



## Online Court Conceptual Design

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### Access to Justice through Online Dispute Resolution

In an effort to promote access to justice, the judicial council directed the administrative office of the courts to investigate the feasibility of creating a dispute resolution process based on the assumption that resolution would be online rather than through traditional litigation.

The premises to be tested include:

- The online court will result in lower costs to the courts, which will be passed to the parties in the way of reduced filing fees.
- The online court will result in lower costs to the parties by, among other things, reducing the costs of primary and secondary service, reducing the cost to exchange evidence, and eliminating the need to appear at hearings in person.
- The online court will lower costs enough that parties who would otherwise not pursue a claim will do so.
- The online court will lower costs enough that first-party creditors will personally pursue claims rather than sell the debt to a collection agency.
- The online court will be sufficiently simple, quick and inexpensive and with sufficient structured settlement steps to decrease the number of default judgments.
- Built-in negotiation and mediation steps will enable parties to settle claims short of trial.
- The online court can be used with equal effect by one-time filers and those who file numerous cases.

A steering committee was formed, consisting of Kim Allard, Dan Becker, Ron Bowmaster, Justice Deno Himonas, Brent Johnson, Rick Schwermer, Tim Shea, and Ray Wahl.

### Principles

Online dispute resolution (ODR) systems are not new, but there are no operational examples in the courts. In the court context, an ODR system would facilitate evaluation, negotiation and judicial decision. A dispute might be resolved at any of the three stages.

- Evaluation. Classify and organize the dispute. Inform the parties of the rights and obligations of each and the options and remedies available.
- Negotiation. In addition to inter-party negotiations, third-party mediators would be available to help parties negotiate a settlement.
- Judicial decision. Judicial review of facts based on a structured process for online pleadings, evidence and testimony.

Fundamental to the concept of the online court is that communication among the parties and other participants takes place in a virtual environment, one without a courtroom. That fact makes all the more important the requirement that the online court be fair and unbiased, and that it be transparent to the parties and public. The role and responsibilities of the participants—be they advisor, mediator, judge or party—must be clear.

The effectiveness of an online court will be increased by:

- Individualized assistance. For example, the system should provide basic information about the claims and defenses of the parties; it should compare high-low offers by the parties.
- A collaborative approach to resolution among the parties. For example, the system should flag disputes in which one or more of the parties is not seeking an equitable settlement.
- Compensating for imbalances of power and resources. For example, the process should “level the playing field” for represented and self-represented parties and for parties of substantial means and modest means.
- Allowing asynchronous conversations, in which parties control the pace, as well as contemporaneous conversations.
- Creating incentives to encourage parties to resolve their dispute online. For example, incentives could include reduced filing fees, mitigation of travel, and an expedited resolution.

The legal infrastructure of an online court will have to be created. Some fundamental legal principles and the statutes and rules that codify them are based on the premise that the court delivers its services at a physical location. An online court has no location. The advisors, mediators and judges work in a building, but that place has no bearing on the deliverables. The parties receive those deliverables at their locations, but neither do those places have any relevance. The participants might be within blocks of each other or separated by hundreds of miles; it does not matter.

The procedures of an online court also will have to be created. Those procedures should draw on long-standing principles—such as due process, equity, disclosure, and the need for a justiciable claim—that traditionally have guided the courts. But the application of those principles in an online environment is new, and the procedures should be described so that all can understand them.

The technical infrastructure and processes of an online court also will have to be built. The Utah courts are fortunate to have in place several component parts that can be expanded or repurposed to an online court. Others will have to be bought or built.

### Small Claims

The steering committee considered several types of litigated disputes that might be resolved through an online court and decided to focus initially on small claims cases. Disputes that qualify for small claims procedures are a good place to start the online court because the claims are limited—claims for money up to \$10,000—and the procedures are simple—file and serve the complaint;<sup>1</sup> exchange evidence; appear at the trial; submit evidence and testimony to the judge. If successful and if suitable, online resolution can be expanded to other types of disputes.

### Legal Requirements—Jurisdiction and Venue

The district court and the justice court have concurrent subject matter jurisdiction of small claims cases. There is no need to amend the statutes governing subject matter jurisdiction for the purpose of establishing an online court.

The court exercises personal jurisdiction over the plaintiff by virtue of the plaintiff filing the claim with the court. The court exercises personal jurisdiction over the defendant by virtue of there being a sufficient connection between the defendant and Utah, coupled with serving the complaint and summons on the defendant. There is no need to modify the principles governing personal jurisdiction for the purpose of establishing an online court, although we recommend amending the process by which the defendant can be served.

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<sup>1</sup> The initiating document in a small claims case is an affidavit. We recommend eliminating the requirement of a notarized statement sworn to under oath. The time, trouble and expense of a notary are eliminated, as are the technical difficulties of electronically filing a notarized document.

To establish an online court, the laws governing venue will need to be addressed and, in the justice court, the statutes governing territorial jurisdiction.

The Legislature has established in the justice court a concept that is not found in the district court: territorial jurisdiction.<sup>2</sup> Territorial jurisdiction means the power of a justice court is limited to the geographic boundaries of the sponsoring county or municipality. Or of the sponsoring counties and municipalities, since several can join together by interlocal agreement. The geographic reach of the several justice courts do not overlap. Because an online court has no location, territorial jurisdiction limits the ability of the justice court to conduct online proceedings.

