party or counsel." *Adjartey v. Central Division of the Housing Court*, 481 Mass. 830, (2019). In view of this holding, we recommend approval of fee waivers for participants in an ODR system be done in a simple online process.

#### **E. ODR must be as widely available to users as possible.**

Going to court for a hearing in person often can consume the better part of a day – given the commute, parking, navigating the courthouse and waiting for a hearing or other court event. In addition, the existing court hours impose difficulties in terms of time availability to many parties who have the types of jobs, child care obligations or other responsibilities that do not enable them to take time off for a physical trip to court. Furthermore, many parties do not live within easy reach of the courthouse by public transportation or other affordable means. ODR affords such parties the opportunity to avoid these potentially burdensome time and financial barriers. However, ODR should be designed so as to make access to the courts as equitable and seamless as possible.

For ODR to be as successful in that regard, the Committee recommends as follows:

- ODR should be available any time
- ODR should be accessible online from any location
- ODR should be available on an asynchronous basis – *i.e.*, parties should be able to access the system whether or not opposing parties are participating online at the same time
- ODR should be designed to accommodate those with disabilities. The NCSC has recommended that to ameliorate disability-related concerns, an ODR platform must, at minimum, be compliant with the Americans with Disabilities Act,<sup>43</sup> and courts should consider offering alternative options to ODR for those who face barriers to utilizing an online platform.<sup>44</sup> Those implementing an ODR system must be cognizant

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<sup>42</sup> In the same vein, court costs imposed on a losing party at the conclusion of a case should not include additional costs for having participated in – or refused to participate in – ODR. Such a result would be unfair and a disincentive to participating in ODR. This is a cautionary note as the Committee is not aware of any jurisdiction which imposes court costs related to using or declining to use ODR before taking a case to judicial adjudication.

<sup>43</sup> 42 U.S.C. §§ 12131-12134; see David Allen Larson, *Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone*, 34 OHIO ST. J. ON DISP. RESOL. 431 (2019).

<sup>44</sup> *Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits*, National Consumer Law Center (last updated Jun. 2021), [https://www.nclc.org/images/pdf/debt\\_collection/ib-odr-july2019.pdf](https://www.nclc.org/images/pdf/debt_collection/ib-odr-july2019.pdf).

of those individuals who “use computers and mobile devices but cannot see a screen, hear a video, hold a mouse, or have other disabilities” because the “success of any ODR system is contingent upon accessibility.”<sup>45</sup>

The principal rationale for these recommendations is that they help level the playing field for parties with traditional work hours, who have other responsibilities such as a second job or child care or parental care during normal court hours or whose disability makes accessing the court more difficult. Another advantage is that parties who need more time – for reasons of literacy level or language issues or the need to consult with third persons to make informed decisions – to compose their submissions will be able to do so without having to deal with as many time pressures. A potential drawback to asynchronistic hours is that some parties with either few other obligations or obsessive tendencies will be composing messages at all hours of the week, and seeking to overwhelm their opponents. On balance, asynchronistic hours seem to be more equitable overall because all parties will have the same access to the ODR process and the resources it offers.

#### **F. Technology imbalances should be minimized as much as possible.**

In the recent case of *Vazquez Dias v. Commonwealth*, 437 Mass. 336, 353 (2021), in which the Supreme Judicial Court upheld the constitutionality of a virtual motion to suppress hearing, the Court directly addressed the fact that “low-income members of our community ... often have less access to technology.” Of particular interest to the Committee, Justice Kafker’s concurring opinion provided significant insight into the ramifications of this fact, noting:

- Not all litigants – or even their attorneys – have access to stable and reliable internet, have Zoom-ready devices, or have enough familiarity with Zoom to have an opportunity to fully participate in a virtual hearing, as they would in an in-person hearing.
- Importantly, access to reliable internet is often dependent on income, socioeconomic background, and educational attainment.
- Lack of internet access is more common among racial minorities.

*Id.* at 366, n.16 (Kafker, J., concurring).

Because parties have widely divergent access to and familiarity with technology, it is important that an ODR system be designed so as to minimize, to the greatest degree possible, technological imbalances and eliminate technological barriers. In that regard, the Committee makes the following recommendations:

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<sup>45</sup> David Allen Larson, *Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone*, 34 OHIO ST. J. ON DISP. RESOL. 431 (2019).

1. Mobile phone access should be guaranteed.

The ODR system should be accessible by mobile phone. Many parties do not have ready access to computers, and even those who do have computers may lack sufficient internet or broadband capacity for joining the ODR system or maintaining a consistent connection. *Id.* During the COVID-19 pandemic, this problem has become apparent for workers trying to work remotely, students attempting to attend class remotely and others seeking other types of services. There are certain segments of the population that have mobile phones but not computers and adequate broadband.<sup>46</sup> Therefore, the ODR system should be designed not only to be available to mobile phones, but available on essentially equivalent terms as on more sophisticated computers. There should not be features in the ODR system which a party using a computer can access more easily or fully than a party using a mobile phone.

2. Public access points must be made available.

The Trial Court currently has six open Zoom rooms in the Chelsea, Brockton, Worcester, Malden, Lawrence and Springfield courthouses, with a seventh opening soon in Lowell. Each Zoom room has computer stations for users to take part in Zoom videoconferencing.<sup>47</sup> These were introduced during the COVID-19 pandemic to address the needs of litigants who were otherwise unable to access virtual court hearings because of lack of technology. In at least one of the Zoom rooms, members of the local bar association volunteer to provide technical assistance to users. The Trial Court plans to have a Zoom room in gateway cities<sup>48</sup> across Massachusetts where there is a court presence (23 of the 26 gateway cities). Even though the Zoom rooms are only open during court business hours, they are a potential access point for parties to gain access to computers for use with ODR systems. The Committee recommends utilizing the rooms for that additional purpose once there is an ODR platform.

The court system should also work with public and private libraries, local governments, community organizations and non-profits to provide more public access to computers for use with ODR systems, as well as to obtain technical assistance in navigating the system from trained volunteers. As with courthouses, it probably will not be practical for these access points to be open at all times seven days a week, but the public access points at least would enable parties who lack computers or mobile phones (or cannot afford sufficient minutes for their mobile phones) – or who would like assistance in explaining or accessing the ODR system – to participate more robustly in ODR. Many libraries already serve as places where the public can utilize computers, often without charge; courts should coordinate as much as possible with libraries to facilitate use of their computers for ODR. The Committee recognizes that it may not

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<sup>46</sup> *Internet/Broadband Fact Sheet*, Pew Research Center (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#who-hashome-broadband>.

<sup>47</sup> See *Trial Court Zoom Rooms*, Mass.gov, <https://www.mass.gov/lists/trial-court-zoom-rooms>.

<sup>48</sup> Under G.L. c. 23A, § 3A, gateway municipalities have a population between 35,000 and 250,000, with an average household income below the state average, and an average educational attainment rate (bachelor's degree or above) below the state average.

be practical for libraries to accommodate long computer sessions for individual patrons, but some library access should be feasible.

Community organizations can provide similar assistance. A current example of community organization-based public access points for court proceedings exists for eviction cases. The Massachusetts Attorney General's Office has provided grants to four community organizations in gateway cities to purchase computers and engage staff to enable tenants to participate in remote eviction proceedings in some Housing Courts and District Courts.<sup>49</sup> The Trial Court is cooperating in the program. With modest funding, similar arrangements could be structured for the ODR system.

3. ODR should have a familiar look so as to encourage participation.

Because the ODR system is intended, as much as possible, to equalize, and not further gaps between, the rights or opportunities of parties of differing means, the ODR system should have a simple and familiar look to it, and not be complicated or off-putting. Parties need to feel welcome in the system – and not consider ODR to be more difficult or restrictive than going to court in person. Even regular computer users often find that certain applications and directions are hard to follow without supplemental instructions, outside help, or extensive trial and error. The ODR system should require none of those. Unless the system is visually inviting and works with a minimum of stress to the parties, a principle purpose of having a universally available alternative to in-court proceedings will be undermined at the start.

4. No software applications (apps) should be required to access ODR.

The Committee recommends that the ODR system be accessible directly through a court website without the need for parties to utilize separate software applications (apps). The ODR system should be self-contained and equally accessible to all parties. The use of apps with links or windows to the ODR system could provide unfair advantage to parties with either the means or sophistication to obtain or utilize them.

**G. ODR must be language-friendly.**

There are several language access concerns to consider in the implementation of ODR. The user experience study of the Utah small claims ODR platform found that representative users of the system were more likely to be LEP users. Furthermore, while very few litigants opted out of the platform (28 out of 2,000), seven (7 or 25%) did so for language access issues.<sup>50</sup>

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<sup>49</sup>Press Release, Office of Attorney General Maura Healey, *AG Healey Provides Funding for Technology to Help Tenants Access Remote Eviction Hearings* (Mar. 18, 2021), <https://www.mass.gov/news/ag-healey-provides-funding-for-technology-to-help-tenants-access-remote-eviction-hearings>.

<sup>50</sup> Stacey Butler, et al., *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona, [https://law.arizona.edu/sites/default/files/i4J\\_Utah\\_ODR\\_Report.pdf](https://law.arizona.edu/sites/default/files/i4J_Utah_ODR_Report.pdf).

1. ODR should be available in multiple languages.

One concern is the availability of the platform in additional languages. Regardless of the platform selected, it is necessary that the content on the platform and self-help materials related to using ODR can be made available in multiple languages. Any written materials provided to an LEP litigant as part of the ODR process would also need to be translated. Another concern is determining whether an interpreter is needed for verbal, real-time translation. If there is any question as to whether language barriers would affect either party's ability to fully and meaningfully participate in mediation, there should be a process through which the mediator or litigant can request an interpreter. As such, the selected platform must have a way to integrate interpreter services into the process when necessary.

2. The ODR systems should use plain language.

Literacy concerns must be considered when selecting an ODR platform. Content and materials should be incorporated in plain language. The Massachusetts Trial Court Readability Guidelines recommend a reading level of 5<sup>th</sup> grade or lower when creating forms and self-help materials and those guidelines should be followed when incorporating content into the ODR platform. Another factor to consider is whether templates, forms and guided interviews (which assists users in filling out court forms by providing information and asking questions designed to elicit relevant information) can be incorporated into the design of the platform. The Committee recommends that this be done to the greatest extent practicable, as tools like these would help address literacy concerns by minimizing the need for freewriting when drafting documents. The system should also work with the court's existing forms and documentation requirements.

#### **H. Legal information, assistance, and advice should be readily available to ODR users.**

A theme that the Committee heard repeatedly from other jurisdictions is that an ODR system should not replicate online the pain points or barriers that can exist in the brick-and-mortar, in-person process. Among those barriers is the absence of sufficient and accessible legal information, assistance, and advice for unrepresented litigants. The presumptively asynchronistic nature of an ODR system creates an opportunity to address and reduce this barrier.

The Committee recommends that access to legal information, assistance, and advice be built into the ODR system, and that users be encouraged to use these resources. This can take multiple forms, including information modules at various steps along the ODR process (*e.g.*, information regarding exempt income for purposes of collecting a small claims judgment); guided interviews for creating forms, which inherently provide legal information; off-ramps for consultation with court service center and law library staff; and referrals to legal aid and lawyer-for-a-day programs.

