



Initial Report ON THE Goals And Recommendations FOR New York State's Online Court System

Produced by the Online Courts
Working Group of the Commission to
Reimagine the Future of New York's Courts
November 9, 2020

Table of Contents

Executive Summary	1
Overview of UCS	2
Summary of Recommendations	4
New York Courts Public Access Portal	7
Summary of Current UCS Website	7
Recommendations for a Centralized Court Portal	8
Virtual Proceedings	11
Opportunities Presented by Use of Virtual Proceedings	11
Challenges Presented by Use of Virtual Proceedings	13
Recommendations	14
Statewide Online Dispute Resolution	18
Overview of ODR	18
ODR in New York State	20
Recommendations for Launching and Expanding ODR in New York State	25
Conclusion	28
Acknowledgments	29
Online Courts Working Group	31
Citations	32

Executive Summary

The Commission to Reimagine the Future of New York’s Courts was created on June 17, 2020, by Chief Judge Janet DiFiore. The Commission was charged with examining the enhanced use of technology and online platforms, and making recommendations to improve the delivery and quality of justice services, facilitate access to justice, and better equip the New York State Unified Court System (“UCS”) to keep pace with society’s rapidly evolving changes and challenges. The Commission is comprised of a distinguished group of judges, lawyers, academics, and technology experts.^[1]

The Online Courts Working Group, a subset of the Commission, produced this report containing initial recommendations for the development of the online court system in New York.^[2] The Working Group has interviewed experts and various stakeholders in New York courts, including sections of the New York State Bar Association, advocacy groups, prosecutors, public defenders, and other providers of legal services in New York, as well as court administrators, judges, and judicial staff, and researched existing online court systems both within and outside New York. We recommend that UCS strive, in accordance with the guiding principles discussed below, to establish a unified and centralized court system that will promote access to justice and enhance court efficiency. Specifically, as detailed below, we recommend:

- Analyzing **virtual court proceedings** to determine their role in the future of New York courts.
- Launching the small claims **online dispute resolution** pilot in New York County and developing additional pilots.
- Redesigning the UCS website to become a **centralized court portal**, consolidating various “eCourts” systems, and standardizing the websites of individual courts.
- Enacting legislation to allow the Chief Administrative Judge to institute **e-filing** on a mandatory basis, in any or all of the state’s trial courts.

We recommend that the implementation of *any* innovation, particularly those involving the use of technology, be done judiciously and purposefully. The objective should be to maximize benefits and minimize harms, and all courts should strive towards the same goal: maximize access to justice and achieve a fair, impartial, and accessible legal system for *all*. As such, successful implementation of the Working Group’s goals will require ongoing discussions with all relevant stakeholders, careful review of empirical evidence and literature, and data-driven monitoring and analysis of innovation outcomes.



Executive Summary (continued)

Overview of UCS

UCS is made up of hundreds of different courts of different types from New York State. There are at least ten different types of trial courts alone. These courts form a vast and often confusing and burdensome labyrinth for litigants to navigate.

At the lowest level are civil courts, which can hear civil claims below a certain damages threshold, and may have a small claims and/or a housing part, and criminal courts which handle misdemeanors and lesser offenses, and may conduct arraignments and preliminary matters for felonies. In New York City, these are called the **Civil Court of the City of New York** and the **Criminal Court of the City of New York**. On Long Island, these are called **District Courts**. Elsewhere throughout the state, these matters are handled by **Town and Village Justice Courts**, which handle civil claims up to \$3,000 and misdemeanors and lesser offenses; **City Courts**, which handle civil claims up to \$15,000 and misdemeanors and lesser offenses; and **County Courts**, which handle claims up to \$25,000 and have exclusive authority over felonies outside of New York City. The **Supreme Court** generally hears cases outside of the authority of the lower courts mentioned above, such as civil matters with higher dollar amounts; divorce, separation and annulment proceedings; and, in New York City, criminal