The objective of venue is to require a plaintiff to file a claim in the court of a jurisdiction in which the defendant resides or in which the events took place. Although territorial jurisdiction does not overlap, venue might. Venue, like territorial jurisdiction, is a concept that depends on geographic boundaries, and an online court has none. But venue is primarily for the convenience of the defendant, rather than a limit on the court's power, and an online court can satisfy that policy of convenience.

**Intake, diagnosis and information for the plaintiff.** The Online Court Assistance Program (OCAP) can be expanded and repurposed to initiate the online resolution of small claims cases. Currently OCAP uses an online interview to gather the information necessary to establish a court case and prepare documents for filing. OCAP will need to be expanded to record as metadata this and other information about the plaintiff and the plaintiff's claim and the plaintiff's information about the defendant. Once recorded, the online court will use the information to classify and organize the claim and inform the plaintiff, with notice to the defendant, of the rights and obligations of the parties and the options and remedies available.

**File the complaint.** Currently OCAP prepares a document for filing. In the online court the complaint is electronically filed. The e-filing will not be of a traditional document, but rather the transfer of the information recorded during the online interview with plaintiff into the CORIS case management system. As needed, this dynamic information can be coupled with a static template to create a viewable document.

**Serve the complaint.** This will be new functionality. For the court to have authority to compel the defendant, the complaint and summons must be served on the defendant. Currently the complaint and summons must be handed to the defendant or to one of a few others who are presumed by law to have forwarded it to the defendant. The person serving the documents cannot be the plaintiff or the plaintiff's lawyer. Frequently the person delivering the documents is a process server, which adds to the expense.

The advisory committee on the rules of civil procedure is considering amendments to Rule 4 to allow, in essence, acceptance by the defendant of a complaint and summons delivered by mail or by electronic means. There will be minimum requirements to assure the court that the defendant has been notified of the lawsuit and of the defendant's responsibilities. But, just as we have discovered that secondary service is a logical consequence of e-filing a document, so is primary service a logical consequence—provided the defendant is adequately protected and the court has a record of the event.

**Intake, diagnosis and information for the defendant.** Similar to the plaintiff's OCAP interview, the defendant will record information about the defendant and the defendant's information about the claim and any counterclaim. Once recorded, the online court will use the information to classify and organize the claims and defenses and inform the defendant, with notice to the plaintiff, of the rights and obligations of the parties and the options and remedies available. If any of the information previously provided to plaintiff

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<sup>2</sup> The district court, in essence, has territorial jurisdiction over the entire state.

changes as a result of the defendant's interview, that new information will be provided to the plaintiff, with notice to the defendant.

**File and serve the answer<sup>3</sup> and counterclaim.** The defendant may have defenses to the claim and may have a claim against the plaintiff. Once the information is recorded, these will be e-filed with the court and served on the plaintiff.

**Exchange evidence.** The parties probably have evidence of their claims and defenses. Exchanging the evidence is a basic principle of due process, and it means the parties will be better informed about the respective strengths and weaknesses of their case during negotiation and trial. Any digital file to be exchanged through the online court. Physical exhibits cannot be exchanged, but digital photographs of physical exhibits can.

**"Satellite" litigation.** Within many cases, there are frequently sub-controversies. In traditional litigation, these sub-controversies often take the form of a motion, to which there is a response, a reply and frequently a hearing. The online court will be designed so that its components can be reused and applied to many types of disputes, whether those be other types of cases or discrete sub-controversies within the larger dispute.

**Negotiation and mediated negotiation.** The online court will include a component for the parties to discuss settlement, including high-low settlement offers. If offers intersect and are accepted, the online court will prepare a settlement agreement. The online court will include a mediation component in which a mediator can join the party's conversation to try to facilitate the negotiations.

**Trial.** Any issue not settled will be submitted to a judge. The court already has the evidence exchanged among the parties. The parties might submit more information in the form of the statements recorded during the OCAP interviews or other statements e-filed by parties or witnesses. The judge might electronically communicate questions to the parties, or the judge might conduct a hearing at which the parties and witnesses testify by video conference. After gathering all of the necessary evidence, the judge will decide the remaining issues and enter a judgment.

**Supplemental proceedings.** A willing debtor will complete an OCAP interview that is the digital equivalent of a sup-order hearing. A creditor will use that information to prepare an electronic application for a writ of garnishment or a writ of attachment. In theory those writs can be electronically served on third-parties, but, given the variety of third-parties, the simpler method may be to print and serve the documents using traditional methods.

An online court will not help if the debtor is not cooperating with the creditor and the court. The creditor can e-file a motion for an order to show cause or for a bench warrant, but these will have to be printed and executed using traditional methods.

**Opt out.** The parties should be given the opportunity to opt out of the online court at their respective intake points. The online court should provide the parties with a realistic evaluation of the time and expenses of online resolution and traditional litigation. If a party opts out, either at the start or at some later point, the case and the documents up to that point will be transferred to the district or justice court with jurisdiction. The matter will proceed in that court in the normal course.

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<sup>3</sup> Currently there is no answer in a small claims case. All of the allegations in the complaint are deemed denied. The online court design anticipates disputes in which there is an answer. An answer can be omitted from a small claims application, or, upon examination, there may be some benefit to including an answer to help advise the parties and to frame the negotiation.