The CRT in British Columbia, described in more detail above, addressed the need for legal information by developing a "Solution Explorer" for its ODR process. The Solution Explorer is described on the CRT website as follows: "The Solution Explorer is the first step in the CRT

process. It gives you free legal information and self-help tools. If your dispute is something the CRT can help resolve, then you can apply to the CRT right from the Solution Explorer.”<sup>51</sup>

In addition, the Committee recommends that ODR in Massachusetts should be designed to accommodate at least some level of attorney assistance. In order to do so, the Committee recommends consideration of the following elements:

- Up-front information about the existence of legal aid, pro bono programs,<sup>52</sup> and lawyer referral services;
- Connection to real-time, online legal assistance such as lawyer-for-a-day programs;
- The technological ability for attorneys to enter into the ODR process on a limited basis; and
- Modifications to Limited Assistance Representation rules as necessary to accommodate limited engagement in ODR to the extent it is deemed appropriate for certain case types.

## V. ADDITIONAL CONSIDERATIONS FOR THE ODR DESIGN PROCESS

One lesson learned from ODR projects undertaken elsewhere is that careful planning and a thoughtful design process are critical to a successful online dispute resolution process. For that reason, many courts and organizations that support court-annexed ODR have grappled with capturing the multiple factors that should be considered and there are many resources available, including from the NCSC,<sup>53</sup> on this topic.<sup>54</sup>

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<sup>51</sup> *Small Claims*, Civil Resolution Tribunal, <https://civilresolutionbc.ca/how-the-crt-works/getting-started/small-claims-solution-explorer/>.

<sup>52</sup> While the proposed pilots involve topics that legal aid and pro bono attorneys are not likely to handle (small claims and driving infractions), this is definitely important for ODR generally.

<sup>53</sup> See Key Decision Points, Online Dispute Resolution, <https://www.ncsc.org/odr/KeyDecisionPoints>; Sharon Sturges & Susanne van der Meer, *Making Project Decisions Visible: Online Dispute Resolution Project Design, Structured Decision-Making, and Visual Information Tools*, National Center for State Courts, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0012/42600/Project-Design,-Structured-Decision-Making,-and-Visual-Information-Tools.pdf](https://www.ncsc.org/_data/assets/pdf_file/0012/42600/Project-Design,-Structured-Decision-Making,-and-Visual-Information-Tools.pdf). See also *Considerations in Implementing Court ODR Systems*, Office of Dispute Resolution, State Court Administrators Office, Michigan Supreme Court (Jan. 6, 2020), <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Resources/ODRConsiderations.pdf>; *Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits*, National Consumer Law Center (last updated Jun. 2021), [https://www.nclc.org/images/pdf/debt\\_collection/ib-odr-july2019.pdf](https://www.nclc.org/images/pdf/debt_collection/ib-odr-july2019.pdf).

<sup>54</sup> Valuable resources are also available through organizations that study and promote ODR beyond the courts, such as the National Center for Technology and Dispute Resolution (“NCTDR”) and the International Council for Online Dispute Resolution (“ICODR”). See *Ethical Principles for Online Dispute Resolution*, by Leah Wing, Co-Director, NCTDR, founding board member of the ICODR and Senior Lecturer, Legal Studies Program, Department of Political Science, University of Massachusetts (Amherst), 3 INT’L J. ON ONLINE DISP. RESOL 12 (2016). Reference should also be made to the Guiding Principles for Post-Pandemic Court Technology, and the supporting resolution

The fundamental access to justice principles described in Section IV address issues and topics sometimes treated as design considerations. Under any rubric, the Committee views them as critical issues that must be taken into account when planning for ODR, but there are many additional factors to consider that will enhance user satisfaction and utilization, and thus increase access to ODR, with all the benefits it will hopefully afford litigants. Based on our work to date, the Committee recommends that the preparatory design process should take the issues discussed below into account.

One of the major purposes of following a design process that considers critical access to justice principles and these design factors is to carefully describe the desired features for an RFP. Pew has advised the Committee that the RFP for an ODR platform is more important than it might ordinarily be to insure achieving access to justice goals. An RFP will obviously address issues like compatibility with other Massachusetts e-courts initiatives but must also address unique issues such as those outlined in this section. The Committee hopes that Massachusetts will help set the standard for what court-annexed ODR looks like in the future and is confident that with a detailed RFP process, a vendor who can meet most if not all of our suggested requirements, can be found.<sup>55</sup>

For sample RFPs, see sample RFIs on [nsc.org/ODR](https://nsc.org/ODR). The Committee has also collected samples from Alaska, New Hampshire and New York.<sup>56</sup>

#### **A. Make ODR multi-faceted, expeditious and enforceable.**

##### **1. ODR should provide for multiple means of resolving disputes.**

The value of any ODR program is ultimately determined by its ability to resolve the disputes that it processes. The Committee recommends that any ODR system in Massachusetts include multiple approaches for resolving disputes, be expeditious, and result in enforceable agreements and orders. As noted above, ODR is not online ADR; nor is it virtual mediation. However, to achieve its full potential, the Committee recommends that ODR in Massachusetts include

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adopted by the Conference of Chief Justices and the Conference of State Court Administrators, many of which are highly relevant to ODR, *Guiding Principles for Post-Pandemic Court Technology*, National Center for State Courts (Jul. 16, 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf](https://www.ncsc.org/_data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf); *Considerations in Implementing Court ODR Systems*, Office of Dispute Resolution, State Court Administrators Office, Michigan Supreme Court (Jan. 6, 2020); and the guiding principles developed by the NLADA. *Efficiency is Fine, but Equity is Better: The Civil Legal Aid Community and their Views of Online Dispute Resolution*, National Legal Aid & Defender Association at 41, <https://www.nlada.org/sites/default/files/NLADA%20Pew%20ODR%20Report%20Final%20Draft%2012.30.20.pdf>

<sup>55</sup> The Committee is aware that after a thorough planning and RFP process, the New Hampshire court found it difficult to identify a company that could both tie in to its case management system and also offer a negotiation system based on best practices instead of reinforcing bad bargaining practices; most also do not offer mechanisms to check for exempt income and ability to pay in small claims cases. The New Hampshire court believes it cannot meet its basic legal obligations as a court system if it were to adopt ODR now and has found in-person court or telephonic hearings a better option at present. There are a few systems in production (Global Justice Solutions and RDO) that show some promise in this area, but ODR is on hold for now in New Hampshire. As noted at the outset, the Committee is optimistic that the ODR industry will respond to the unique needs of court providers.

<sup>56</sup> These are available on request.

opportunities for party-to-party negotiation, facilitated mediation, and adjudication. This would meet the public demand for a system that potentially makes it easier and more convenient for them to resolve disputes, without sacrificing fundamental fairness.

To the extent that a given ODR process results in an agreement between the parties, the Committee recommends that the agreement be “fast-tracked” for review by a judge or other court official, so as to ensure that the terms are fundamentally fair and comport with the law. The Alaska court system, which is preparing to pilot ODR in most civil case types, is including a “pre-filing” option, which will allow the parties to reach an agreement before filing a case, and then “fast-track” that agreement for case initiation and review by a judge.

The British Columbia CRT is an example of a comprehensive ODR system. As indicated above, users have the opportunity to obtain problem-solving legal information through the “Solution Explorer” before beginning the dispute resolution process. Upon initiation of a claim, the parties can engage remotely with one another in an effort to negotiate a resolution. If unsuccessful on their own, the parties move to facilitated mediation with CRT staff. If mediation does not resolve the dispute, the claim goes before a Tribunal Member for adjudication. Typically, the claim is adjudicated on the written record, although the Tribunal Member has the discretion to contact the parties for additional information, and to convene a video hearing if s/he deems it necessary. Agreements reached in negotiation or mediation are reduced to writing, and adjudication results in a written decision. All dispositions are enforceable by the Tribunal.

Alaska is also preparing to pilot an ODR program for most civil cases. The Alaska system will offer negotiation, mediation, and online trials. All phases will be asynchronistic and based upon written submissions, with judges having the discretion to engage with litigants directly at the trial phase, if necessary. In an effort to provide legal information and assist the parties in reaching agreement, Alaska is drafting templates for all case types, which include the typical elements of a resolution in that case type, *e.g.*, possession in an eviction case, payment terms in a small claims case, etc.<sup>57</sup>

Experience teaches that ODR users want the range of resolution processes offered there, including adjudication. From the users’ perspective, there is no reason to switch to in-person engagement at the adjudication stage, and users want the convenience of remote participation along the entire continuum of options. If, as urged by the Committee, an ODR program in Massachusetts is designed from the perspective of its users – from the outside in, rather than the inside out – the Trial Court should consider a process that offers all options to the user remotely, on the basis of a written record unless decided otherwise by the court, even while retaining the role of judges and clerk magistrates as decision makers.

## 2. ODR must provide for expeditious resolution of disputes.

It is also important that the ODR process be expeditious. Once engaged, users typically want to move quickly through their options and get the case resolved. If widely used, ODR offers

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<sup>57</sup> Personal communication, Hon. Dina Fein (ret.) and Stacey Marz, Administrative Director, Alaska Court System, April 15, 2021.

enormous benefit to the court system in terms of efficiency, but ODR is only likely to be widely used if it is either opt-out (discussed below), or preferable – from the perspective of court users – to the traditional processes. As such, the Committee recommends providing sufficient staff and resources for any ODR program to assure its users that their claims will be resolved expeditiously.

3. ODR resolutions must be enforceable.

Finally, ODR claims must resolve by way of enforceable dispositions. Other jurisdictions require parties to file any agreements reached through ODR so as to ensure that they will be enforced by the court.<sup>58</sup> The Committee recommends that ODR in Massachusetts be designed so as to reassure users that they will have the support of the court in enforcing claim outcomes.

**B. Identify goals.** The Trial Court should try to identify goals for any ODR project – for example, increasing user access and convenience, customer satisfaction, customer empowerment and control, reducing defaults, shortening time to disposition, cost savings and greater efficiency for litigants and the courts (without leaving some users behind). These may also be the metrics for operational success. In order to do that, the Trial Court should fully understand and analyze the current system for each case type considered as a candidate for ODR, including metrics on number of cases, time to disposition, default rate, numbers of SRLs as plaintiffs and defendants, and any other information that will help identify problems and bottlenecks that ODR can address and improve. Data and metrics should be collected in order to determine whether the goals have been accomplished.

**C. Consider streamlining systems first.** As the Trial Court considers different case types as candidates for ODR, it should first consider whether the current system works as well as it should for SRLs. The Boston Sunday Globe recently made that same observation in an article about the growth in telehealth during the COVID-19 pandemic: “We can’t take a broken experience and simply make it virtual. There is no app for fixing healthcare [or, in our case, court systems].”<sup>59</sup> For example, is there a better way to serve a small claims complaint to avoid defaults due to failure to actually receive the complaint, even though the requirements for service are met? Such fixes may include statutory requirements, such as Registry fees to appeal a traffic ticket, which would require a legislative change.

**D. Use user-centric/human design.** One step to ensure the focus stays on SRLs lies in utilizing the new field of user experience or UX studies, as was done in the seminal user experience study conducted by the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law in collaboration with Pew and the Utah Administrative Office

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<sup>58</sup> See *2020 Civil Justice Committee Report and Recommendation*, Texas Judicial Council, Attachment A, Texas Online Dispute Resolution Policy Framework (Sep. 2020 at 7-8, Section 5.e.i and f.ii, [https://www.txcourts.gov/media/1449780/civil-justice-committee-2020\\_0923\\_final.pdf](https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf)).