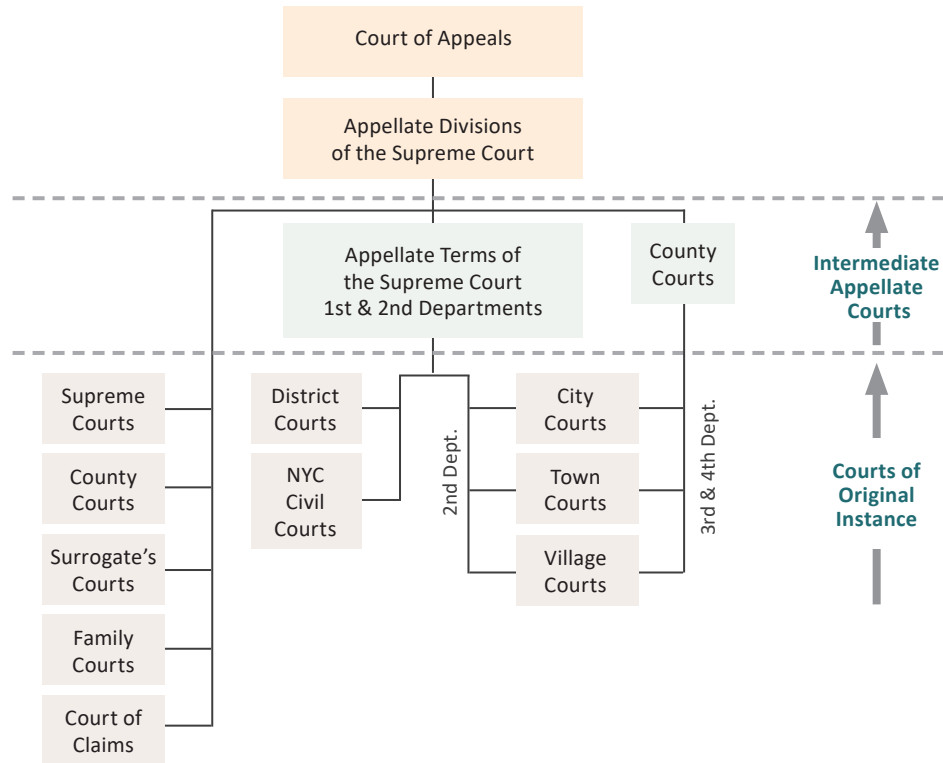
prosecution of felonies. There are also three specialized courts: **Family Court**, which hears matters involving children and families; **Surrogate's Court**, which hears cases relating to individuals who have passed away, and the **Court of Claims**, which has exclusive authority over lawsuits seeking money damages from the State of New York, and may hear suits against state-related entities.

Appeals from these trial courts are heard by various intermediate appellate courts. **Appellate Terms of the Supreme Court** in the First and Second Departments hear appeals of decisions in cases that are brought in the New York City Civil and Criminal Courts. In the Second Department, the Appellate Terms also hear appeals of decisions in cases that were brought in the District, City or Town and Village Courts. The County Courts in the Third and Fourth Departments, while primarily trial courts, hear appeals of decisions in cases that were brought in the City Courts and Town and Village Courts. There are four **Appellate Divisions of the Supreme Court**, one in each judicial department, which hear civil and criminal appeals from the trial courts as well as civil appeals from the Appellate Terms and County Courts. Finally, the **Court of Appeals** is the highest court in New York, and hears appeals from the intermediate appellate courts.^[3]

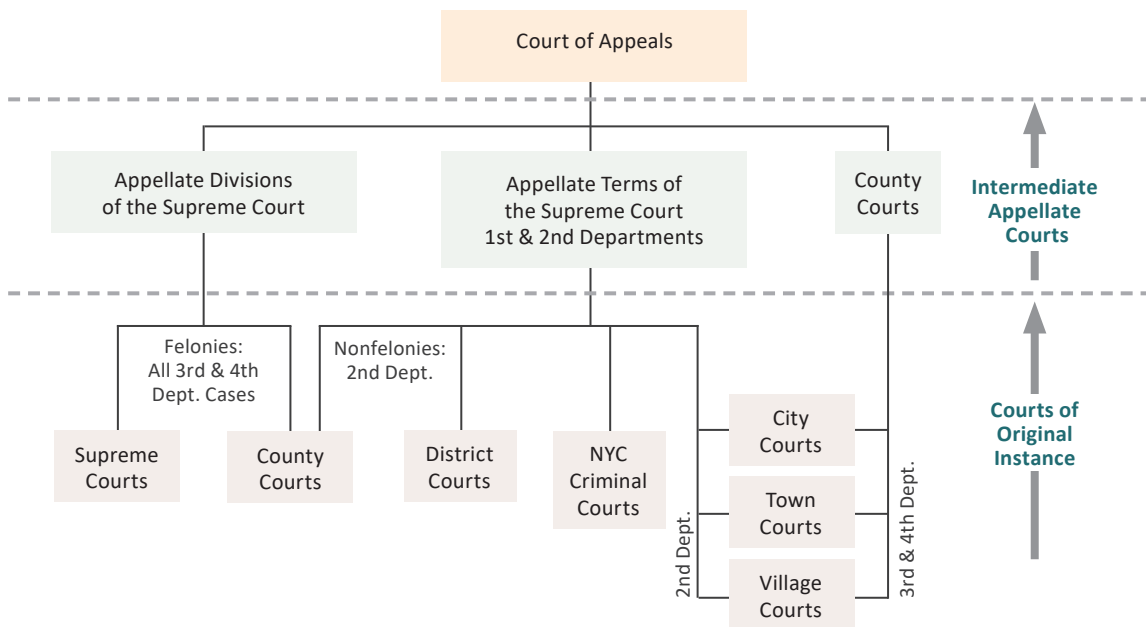


Executive Summary (continued)