<sup>59</sup> Shantanu Nundy, *Covid-19 Has Finally Brought Health Care Into the 21<sup>st</sup> Century. Here’s What’s Next*, BOSTON GLOBE MAGAZINE (May 2, 2021).

of the Courts.<sup>60</sup> The researchers in that study made five actionable recommendations that the Utah courts could adopt to create a more accessible and just online space:

- Ease the Transition from Paper to Platform;
- Streamline the Registration Process;
- Simplify Document Upload and Review;
- Improve ODR Information and Help; and
- Clarify Legal Information and User Options.<sup>61</sup>

Each of these recommendations are explained more fully in the report, which is a valuable resource for courts to utilize in both initiating and improving an ODR system. The report ultimately concluded that litigants are ready – if not eager – to utilize an ODR system. Courts must keep in mind the necessity of integrating human-centered design and creating an accessible and transparent ODR system that informs the litigants of their legal rights and options.

Another recommendation to consider is providing users with the ability to explore the ODR platform anonymously, in order to become familiar with it, before choosing to engage in ODR.<sup>62</sup> Also, as noted in our recommendation that legal information, assistance, and advice should be readily available, the use of templates, forms and guided interviews would be very helpful to SRLs.

**E. Opt-out or opt-in?** One major issue for stakeholder discussions is whether participation in ODR is presumptively required (meaning there will be some limited exceptions) or voluntary, often referred to as “opt-out” versus “opt-in.” The British Columbia CRT and Utah Small Claims ODR platform are examples of “opt-out” systems. An opt-out system will increase utilization, with the anticipated efficiencies and cost-savings for both users and the courts, but consumer advocates are leery of forcing SRLs into an ODR platform that may not adequately protect their rights. *See Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits*, National Consumer Law Center (last updated Jun. 2021),

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<sup>60</sup> *See* Utah Online Dispute Resolution Platform: A Usability Evaluation and Report, The University of Arizona, <https://law.arizona.edu/utah-online-dispute-resolution-platform-usability-evaluation-and-report>. *See also*, *How to Evaluate the Litigant Experience as Courts Turn to Online Dispute Resolution*, The Pew Charitable Trusts (Jan. 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/01/25/how-to-evaluate-the-litigant-experience-as-courts-turn-to-online-dispute-resolution>. The study itself can be found at Stacey Butler, et al., *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona, [https://law.arizona.edu/sites/default/files/i4J\\_Utah\\_ODR\\_Report.pdf](https://law.arizona.edu/sites/default/files/i4J_Utah_ODR_Report.pdf).

<sup>61</sup> *Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona, <https://law.arizona.edu/utah-online-dispute-resolution-platform-usability-evaluation-and-report>.

<sup>62</sup> *Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits*, National Consumer Law Center (last updated Jun. 2021), [https://www.nclc.org/images/pdf/debt\\_collection/ib-odr-july2019.pdf](https://www.nclc.org/images/pdf/debt_collection/ib-odr-july2019.pdf). (“Courts adopting ODR should make it optional and allow participants to opt in. Consumers should be able to try ODR without penalty and be allowed to easily transfer back to a traditional court at any time. There should be no consequence if a consumer does not opt in to ODR.”).

[https://www.nclc.org/images/pdf/debt\\_collection/ib-odr-july2019.pdf](https://www.nclc.org/images/pdf/debt_collection/ib-odr-july2019.pdf). The Committee is recommending that the pilots be opt-in, since one of the purposes of the pilots is to collect information to make a more informed decision on this issue. An opt-out system might only be advisable if the ODR platform was sufficiently protective of SRLs.

**F. Funding.** The Committee hopes that the expertise of the Trial Court Grants Coordinator can be utilized to explore potential funding sources.<sup>63</sup> Connecticut used National Highway Traffic Safety funds to build its ODR traffic platform. Another example is the use of Title IV-D of the Social Security Act, which established the child support enforcement program, which can be used to assist SRL access to child support cases. Ottawa County, MI used this funding to introduce several ODR tools to increase child support collections while decreasing contempt hearings and arrest warrants.<sup>64</sup> We also note that Cares Act funds are available to courts for ODR if ODR is used to address a backlog in cases caused by the COVID-19 pandemic.<sup>65</sup>

**G. Payment.** By this we refer to payments to be made by the user (not fees the court system will pay to a vendor). In many case types, ODR will lead to a resolution that involves the payment of money by one party to the other or, in CMVI cases, to the state. Ideally, payment options should be available online or through another readily available system that may be more useful for the users without bank accounts. For example, Arizona uses a vendor called Pay Near Me that allows someone to make a payment to the court at local stores like CVS, or 7-11, using cash payments and QR codes without the clerk knowing anything about the payment.

**H. Data Collection and Ownership.** Anyone who participates in the digital world has grave concerns about cyber security given the extensive information shared online in transactions ranging from e-commerce to tele-health. There are significant additional concerns in the court context, particularly given the confidentiality statutorily accorded to mediation.<sup>66</sup> Questions about who can access information provided by litigants, what information should be collected about case metrics, whether it can be used for anonymous data research, and who actually owns the data are among the many issues that must be considered.<sup>67</sup> For example, participants in a survey conducted by the NLADA expressed a specific concern that low-income clients “already

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<sup>63</sup> The Committee notes that the first step in securing funding will be to accurately predict all costs including, by way of example, the costs for court support for the ODR user.

<sup>64</sup> See Kevin Bowling, et al., *Improving Child Support Enforcement Outcomes with Online Dispute Resolution*, National Center for State Courts, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0013/27103/improving-child-support-enforcement.pdf](https://www.ncsc.org/_data/assets/pdf_file/0013/27103/improving-child-support-enforcement.pdf) (original article by MI court staff); *Federal Pass-Through Funding for Courts Supports Innovations and Equity*, The PEW Charitable Trusts (Mar. 5, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/03/05/federal-pass-through-funding-for-courts-supports-innovations-and-equity>.

<sup>65</sup> Amy Schmitz *Online Dispute Resolution – Promise and Pitfalls* [Webinar], Association of American Law Schools (June 9, 2021).

<sup>66</sup> G.L. c. 233, § 23C.

<sup>67</sup> The Texas ODR Policy Framework specifically recommends that the ODR “[i]mplementation process should include contingencies for transfer of all system data back to the court in a usable format in the event of termination of the contract at a future date.” *2020 Civil Justice Committee Report and Recommendation*, Texas Judicial Council, Attachment A, Texas Online Dispute Resolution Policy Framework (Sep. 2020) at 5, [https://www.txcourts.gov/media/1449780/civil-justice-committee-2020\\_0923\\_final.pdf](https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf).

had too much of their data available to too many different entities, entities whose interests may be in direct conflict with theirs.”<sup>68</sup> Courts need to be cognizant of the responsibility of collecting litigant data from an ODR platform, and view the court’s role as a “good steward” of any data they collect.<sup>69</sup> In sum, courts must be careful, in collecting data, “to only collect data that serves a specific purpose, limit who has access, and have robust security in place *without* putting any onus on the client to have to ‘opt’ for greater security.”<sup>70</sup> To the extent the Trial Court vendor collects personal information, they must comply with 201 C.M.R. § 17: Standards for the Protection of Personal Information of Massachusetts Residents.<sup>71</sup>

**I. Evaluation.** Evaluation should be an integral part of the pilot ODR projects, as well as full-scale projects. In determining the length of the pilot projects, allowing sufficient time to collect reliable data for evaluation is an important factor for the Trial Court to consider. In addition to the very important user feedback discussed above, data as to who is using the system, types of disputes, outcomes, length of time to resolution, and default data may be collected, among other metrics.<sup>72</sup> There has been very strong interest in the extent to which ODR reduces default rates, with some jurisdictions reporting a twenty to thirty percent drop in default rates after implementing an ODR program.<sup>73</sup> Care should be taken to identify data that will be wanted and make plans to collect it. Any evaluation should systematically review how well ODR meets the access to justice goals presented in this report.

The Committee notes that just as it was finalizing this report, it learned that the NCSC, with support from the State Justice Institute, has issued a new report describing a framework for program evaluation and ongoing performance measures for ODR programs (as well as a brief but helpful summary of the history of ODR in the United States). The report concludes that “[a]s new ODR programs are implemented, it will be important to evaluate their effectiveness and make ongoing adjustments as needed. Carefully planned data collection and evaluation are

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<sup>68</sup> *Efficiency is Fine, but Equity is Better: The Civil Legal Aid Community and their Views of Online Dispute Resolution*, National Legal Aid & Defender Association at 41, <https://www.nlada.org/sites/default/files/NLADA%20Pew%20ODR%20Report%20Final%20Draft%2012.30.20.pdf>

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 42.

<sup>71</sup> The definition of person in these regulations appears to exclude the Trial Court itself. 201 C.M.R. § 17.02. Even though these would not apply to ODR, we note that the Trial Court has existing policies on data collection and record keeping. *Trial Court Policy on Data Collection and Record Keeping*, Mass.gov (Aug. 23, 2018), <https://www.mass.gov/policy-statement/trial-court-policy-on-data-collection-and-record-keeping>. (These policies currently only apply to ADR.) [The Trial Court Uniform Rules on Dispute Resolution 6\(g\)](#) also references data collection and states that the court shall, “develop a system to record accurately and compile regularly data sufficient to track cases, monitor services, and provide any information required or requested by the applicable.”

<sup>72</sup> For example, the Utah UX Study collected both quantitative data (such as errors, time-on-task, completion rates, and post-task satisfaction) as well as qualitative data (such as participants’ reactions, comments, and body language). The study reported that the data collection yielded consistent usability metrics for the primary outcome variables: (1) error rates; (2) time-on-task; (3) task completion rates; and (4) subjective evaluations. Stacey Butler, et al., *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, The University of Arizona at 20, [https://law.arizona.edu/sites/default/files/i4J\\_Utah\\_ODR\\_Report.pdf](https://law.arizona.edu/sites/default/files/i4J_Utah_ODR_Report.pdf).

<sup>73</sup> *Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits*, National Consumer Law Center (last updated Jun. 2021) at 3, n.10, [https://www.nclc.org/images/pdf/debt\\_collection/ib-odr-july2019.pdf](https://www.nclc.org/images/pdf/debt_collection/ib-odr-july2019.pdf).

crucial components of the implementation of any new program designed to promote access to justice.” Andrea Miller, Paula Hannaford-Agor, Kathryn Genthon, *An Evaluation and Performance Measurement Framework for Online Dispute Resolution Programs: Assessing Improvements in Access to Justice*, First Edition (May 2021) at 11. This is a useful reference which should be of great value to the Trial Court.

## **VI. CONCLUSION**

ODR offers the Trial Court the opportunity to make resolution of disputes more efficient, less costly and more equitable for members of the Massachusetts community. In order to accomplish this, the Committee has articulated basic access to justice principles that must be incorporated into any ODR system that will be adopted in Massachusetts if we are to promote, and not diminish, access to justice for all those who come before the Trial Court, without regard to income, race, disability, education, language barrier or any other disadvantage or impediment a litigant may face. The Committee recommends that the Trial Court begin its adoption of ODR by piloting ODR for both CMVI and Small Claims. The Committee’s more detailed recommendations for these two pilots are found in the Appendices to this report. The Committee intends that the access to justice principles and design steps discussed above should inform the design and implementation of the pilots as well as any broader implementation of ODR. The pilots would require the full support of court leaders and staff at every level. Information learned from pilot projects will be utilized to evaluate ODR as a possible tool in multiple case types before full-scale implementation in those case types, and then potentially expansion to other case types. The Committee urges the Trial Court to take advantage of the experiences of other jurisdictions with ODR systems, as well as to follow our suggestions on the design and implementation stages, so as to better ensure that ODR in Massachusetts increases, and never diminishes, access to justice for court users.

**TABLE 1****TABLE OF U.S. JURISDICTIONS UTILIZING ONLINE DISPUTE RESOLUTION (AS OF JUNE 2021)<sup>1</sup>**

<b>Jurisdiction</b>	<b>Date Implemented</b>	<b>Types of Cases</b>	<b>Court Website</b>
Arizona - Superior Court of Arizona in Maricopa County	March 2019	Civil Debt; Family Law	<a href="https://superiorcourt.maricopa.gov/civil/civil-online-dispute-resolution/">https://superiorcourt.maricopa.gov/civil/civil-online-dispute-resolution/</a>
Arizona - Pinal County Superior Court	March 2019	Family Law	<a href="https://cii2.courtinnovations.com/AZPCSC/">https://cii2.courtinnovations.com/AZPCSC/</a>
Arizona - Scottsdale City Court	January 2019	Criminal; Parking	<a href="https://cii2.courtinnovations.com/AZSMC">https://cii2.courtinnovations.com/AZSMC</a>
Arizona - Superior Court of Arizona in Yuma County	December 2018	Family Law	<a href="https://www.yumacountyaz.gov/government/courts/superior-court/conciliation-court">https://www.yumacountyaz.gov/government/courts/superior-court/conciliation-court</a>
Arkansas - Bentonville District Court	November 2019	Traffic; Warrants	<a href="https://www.courtinnovations.com/ARBDC">https://www.courtinnovations.com/ARBDC</a>
Arkansas - Faulkner Van Buren County District Courts	July 2018	Traffic; Warrant	<a href="https://www.courtinnovations.com/ARFVB">https://www.courtinnovations.com/ARFVB</a>
Arkansas - Guy District Court	July 2018	Traffic; Warrant	<a href="https://www.courtinnovations.com/ARGDC">https://www.courtinnovations.com/ARGDC</a>
Arkansas - Mayflower District Court	July 2018	Traffic; Warrant	<a href="https://www.courtinnovations.com/ARMDC">https://www.courtinnovations.com/ARMDC</a>
Arkansas - Sherwood District Court	August 2018	Traffic; Warrant	<a href="https://www.courtinnovations.com/ARSDC">https://www.courtinnovations.com/ARSDC</a>
Arkansas - Vilonia District Court	July 2019	Traffic; Warrant	<a href="https://www.courtinnovations.com/ARVDC">https://www.courtinnovations.com/ARVDC</a>
California - Los Angeles County Superior Court	Unknown	Family Law	<a href="https://losangelescafam.modria.com/">https://losangelescafam.modria.com/</a>
California - Yolo County Courts	October 2019	Civil Debt	<a href="https://www.yolo.courts.ca.gov/divisions/small-claims/modria-faqs">https://www.yolo.courts.ca.gov/divisions/small-claims/modria-faqs</a>
State of Connecticut - Superior Court System	December 2019	Traffic	<a href="https://www.jud.ct.gov/faq/traffic.html">https://www.jud.ct.gov/faq/traffic.html</a>

<sup>1</sup> Note to reviewers – we are still working on this, including making sure all the hyperlinks work.

<b>Jurisdiction</b>	<b>Date Implemented</b>	<b>Types of Cases</b>	<b>Court Website</b>
Connecticut Superior Court - Hartford Judicial District	January 2019	Contract Collection; Small Claims	<a href="https://www.jud.ct.gov/odr/ODR_FAQs.htm">https://www.jud.ct.gov/odr/ODR_FAQs.htm</a> ; <a href="https://jud.ct.gov/webforms/forms/CV169.pdf">https://jud.ct.gov/webforms/forms/CV169.pdf</a>
Connecticut Superior Court - New Haven Judicial District	January 2019	Contract Collection; Small Claims	<a href="https://www.jud.ct.gov/odr/ODR_FAQs.htm">https://www.jud.ct.gov/odr/ODR_FAQs.htm</a> ; <a href="https://jud.ct.gov/webforms/forms/CV169.pdf">https://jud.ct.gov/webforms/forms/CV169.pdf</a>
Connecticut Superior Court - Bridgeport Judicial District	December 2020	Small Claims	<a href="https://www.jud.ct.gov/odr/">https://www.jud.ct.gov/odr/</a>
Delaware - Justice of the Peace Courts	November 2020	Landlord/Tenant	<a href="https://www.courts.delaware.gov/jpcourt/odr.aspx">https://www.courts.delaware.gov/jpcourt/odr.aspx</a>
Florida - Ninth Judicial Circuit Court	March 2021	Small Claims	<a href="https://www.ninthcircuit.org/online-dispute-resolution-odr">https://www.ninthcircuit.org/online-dispute-resolution-odr</a>
Florida - Eleventh Judicial Circuit Court	March 2021	Traffic	<a href="https://cii2.courtinnovations.com/FL11JC">https://cii2.courtinnovations.com/FL11JC</a>
Florida - Eighteenth Judicial Circuit Court	March 2021	Small Claims	<a href="https://flcourts18.org/court-programs/odr/">https://flcourts18.org/court-programs/odr/</a>
Georgia - DeKalb County State Court - Traffic Division	July 2019	Traffic	<a href="https://cii2.courtinnovations.com/GADCSC">https://cii2.courtinnovations.com/GADCSC</a>
Georgia - Fulton County Small Claims	February 2019	Small Claims; Landlord/Tenant	See generally <a href="https://www.businesswire.com/news/home/20190115005118/en/Fulton-County-Georgia-Helping-Resolve-Small-Claims-Online-with-Tyler-Technologies%E2%80%99-Modria-Solution">https://www.businesswire.com/news/home/20190115005118/en/Fulton-County-Georgia-Helping-Resolve-Small-Claims-Online-with-Tyler-Technologies%E2%80%99-Modria-Solution</a>
Illinois - Village of Ford Heights	March 2018	Traffic	<a href="https://www.courtinnovations.com/ILFH">https://www.courtinnovations.com/ILFH</a> (inactive); see generally <a href="https://getmatterhorn.com/odr-in-illinois-ford-heights/">https://getmatterhorn.com/odr-in-illinois-ford-heights/</a>
Iowa District Court for Carroll County	October 2020	Traffic	<a href="https://cii2.courtinnovations.com/IAJD2">https://cii2.courtinnovations.com/IAJD2</a>
Kentucky - Jefferson County District Court	May 2018	Traffic	See generally <a href="https://getmatterhorn.com/jefferson-district-court-kentucky-now-offers-matterhorn-online/">https://getmatterhorn.com/jefferson-district-court-kentucky-now-offers-matterhorn-online/</a>

<b>Jurisdiction</b>	<b>Date Implemented</b>	<b>Types of Cases</b>	<b>Court Website</b>
Michigan - MI-Resolve Community Mediation Services	May 2019	Civil Debt; Landlord/tenant; Contract Collection	<a href="https://cii2.courtinnovations.com/MICMS">https://cii2.courtinnovations.com/MICMS</a>
Michigan - MI-Resolve, The Resolution Center	May 2019	Civil Debt; Landlord/Tenant; Contract Collection	<a href="http://www.theresolutioncenter.com/">http://www.theresolutioncenter.com/</a>
Michigan - MI-Resolve Wayne Mediation Center	May 2019	Civil Debt; Landlord/Tenant; Contract Collection	<a href="https://cii2.courtinnovations.com/MIWMC">https://cii2.courtinnovations.com/MIWMC</a>
Michigan - 1st District Court	August 2019	Traffic; Warrant	<a href="https://courtinnovations.com/MID01">https://courtinnovations.com/MID01</a>
Michigan - 10th District Court	February 2019	Criminal	<a href="https://www.courtinnovations.com/MID10">https://www.courtinnovations.com/MID10</a>
Michigan - 12th District Court	May 2018	Traffic; Warrant	<a href="https://www.co.jackson.mi.us/589/District-Court">https://www.co.jackson.mi.us/589/District-Court</a>
Michigan - 14B District Court	April 2019	Traffic; Warrant; Past Due Judgments; Drivers' License	<a href="https://www.courtinnovations.com/MID14B">https://www.courtinnovations.com/MID14B</a>
Michigan - 15th District Court	February 2019	Traffic; Criminal; Warrant	<a href="https://www.a2gov.org/departments/15D/pages/default.aspx">https://www.a2gov.org/departments/15D/pages/default.aspx</a>
Michigan - 16th District Court	April 2016	Traffic Warrant	<a href="https://www.courtinnovations.com/MID16">https://www.courtinnovations.com/MID16</a>
Michigan - 20th Circuit Court	December 2016	Family Law	<a href="https://cii2.courtinnovations.com/MIC20/">https://cii2.courtinnovations.com/MIC20/</a>
Michigan - 21st District Court	October 2017	Traffic	<a href="https://www.courtinnovations.com/MID21">https://www.courtinnovations.com/MID21</a>
Michigan - 22nd District Court	October 2016	Traffic	<a href="https://www.courtinnovations.com/MID22">https://www.courtinnovations.com/MID22</a>
Michigan - 29th District Court	January 2016	Traffic; Warrant	<a href="https://www.ci.wayne.mi.us/index.php/29th-district-court">https://www.ci.wayne.mi.us/index.php/29th-district-court</a>
Michigan - 30th District Court	June 2015	Traffic; Warrant; Driver's License	<a href="https://highlandparkmi.gov/Government/30th-District-Court.aspx">https://highlandparkmi.gov/Government/30th-District-Court.aspx</a>
Michigan - 31st District Court	October 2016	Traffic; Past Due Judgments	<a href="http://www.31stdistrictcourt.net/">http://www.31stdistrictcourt.net/</a>
Michigan - 32A District Court	April 2016	Traffic; Criminal	<a href="https://districtcourt32a.wixsite.com/32adistrictcourt">https://districtcourt32a.wixsite.com/32adistrictcourt</a>
Michigan - 41B District Court	August 2018	Traffic; Past Due Judgments	<a href="https://www.courtinnovations.com/MID41B">https://www.courtinnovations.com/MID41B</a>

<b>Jurisdiction</b>	<b>Date Implemented</b>	<b>Types of Cases</b>	<b>Court Website</b>
Michigan - 46th District Court	September 2016	Traffic; Warrant; Parking	<a href="https://www.cityofsouthfield.com/departments/46th-district-court">https://www.cityofsouthfield.com/departments/46th-district-court</a>
Michigan - 50th District Court	February 2019	Traffic	<a href="https://www.oakgov.com/courts/district-courts/50/Pages/default.aspx">https://www.oakgov.com/courts/district-courts/50/Pages/default.aspx</a>
Michigan - 54A District Court	September 2015	Traffic; Warrant; Parking	See generally <a href="https://sc.courtinnovations.com/MILANSING">https://sc.courtinnovations.com/MILANSING</a>
Michigan - 54B District Court	October 2015	Traffic; Warrant; Parking; Criminal	<a href="https://cityofeastlansing.com/676/54B-District-Court">https://cityofeastlansing.com/676/54B-District-Court</a>
Michigan - 55th District Court	March 2016	Traffic	<a href="http://dc.ingham.org/courts_sheriff/55th_judicial_district_court/">http://dc.ingham.org/courts_sheriff/55th_judicial_district_court/</a>
Michigan - 60th District Court	January 2019	Traffic	<a href="https://www.courtinnovations.com/MID60">https://www.courtinnovations.com/MID60</a>
Michigan - 61st District Court	August 2015	Traffic; Warrant; Parking	<a href="https://www.grcourt.org/">https://www.grcourt.org/</a>
Michigan - 65A District Court	April 2016	Traffic	<a href="https://www.clinton-county.org/149/65A-District-Court">https://www.clinton-county.org/149/65A-District-Court</a>
Michigan - 65B District Court	November 2018	Traffic	<a href="https://www.gratiotmi.com/386/65th-District-Court">https://www.gratiotmi.com/386/65th-District-Court</a>
Michigan - 74th District Court	September 2014	Traffic; Warrant; Past Due Judgments	<a href="https://www.baycounty-mi.gov/DistrictCourt/">https://www.baycounty-mi.gov/DistrictCourt/</a>
Nevada - Clark County Family Court	April 2018	Divorce	<a href="https://www.tylertech.com/resources/case-studies/clark-county-family-mediation-odr-case-study&lt;sup&gt;2&lt;/sup&gt;">https://www.tylertech.com/resources/case-studies/clark-county-family-mediation-odr-case-study<sup>2</sup></a>
New Jersey - Midland Park Municipal Court <sup>3</sup>	May 2020	Traffic	<a href="https://www.NJMCdirect.com">https://www.NJMCdirect.com</a>
New Mexico - 2nd District	September 2019	Civil Debt	<a href="https://seconddistrictcourt.nmcourts.gov/">https://seconddistrictcourt.nmcourts.gov/</a>

<sup>2</sup> While the adoption of an ODR system is on a court-by-court basis in Nevada, the Nevada State Judiciary has provided each court with access to a centralized ODR system, which the court may adopt if it chooses to offer ODR to its litigants.

<sup>3</sup> Recent reports suggest that in the state of New Jersey, approximately thirty municipal courts have adopted an ODR system for resolving traffic infractions. See <https://www.southjerseyobserver.com/2020/07/28/municipal-court-changes-allow-for-case-resolution-without-in-person-appearance/>. However, a list of the participating municipal courts is not readily available. We have included information regarding the Midland Park Municipal Court, which has publicly-posted information regarding the adoption of an ODR platform in May 2021.

<b>Jurisdiction</b>	<b>Date Implemented</b>	<b>Types of Cases</b>	<b>Court Website</b>
New Mexico - Grant County Magistrate & 6th District	September 2019	Civil Debt	<a href="https://adr.nmcourts.gov/home/odr/">https://adr.nmcourts.gov/home/odr/</a>
New Mexico - Hidalgo County Magistrate & 6th District	September 2019	Civil Debt	<a href="https://adr.nmcourts.gov/home/odr/">https://adr.nmcourts.gov/home/odr/</a>
New Mexico - Luna County Magistrate & 6th District	September 2019	Civil Debt	<a href="https://adr.nmcourts.gov/home/odr/">https://adr.nmcourts.gov/home/odr/</a>
New Mexico - Curry County Magistrate & 9th District	September 2019	Civil Debt	<a href="https://adr.nmcourts.gov/home/odr/">https://adr.nmcourts.gov/home/odr/</a>
New Mexico - Roosevelt County Magistrate & 9th District	September 2019	Civil Debt	<a href="https://adr.nmcourts.gov/home/odr/">https://adr.nmcourts.gov/home/odr/</a>
New York - New York City Civil Court - Manhattan	January 2021	Small Claims	<a href="https://cii2.courtinnovations.com/NYNYSC">https://cii2.courtinnovations.com/NYNYSC</a>
Ohio - Cleveland Municipal Court	January 2018	Tax	<a href="https://sc.courtinnovations.com/OHCMC">https://sc.courtinnovations.com/OHCMC</a>
Ohio Court of Claims	July 2018	Public Records Requests	<a href="https://ohiocourtofclaims.gov/alternative-dispute-resolution.php">https://ohiocourtofclaims.gov/alternative-dispute-resolution.php</a>
Ohio - Franklin County	October 2016	All Civil Case Types	<a href="https://sites.google.com/view/fcmcdataproject/about">https://sites.google.com/view/fcmcdataproject/about</a>
Tennessee - Hamilton County General Sessions Court	August 2020	Medical Debt	<a href="https://cii2.courtinnovations.com/TNMEDDEBT">https://cii2.courtinnovations.com/TNMEDDEBT</a>
Texas - Collin County Justice Court	September 2019	Small Claims; Civil Debt	<a href="https://www.collincountytx.gov/justices_peace/Pages/default.aspx">https://www.collincountytx.gov/justices_peace/Pages/default.aspx</a>
Texas - Denton County Justice Courts	Unknown	Small Claims; Civil Debt; Traffic; Criminal; Warrants	<a href="https://dentontxsc.modria.com/">https://dentontxsc.modria.com/</a>
Texas - Farmers Branch Municipal Court	January 2018	Traffic; Criminal; Warrants	<a href="https://www.farmersbranchtx.gov/199/Municipal-Court">https://www.farmersbranchtx.gov/199/Municipal-Court</a>
Texas - Travis County Small Claims	August 2018	Small Claims	See generally <a href="https://www.traviscountytx.gov/news/2018/1644-travis-county-jp-2-first-in-the-country-to-use-online-dispute-resolution-technology">https://www.traviscountytx.gov/news/2018/1644-travis-county-jp-2-first-in-the-country-to-use-online-dispute-resolution-technology</a>

<b>Jurisdiction</b>	<b>Date Implemented</b>	<b>Types of Cases</b>	<b>Court Website</b>
Texas - Williamson County	August 2019	Small Claims	See generally <a href="https://communityimpact.com/news/2019/08/28/williamson-county-small-claims-online-platform-goes-live/">https://communityimpact.com/news/2019/08/28/williamson-county-small-claims-online-platform-goes-live/</a>
Utah - Carbon County Justice Court	August 2019	Small Claims	<a href="https://www.utcourts.gov/smallclaimsodr/">https://www.utcourts.gov/smallclaimsodr/</a>
Utah - Orem City Justice Court	August 2019	Small Claims	<a href="https://orem.org/court/">https://orem.org/court/</a>
Utah - West Valley City Justice Court	September 2018	Small Claims	<a href="https://www.wvc-ut.gov/317/Justice-Court">https://www.wvc-ut.gov/317/Justice-Court</a>

## APPENDIX A

### RECOMMENDED ODR PILOT FOR CIVIL MOTOR VEHICLE INFRACTIONS

The Committee is recommending that the Massachusetts Trial Court (“Trial Court”) implement a pilot ODR project for Civil Motor Vehicle Infractions in the District Courts or the Boston Municipal Court. Although traffic violations are not the typical legal aid case, the failure to resolve traffic citations can lead to far-reaching consequences including loss of license and warrants, as discussed below. For low income persons who depend on a car to get to work or to essential medical care, loss of a license or worse – continuing to drive after loss of a license – can lead to catastrophic results, particularly for an undocumented immigrant who then comes under law enforcement scrutiny. In addition, experience shows that being able to dispute a traffic ticket without going to court is popular, which makes it likely that ODR for these cases will be in demand and thus should provide good data about user acceptance, user preferences and other valuable information. And last, but not least, ODR appears to save time for busy court staff with many pressing demands on their desks. In many respects, traffic violations fit the profile of high volume, relatively low dollar value cases that have been considered ripe for ODR.

This section begins with a detailed discussion of how the current system handles this case type, consistent with the recommendations in the report that it is important to understand the status quo and the stakeholders as one of the first steps in developing a good ODR platform. This should also be helpful to the many readers who have no experience with how the Trial Court deals with traffic violations. The Committee then discusses its specific and general recommendations for a pilot ODR project.

#### I. CIVIL MOTOR VEHICLE INFRACTIONS (CMVI) GENERALLY

A civil motor vehicle infraction is “an automobile law violation for which the maximum penalty does not provide for imprisonment, excepting: (a) operation of a motor vehicle in violation of the first paragraph of G.L. c. 90, § 10 [operating without a license]; (b) a violation of G.L. c. 90, § 23 [operating after suspension or revocation], § 25 [refusal to submit to a police officer], or § 34J [operating without insurance]; and (c) any automobile law violation committed by a juvenile who does not hold a valid operator’s license.” G.L. c. 90C, § 1.

An “automobile law violation” is defined as “any violation of any statute, ordinance, by-law or regulation relating to the operation or control of motor vehicles other than a violation (1) of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles established by any city or town or by any commission or body empowered by law to make such rules and regulations therein, or (2) of any provision of [G.L. c. 159B].” G.L. c. 90C, § 1

There are different stages to the CMVI assessment process and therefore the formulation and implementation of an ODR pilot would require the engagement of the following stakeholders:

- The operator/violator who receives a citation for a CMVI (the CMVI ODR user).

- The police authorities who issue the citation. This includes local and state police as well as police at the state universities and community colleges.
- Registry of Motor Vehicles (“RMV”).
- The courts, which includes the District Court, the Boston Municipal Court (“BMC”), and, with respect to automobile law violations that are treated as a delinquency matter, the Juvenile Court Department.
- The clerk-magistrate of a district court or the BMC, or an assistant clerk who has been designated as a magistrate pursuant to G.L. c. 221, § 62B.
- The Merit Rating Board (“MRB”). The MRB maintains operator driving records consisting of traffic law violations and reports surchargeable incidents to Massachusetts auto insurers and other government agencies involved in transportation and public safety. A surchargeable incident is an at-fault accident or traffic law offense that may result in an increase in an operator’s insurance premium. *See* G.L. c. 90C, § 2.

## II. CURRENT CMVI PROCESSES

A flowchart depicting the current CMVI process is attached at the end of this section as Exhibit A.

The CMVI process begins with the issuance of a citation. A police officer who observes or learns of the occurrence of a CMVI may cite the violator. The citation can be handwritten, or issued electronically and then printed on paper. Police agencies, upon manual issuance of a citation, send a hard copy of the citation to the RMV/MRB. The State Police also issue electronic citations.

If the citation alleges only CMVI violations,<sup>1</sup> the operator has the option of paying the fine amounts listed on the citation, or requesting a magistrate’s hearing. If an operator chooses to pay the citation, their right to a hearing is waived.

An operator who chooses to request a magistrate’s hearing has to submit the request to the RMV/MRB within 20 days of receiving the citation, together with payment of a \$25.00 fee. G.L. c. 90C, § 3[A][4]. The \$25.00 fee is refundable if the violator prevails. *Crawford v. Blue*, 271 F.Supp.3d 316 (D. Mass. 2017). There is no established procedure for seeking waiver of this fee.

Upon receipt of the hearing request, the RMV/MRB sends electronic notification to the court with jurisdiction over the location where the alleged offense occurred. The court division receives the new filing directly from MassCourts by viewing the Daily Summary screen or the

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<sup>1</sup> A violator may also be charged criminally in conjunction with the CMVI if the automobile law violation also constitutes a criminal offense. The ODR pilot will not deal with criminal citations.

Daily Index for that day. A list of new CMVI filings will display in MassCourts for courts to schedule a hearing. Courts may filter this search by date range, police agency or case category.

After identifying a CMVI case that requires scheduling, the clerk's office reviews the relevant information (citation) that the RMV/MRB sent electronically. The court then schedules the case for a magistrate's hearing. MassCourts will record the scheduled event and time and produce a multi-part notice. The notice package includes a hard-copy of the notice for the police agency and another for the operator, and a hard copy for the magistrate to enter his or her decision at the magistrate's hearing.

Uniform Rules on Civil Motor Vehicle Infractions (Trial Court Rule VII) govern the court procedure for the determination of an operator's responsibility for a CMVI, in accordance with G.L. c. 90C, § 3. The operator is ultimately found "responsible" or "not responsible."

Pursuant to Trial Court Rule VII(b)(1), all witnesses are placed under oath. The rules of evidence do not apply at such hearings. The evidence is given such weight as the clerk-magistrate deems appropriate. Questioning and cross-examination of witnesses proceed to the extent and in the manner determined appropriate by the clerk-magistrate, provided, however, that a party is not denied the opportunity to present relevant evidence or cross-examine witnesses. Anecdotal evidence suggests the hearings take 10-15 minutes each.

During the COVID-19 pandemic, many courts scheduled virtual magistrate's hearings. The sample Notice of Video or Telephone Civil Motor Vehicle Infraction Hearing made available to the Committee required submission of written evidence, pictures or documents by email to the clerk-magistrate three days before the hearing.

As noted above, at the conclusion of the hearing, the clerk-magistrate announces a finding and disposition of "not responsible" or "responsible." The clerk-magistrate enters a finding of "not responsible" if he or she determines that it was not shown, by a preponderance of the credible evidence, that the alleged violator committed the infraction charged. If the clerk-magistrate determines by a preponderance of the credible evidence that the alleged violator did commit the infraction charged, he or she enters a finding of "responsible" and imposes an assessment which must be within the range permitted by law and in accordance with any applicable guidelines that have been promulgated pursuant to law. *See* Schedule of Assessments for CMVI promulgated under G.L. c. 90C, § 1, <https://www.mass.gov/doc/citable-motor-vehicle-offenses-and-cmvi-assessments/download>.

If a violator is found "responsible" on a charge, payment of the fine is made to the RMV; the court does not collect fine payments. Failure to make payment can result in a contempt hearing but those are rare as the RMV can suspend the operator's license instead.

After completion of the hearing, either party (operator or police prosecutor) can appeal the clerk-magistrate's findings. The police prosecutor is the officer who issued the citation. Claim of appeal to a judge from a clerk-magistrate's finding and disposition can be made upon the clerk-magistrate's announcement of the finding and disposition, and is noted on the citation.

G.L. c. 90C, § 3(A)(4) imposes a \$50 fee to appeal the clerk-magistrate's finding. This contradicts Trial Court Rule VII (b)(3) which states that "there shall be no filing fee for such appeal." The Supreme Judicial Court in *Police Department of Salem v. Sullivan*, 460 Mass. 637 (2011) held that "where a court rule is in irreconcilable conflict with a statute, the statute supersedes the rule." The statute does not mention a procedure for fee waiver but according to the Mass.gov website, you can fill out an application (available in the clerk-magistrate's office) to waive the filing fee.

Either party (operator or police prosecutor) can file a further appeal to the Appellate Division. Claim of appeal to the appropriate Appellate Division shall be filed with the clerk-magistrate of the court in which the CMVI was heard no later than ten days following the entry of the court's determination of responsibility.

If an operator does not respond to a traffic ticket within 20 days, they waive their right to a hearing and are charged certain fees<sup>2</sup> in addition to the fine. The RMV sends the operator a letter stating they are in default, and if they do not pay their fine and fees within 30 days of that letter their driver's license or right to operate a motor vehicle is suspended and they are likely to have a motor vehicle surcharge imposed. See 211 C.M.R. § 134.09, <https://www.mass.gov/doc/211-cmr-134-safe-driver-insurance-and-merit-rating-plans/download> .

In 2019, the District Court scheduled 69,000 magistrate hearings for CMVI outside of the BMC <https://www.mass.gov/doc/total-filings-by-court-location-18/download>. In 2020, the District Court scheduled 54,285 magistrate hearings for CMVI <https://www.mass.gov/doc/district-court-total-filings-by-court-location/download>. The BMC had 8,330 CMVI hearing requests in 2019 and had 1,200 appeals to judges <https://www.mass.gov/doc/total-filings-by-court-location-15/download>. The BMC had 5,473 CMVI hearing requests in 2020 and had 934 appeals to judges. See <https://www.mass.gov/doc/bmc-total-filings-by-court-location/download>. The time standards for CMVI cases (Category B under District Court Standing Orders) is 5 months if subject to de novo appeal; otherwise the time standard is 4 months from the date of commencement. Note, however, that all time standards were suspended under the COVID-19 Standing Orders. Lastly, the default rate for CMVI cases has been around 10% since 2018. Since users have to pay for this hearing they are motivated and interested, which results in a low default rate.<sup>3</sup>

### **III. PROPOSED USE OF ODR IN MASSACHUSETTS CMVI CASES**

#### **A. The Connecticut system.**

Many jurisdictions have implemented ODR use in traffic violation citation cases, presumably because there is a large volume of such cases, the dispute is relatively simple, and the resulting increase in efficiency for the public and the court system is substantial. Connecticut implemented

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<sup>2</sup> The RMV website has a schedule for late fees and what it calls release fees, see [https://www.mass.gov/doc/rmv-schedule-of-fees/download?\\_ga=2.34251234.252129509.1620051949-433893798.1620051949](https://www.mass.gov/doc/rmv-schedule-of-fees/download?_ga=2.34251234.252129509.1620051949-433893798.1620051949).

<sup>3</sup> Personal communications, Commissioner Judge Bernard and Trial Court staff, April 17, 2021, based on CMVI cases with a charge disposition of "responsible" after default.

the first statewide ODR system for traffic cases in 2018, and the system handles mostly CMVI cases.<sup>4</sup> In Connecticut, all of these violations funnel through a state infractions bureau, which means that there is a single state agency that handles traffic prosecutions, unlike Massachusetts, where the police prosecutor for a CMVI could be an officer from any number of local, state or other agencies.

In Connecticut, most citations are created digitally and include a QR code which brings the operator to the payment page. The operator enters the ticket number and the first three letters of their last name, and then has the option to either pay the fine or plead not guilty. If pleading not guilty, the operator can choose to submit to online review, *i.e.*, dispute resolution. The operator is diverted to a web page that allows him/her/them to submit evidence, including typing in a narrative or uploading photos and other documentation. A hyperlink is included on this page explaining what “online review” means. Next, the court gathers the not guilty pleas, and presents them to the state prosecutor, who has one week to act. The prosecutor can click on the ticket to review the case details, charge information, and documentation provided by operator. They can also click on a link to the DMV to verify documentation and review the operator’s infraction history. Prosecutors may propose a settlement involving a reduction in the offense and fine, but not the associated fees. An email is then sent to the operator communicating the original charge and the prosecutor’s offer. The operator can then accept the offer and pay, or reject the offer, in which case it is transferred to court and a hearing is held on the original charges.

When Connecticut first implemented the system, 76% of the public chose the ODR option. Since the COVID-19 pandemic began, this rate has increased to 93%. Around 85% of the prosecutor’s offers are accepted. The average number of days between issuance of citation and adjudication has decreased from 182 to 56. The percent of cases not prosecuted has fallen from 30% to 16%.

## **B. Proposed CMVI pilot project in Massachusetts Trial Court.**

The volume of CMVI cases in the District Courts and the Boston Municipal Court is significant (over 77,000 in 2019 and over 59,000 in 2020). If the type of improvements in case handling seen in Connecticut were also seen in Massachusetts, there would be substantial benefits for the public, including those using ODR, and the courts in adopting an effective ODR system for CMVI cases. ODR in CMVI cases is an opportunity for the Trial Court, working with public safety stakeholders and others, to create an asynchronous system for resolution of CMVI cases. The ODR pilot should enhance the efficiency of the CMVI process for the court and members of the public, without increasing existing obstacles to accessing the courts; indeed, the goal is to improve access to the courts in these cases. The ODR process in CMVI cases also responds to a changing society and the new operating paradigm in our courts, which includes remote/virtual services.

It is also important to note that while currently there is a charge to appeal an adverse finding, there should be a user-friendly mechanism for waiver in cases of indigency. Failure to respond to

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<sup>4</sup> The system also handles criminal infractions and other payable violations (such as violating rules for mask-wearing or hosting parties during the COVID-19 pandemic).

a CMVI notice can lead to loss of license and imposition of surcharges. This can lead to far more serious consequences if the operator keeps driving without a license or cannot afford the insurance surcharge and goes without insurance, subjecting the operator to escalating violations and penalties. The loss of a license and the inability to afford an appeal can also lead to a downward economic spiral in which a driver is unable to afford an appeal and therefore unable to drive to work, which may well lead to loss of a job and further financial hardship

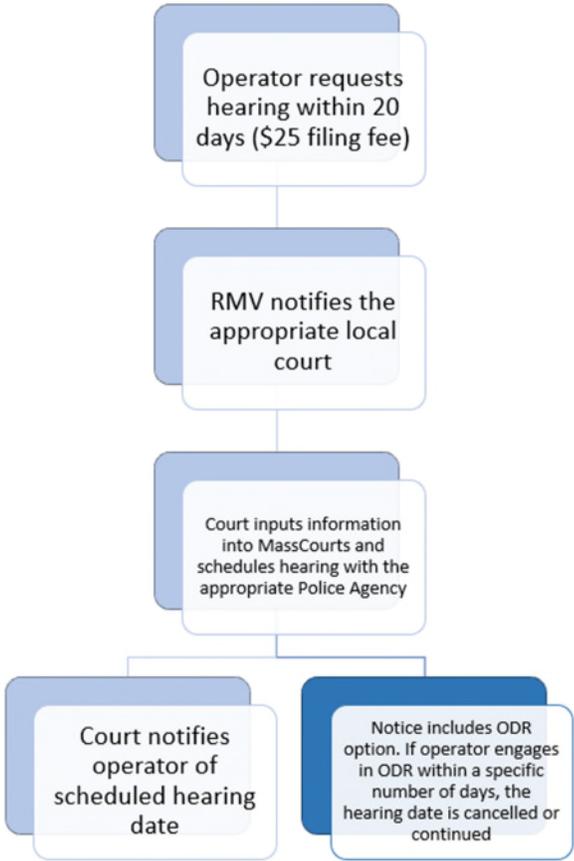
Our recommendation is to provide the operator with a voluntary opportunity to choose ODR at the same time the operator receives notice of the court hearing. If an operator opts into ODR within a specific number of days, the hearing date is cancelled, subject to being rescheduled later if ODR does not resolve the case. If not, the case proceeds in the normal course. Once the operator is engaged in ODR, there should be an opt-in for electronic notification by text or email for any updates concerning the case. This would require the operator to provide the clerk-magistrate with an email address or phone number in addition to (or as an alternative to) the usual notice by mail. This would be similar to the voluntary text notifications some probation offices now offer for court dates.

After the operator opts into ODR, the relevant police department would be notified, and the operator would have 30 days to upload any documentation they deem necessary. Additional features should be considered to ensure the operator can meaningfully understand the issues involved and best present their case. The police officer would then review the documentation and make a recommendation to either dismiss, reduce the assessment, or make no changes to the citation, similar to what happens in the Connecticut ODR process. If the operator accepts the recommendation, the case goes to the clerk-magistrate for review. Under the circumstances, the review would be for facial regularity, including whether any variation from the original citation falls within an acceptable range. The clerk-magistrate can make a different recommendation, which the operator may or may not accept. By entering into an agreement, the operator consents to allow the clerk-magistrate to review the operator's driving history as part of the review. Consistent with the public safety concerns at issue, the clerk-magistrate makes the final decision of responsible or not responsible. If the recommendation is that the operator be found responsible, and it is accepted, the operator makes a payment through an online process.

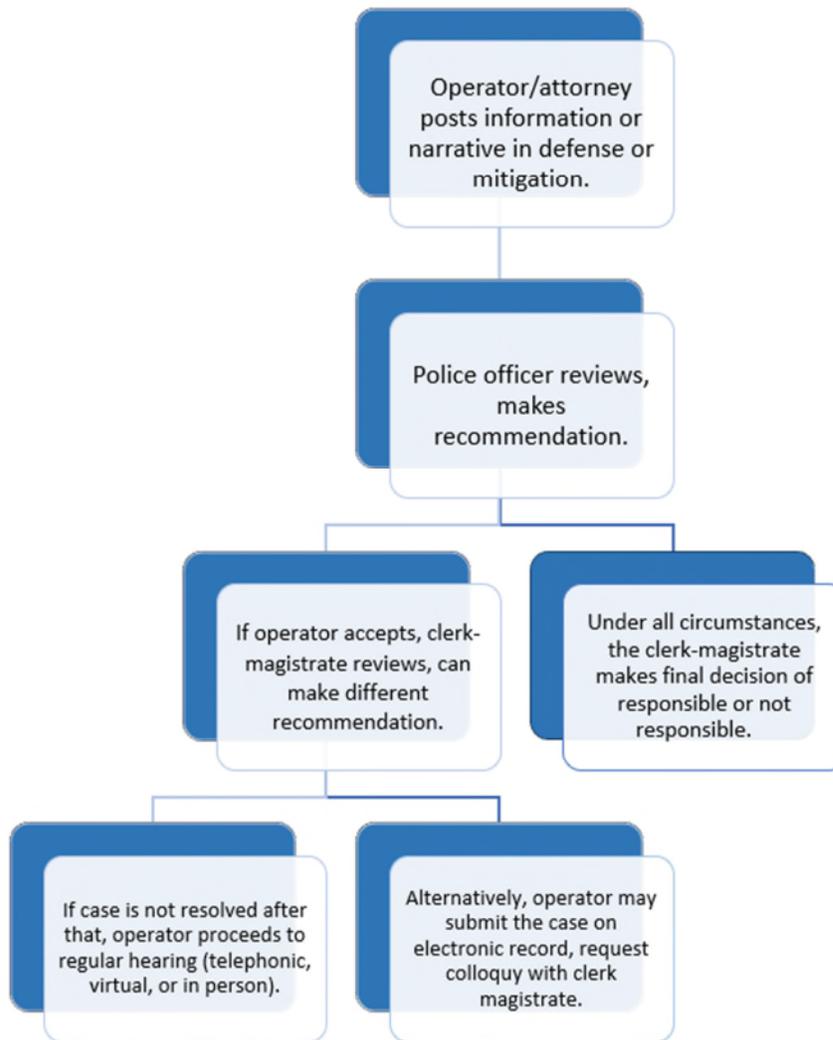
If the case is not resolved after ODR, the operator can choose to proceed to a regular hearing, whether held telephonically, virtually, or in person. Alternatively, the Committee recommends offering the operator the option to submit the case on the basis of an electronic record, which may be different than what the operator submitted in ODR; in that case, either party should also have the right to request the opportunity to speak to the clerk-magistrate in a colloquy (at least during the pilot).

Below is a flow chart illustrating how ODR might work in the pilot study.

# Scheduling CMVI Hearing



## Proposed ODR for CMVI Procedure



### C. Specific issues to be considered in planning and implementing a CMVI pilot.

The Connecticut system provides a good model for Massachusetts<sup>5</sup> but implementation of the access to justice principles set forth in Section III of this report means that additional features should exist to promote universal access and help members of the public better present their case.

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<sup>5</sup> See [Table 1](#) to the report for information concerning additional jurisdictions utilizing ODR for traffic violations. In particular, [New Jersey](#) is another state that has implemented an ODR program for CMVI but initially, it was only implemented in approximately 30 municipal courts. The NJ ODR program applies to 37 traffic offenses, such as speeding, failure to have an insurance card, or failure to yield, where defendants commonly provide additional documentation and seek a reduced charge before pleading guilty. It appears that in New Jersey the judge approves the prosecutor's recommendation for an amended offense and optionally adds his/her comments.

Some of these features, as well as issues for consideration in implementing a CMVI ODR system in Massachusetts, are discussed below.

- The Trial Court should determine the length of the pilot project, balancing the need for sufficient time to generate reliable data and allow for experimentation, but ultimately time-limited so as to ensure that a successful ODR program will be integrated permanently into Trial Court operations within a reasonable period of time.
- As discussed further in the report, the Committee recommends that there be no charge for participating in the ODR pilot. Further, consideration should be given to whether current fees to claim a CMVI hearing and then an appeal create impermissible barriers to access, which may require statutory changes.
- Also as discussed in the report, the operator should be allowed to have counsel participate, if counsel is retained, by providing counsel with direct access to the ODR platform.
- The principal goals in planning a CMVI ODR pilot should be articulated, including user convenience, ease of use, efficiency, accessibility, shortening time to disposition, and reduced burden on the court.
- As noted above, several stakeholders are involved in the different stages of a CMVI assessment and should be appropriately engaged when formulating a CMVI ODR pilot. We note that some jurisdictions initially faced pushback from the stakeholders because an online system may take away police overtime or out of fear it will lead to court staff reductions.
- In light of the access to justice principles set out in the report, some additions to existing ODR traffic platforms are highly recommended. These could include guide and file-type prompts to assist the operator in understanding available defenses and the opportunity to upload a video narrative to eliminate the need for freewriting. A user should be able to access online information resources concerning the traffic laws and the system for handling CMVIs.
- A CMVI ODR platform should be available in multiple languages and should also offer to connect the operator/user with free court interpreter services in multiple languages; given the many different languages used in Massachusetts, it would be impossible to offer the platform in every language that might be needed.
- The availability of federal traffic grants should also be investigated. Connecticut was able to secure funding from the National Highway Traffic Safety Administration (“NHTSA”), a federal Department of Transportation (“DOT”) agency, which was used to build a platform. Both NHTSA and the Federal Motor Carriers Safety Administration, another DOT agency, have grant funds available. Those agencies see this type of program as an opportunity to increase speed and uniformity of traffic sanctions, which impacts safety.

## APPENDIX B

### RECOMMENDED ODR PILOT IN NON-DEBT COLLECTION SMALL CLAIMS CASES

The Committee is recommending that the Massachusetts Trial Court (“Trial Court”) implement a pilot ODR project for non-debt collection Small Claims cases in the District Courts or the Boston Municipal Court. Small Claims procedures in Massachusetts are designed to be easy and convenient for self-represented litigants (“SRLs”) and are therefore prime targets for ODR systems designed with SRLs in mind. In addition, the Committee has learned that many jurisdictions have implemented or are planning to implement ODR in Small Claims cases, both confirming its suitability as an ODR case type and providing rich resources to draw from in planning a Small Claims ODR pilot in Massachusetts.

This section begins with a detailed discussion of how the current system handles this case type, consistent with the recommendations in the report that it is important to understand the status quo and the stakeholders as one of the first steps in developing a good ODR platform. This should also be helpful to the many readers who have no experience with how the Trial Court handles Small Claims cases. The Committee then discusses its specific and general recommendations for a pilot ODR project.

#### I. SMALL CLAIMS GENERALLY

The Small Claims process is established by statute and provides an informal and inexpensive forum to help settle disputes of \$7,000 or less. Small Claims sessions are conducted in every Massachusetts District Court, the Boston Municipal Court, and the Boston Housing Court. The Committee recommends that, at least initially, the ODR process should not be used in debt collection cases given the generally recognized power imbalances in such cases that could be exacerbated in an online format.<sup>1</sup> Examples of claims that could be resolved through a Small Claims ODR pilot for non-debt collection cases include property damage and disputes with contractors, vendors, and neighbors.

#### II. CURRENT PROCESSES

Trial Court Rule III: Uniform Small Claims Rules govern the procedure for all Small Claims cases. A small claim action begins after the plaintiff files a Statement of Claim, which is a one-sided form available at the Clerk’s office or online at [mass.gov/small-claims](https://www.mass.gov/small-claims) (Odyssey Guide and

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<sup>1</sup> Small claims debt collection cases are estimated to constitute somewhere between 50% to 70% of small claims cases. April Kuehnhoff, *Consumer Protection and Court-Sponsored ODR in Collection Lawsuits* [PowerPoint slides], National Consumer Law Center (Jan. 30, 2020). It is widely acknowledged that there is significant potential for abuse in consumer debt collection cases for many reasons, including the disparity in rates of representation of plaintiffs (creditors) and defendants (debtors) and the fact that so many of these cases are filed by large debt buyers whose familiarity with the system far surpasses that of individual debtors. *Id.*; *Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits*, National Consumer Law Center (last updated Jun. 2021), [https://www.nclc.org/images/pdf/debt\\_collection/ib-odr-july2019.pdf](https://www.nclc.org/images/pdf/debt_collection/ib-odr-july2019.pdf).

File). The plaintiff can request assistance from the clerk in completing the form. The claim can be filed online, in person or by mail. At the time of the filing, the plaintiff must pay a small court entry fee (ranging from \$40 to \$150, depending on the claim amount). This fee and any other court fees will be assessed against the defendant if the plaintiff wins their case. The plaintiff may request a fee waiver by means of an affidavit of indigency. As discussed in the main report, fee waivers should be handled in an expeditious user-friendly method, possibly by a simple online process.

After the claim is filed, and the clerk has scheduled the trial, the clerk provides the plaintiff with a copy of the Statement of Claim form, which now includes the date and time of the trial.<sup>2</sup> The clerk-magistrate also sends a copy to the defendant by first class mail along with the Notice form to the address provided by the plaintiff. Notice is deemed served as long as it is not returned as undeliverable.

A defendant can, but is not required, submit a written answer and failure to file an answer does not result in the defendant's default. The defendant also has the option, when answering, to set forth any claim that he or she has against the plaintiff within the jurisdiction of the court. There is no filing fee or surcharge to do so. Both the plaintiff's claim and the defendant's claim shall be deemed as one case if the defendant mails notice of his claim to the plaintiff at least ten days in advance of the scheduled trial date. The defendant may also bring a claim against a third party as long as the defendant's claim is within the jurisdiction of the court and notice is mailed to the third party at least ten days in advance of the scheduled trial date. Finally, under G.L. c. 218, § 24, the defendant can transfer the case out of the small claims session to the regular civil docket or to the Housing Court under G.L. c. 185C, § 20, so long as the case falls within the jurisdiction of the Housing Court. Discovery is not allowed in small claims cases unless good cause is shown.

As in all cases, the parties have the option to enter into a private settlement agreement to resolve the claim and dismiss the case. Alternatively, they can file an Agreement for Judgment at any point. (The court provides a form that may be used.) The court will review the agreement and, if the parties are before the court, any proposed payment order to ensure that the defendant can make the payments without relying upon exempt income and understands the consequences of non-compliance.

If the parties do not resolve their dispute, then the trial takes place as scheduled. If the defendant appears for trial on the scheduled trial date, and the plaintiff fails to appear or is not prepared to proceed to trial, judgment is entered for the defendant. If neither the plaintiff nor the defendant appears for trial, the claim is dismissed. If the plaintiff appears for trial and the defendant fails to appear, the court may render judgment for the plaintiff but must first review the Statement of Small Claim to determine whether further inquiry or an assessment of damages is required. Normally this is done on the scheduled trial date and the court will issue a Payment Order.

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<sup>2</sup> Of note, by filing a small claim the plaintiff waives their right to appeal.

If both parties are present for the trial, a hearing on the merits takes place. The matters are generally heard by a clerk-magistrate.<sup>3</sup> After their respective presentations, the plaintiff and the defendant may ask questions of each other. The clerk acts as moderator but also asks questions and encourages discussion to develop all the facts in the case and then makes a judgment. The clerk-magistrate may make their ruling from the bench or, more typically, they will take the matter under advisement and issue a decision to the parties by mail. The defendant has 10 days to file an appeal.

If the decision of the court is for the plaintiff, the court also orders payment to the plaintiff. If the defendant is not prepared to pay the amount of the judgment and costs at that time, or the plaintiff would like a payment order, the court conducts a payment hearing. This requires the defendant to complete a written financial statement signed under the penalties of perjury, and involves a determination of the defendant's ability to pay without relying on exempt income or assets, for example, income from social security benefits.<sup>4</sup>

After entry of judgment, the court may issue an execution to the plaintiff upon written request after the payment hearing, or if no payment hearing is scheduled, thirty days after the entry of judgment. If the defendant does not attend the payment hearing and the plaintiff does appear and states under oath or in writing under the penalties of perjury that payment has not been made as ordered, the court may immediately issue a *caapias* to bring the defendant before the court to determine the defendant's ability to pay.

A flow chart illustrating this process is attached as Exhibit A to this appendix.

### **III. PROPOSED SMALL CLAIMS PILOT PROJECT IN MASSACHUSETTS**

The Committee recommends an ODR pilot for non-debt collection Small Claims cases for the reasons discussed above but does not have a specific recommendation for how it should be structured, or put differently, for exactly what that online platform should like. Different states have implemented different types of ODR platforms for Small Claims cases. Some of these platforms mirror in-person processes and others have created an alternative system unique to online resolution of the case. The Trial Court will have to decide what kind of Small Claims ODR system would best serve the litigants in Massachusetts. The Committee recommends a

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<sup>3</sup> While the Uniform Small Claims Rule 7(f) provides that judges may hear small claims cases when necessary, with the defendant's assent because there will be a waiver of appeal rights, that is the exception to the general practice.

<sup>4</sup> Small claims rules on this topic will likely be revised. Proposed changes to the rule were posted for public comment, see [Proposed Amendments to Trial Court Rule III: Uniform Small Claims Rules](https://masslawyersweekly.com/files/2021/02/FINAL-Notice-Seeking-Public-Comment-Small-Claims-Rules.pdf). The changes are intended to "ensure that courts do not inadvertently issue or enforce small claim payment orders that require debtors to pay using income or an asset that is exempt from collection under state or federal law." *Trial Court Notice Seeking Public Comment on Proposed Amendments to Trial Court Rule III: Uniform Small Claims Rules*, <https://masslawyersweekly.com/files/2021/02/FINAL-Notice-Seeking-Public-Comment-Small-Claims-Rules.pdf>. Under Proposed Rule 7B, when there is an agreement, the court will inquire into the voluntariness and understanding of the parties to the agreement.

comprehensive ODR system, which means that the system should provide opportunities for direct party-to-party negotiation, facilitated mediation or negotiation, and adjudication.

Reviewing existing and proposed ODR systems for Small Claims in other jurisdictions would be advisable when designing the Massachusetts system. Section III of the report summarizes existing ODR systems for small claims matters in British Columbia, Michigan, Connecticut and Utah. Some further limited information about other jurisdictions utilizing ODR for small claims can be gleaned from [Table 1](#) of the report, Table of U.S. Jurisdictions Utilizing Online Dispute Resolution (as of June 2021). A discussion of the proposed Alaskan ODR system is provided below.

Finally, without repeating every recommendation in the main report which will contribute to a just and fair ODR system, a few key points should be repeated here. As discussed in Section IV.E, the Committee recommends that there be no fee to participate in mediation if the parties agree to do that. The Small Claims pilot, like the CMVI, pilot, should be opt-in (see Section V.E.). Unlike the CMVI pilot, the Committee recommends that the Small Claims pilot be limited to SRLs. Although the Committee believes that any expanded ODR platform should allow for at least some attorney assistance, *see* Section IV.H.3 above, limiting the pilot to SRLs will ensure that SRL's interests are front and center and will allow for evaluation of how best to involve attorneys in the process in the future without creating power imbalances that will be detrimental to the unrepresented party. In CMVI case, the operator is facing an experienced adversary in the form of a police officer so attorney assistance will help eliminate power imbalances. And as with the CMVI pilot, the Trial Court should determine the appropriate length of time for the Small Claims pilot, balancing the time needed to accomplish the purposes of a pilot (collecting data, experimentation, etc.) with the need to move forward with broader implementation in a reasonable time period.

Alaska. The Committee was able to learn more about Alaska's ODR efforts based on the state's Request for Proposals, which provides insight into the vision of the Alaska Court System ("ACS") for its ODR platform.<sup>5</sup> Alaska is currently implementing an ODR system based on a platform consisting of educational information for court users and a three stage structure for all case types, including small claims. The three stages are negotiation, mediation, and trial. The educational information will explain the types of cases that are appropriate for the ODR system, the available remedies, court procedure, and community resources for non-legal remedies. The ACS ODR platform will be available to users pre-filing or after a case has been filed. If parties use the platform pre-filing, they would only need to interact with the court to enforce their agreement.

Once the parties agree to use the Alaska ODR platform, they will be asked to identify the type of case and the ODR platform will then provide resources to the user – *e.g.*, court forms specific to that case type. The parties will have an opportunity to offer and receive proposals in the negotiation stage, and will have a time limit within which to reach an agreement. If the parties are unable to reach an agreement, they can – but are not required – to move to another stage such

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<sup>5</sup> The Alaska RFPs are available upon request.

as mediation or even an online trial. In the mediation stage, a mediator will facilitate negotiation through online asynchronous written communication or live mediation through videoconference. The ACS will set time limits for each side to respond and the number of cycles they can go through. If the parties reach an agreement, the mediator will transmit the agreement to a judge to approve. The judge can ask questions (on an asynchronous basis) through the platform prior to approval. If parties do not reach an agreement through mediation, they can move to the online trial stage, which provides for an in-person trial or a synchronous videoconference trial process.

The planned Alaskan system is another model that Massachusetts should carefully consider when planning for ODR implementation. It offers the potential for serving court users starting with the point when they first seek legal information about their problem, before they even file a lawsuit, up to and including resolution by way of trial. It is also designed for all case types, including small claims. While CMVI cases may be suited for a different platform because of their unique involvement with public safety and police and the relatively straightforward issues presented, Massachusetts should consider designing an ODR platform that could work with multiple case types, but would first be piloted with Small Claims matters. This appears to be the model adopted in British Columbia and Alaska. We also note that there will necessarily be some differences between a Massachusetts system and any other state's system, for example, some of the functions judges perform in Alaska for a small claims case might ordinarily be done by a clerk-magistrate in Massachusetts.

# **EXHIBIT A<sup>1</sup>**

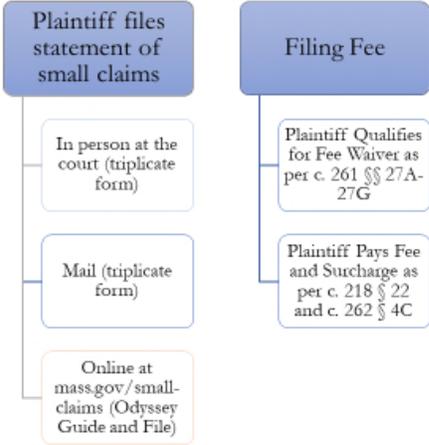
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<sup>1</sup> This exhibit is subject to change once the Proposed Amendments to Trial Court Rule III: Uniform Small Claims Rules take effect.

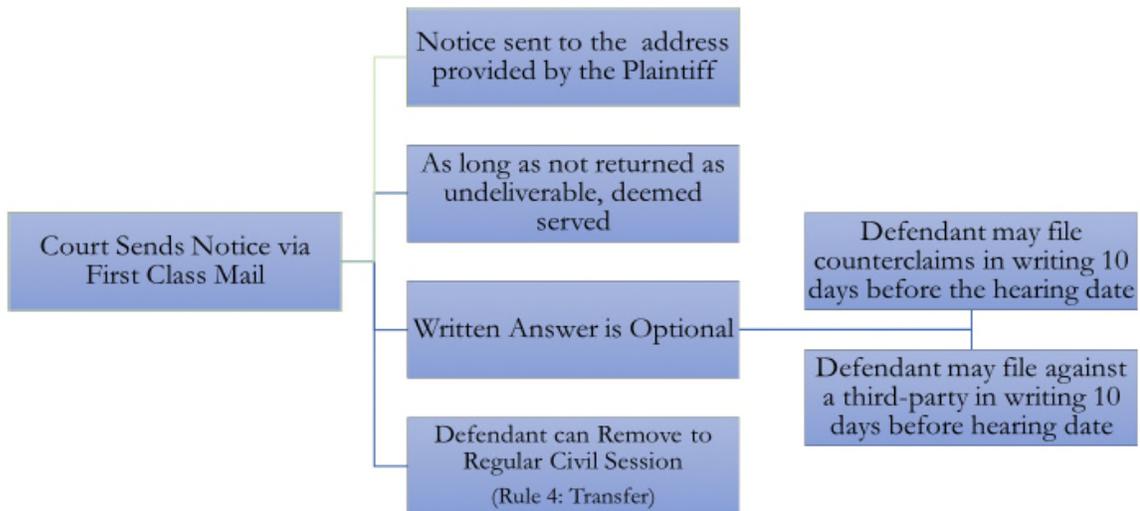
**Trial Court Rule III: Uniform Small Claims Rules  
General Overview**



**Rule 2: Filing a Statement of Claim**



### Rule 3: Notice to Defendant; Answer to Claim



### Rule 7: Trials and Judgement

#### Possible Outcomes on Date of Trial

Private Settlement Agreement

Agreement for Judgement

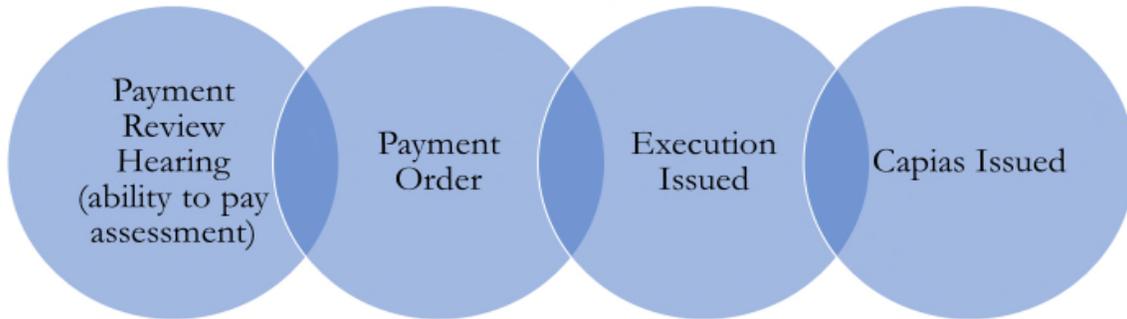
Hearing on the Merits

Clerk will Assess Defendant's Ability to Pay

Money Damages Awarded

Injunctive Relief Granted

**Rules 7(i), 7(k), and 9: Post-Judgment and Enforcement Procedure**



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