Civil Court Structure



Criminal Court Structure



Executive Summary (continued)

Summary of Recommendations

A. Long-Term Guiding Principles

Decrease the “Access to Justice” Gap

One of the fundamental principles of the rule of law is access to justice, or the “ability of individuals to seek and obtain a remedy through formal or informal institutions of justice for grievances.”^[4] This usually requires legal representation or, at a minimum, legal advice. Without legal assistance, individuals can struggle to navigate the maze of court procedures and the substantive law of their case, which can have dramatic consequences, such as the loss of a home, children, job, income, and liberty.

There is a large gap between the legal needs of people and the capacity of the justice system to meet those needs. Legal representation is expensive throughout the United States. More than 80% of low-income individuals cannot afford legal assistance, and 40-60% of the legal needs of the middle class go unmet.^[5] The access to justice gap is heightened in minority groups and in rural communities.

The COVID-19 pandemic has led to an even greater number of unrepresented litigants entering the court system. This has highlighted the “digital divide,” as the justice system was forced to adopt an online, remote system, although many low-income or rural litigants lack access to the internet.^[6]



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“The Digital Divide”

According to a recent survey by the National Center for State Courts, 85% of potential jurors report having some form of internet service at home, with 79% saying they have high-speed broadband service. However, 2% say they have no internet service at all. There are also significant differences in access to the internet across ages. Only 70% of those over age 65 have internet access in their home, and only 64% have broadband.

The pandemic has also increased many people’s comfort with video conferencing services, but, here too, there are large demographic gaps. According to the survey, 70% of respondents said they have used services such as Zoom, WebEx, Skype, or Google Hangouts at least once during the pandemic, and 52% reported using such services regularly during this period. However, regular usage rates were much lower for men over age 50 (38%), non-college educated men (31%), and seniors (30%).^[7]

Executive Summary (continued)

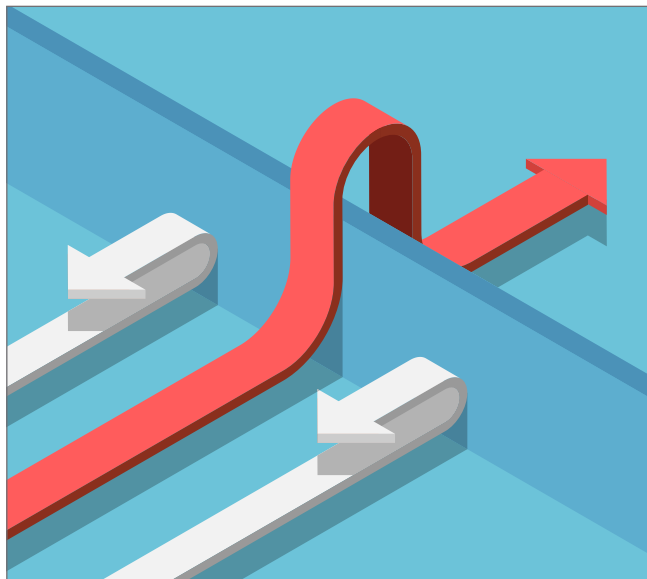
UCS can utilize technology to bring courts online to help bridge the access to justice gap and make the legal system accessible for those who have been historically excluded. In doing so, courts must consider the ways in which online proceedings may entrench or exacerbate the access to justice gap, including by penalizing individuals without access to phones, computers, or high-quality internet service and exacerbating the power imbalance between well-funded parties with private counsel and pro se or inadequately represented individual litigants.

It is critical that the Commission consider the needs of vulnerable populations the justice system largely fails to serve. We have communicated with a broad set of stakeholders in formulating our recommendations, and believe the Commission and the Working Group should continue to do so.

Increase Court Efficiency

Prior to the COVID-19 pandemic, UCS was already struggling under the weight of expanded caseloads and limited financial resources, and the pandemic has only exacerbated these issues. Growing caseloads have profoundly affected litigants' abilities to obtain necessary relief. As of June 2020, the backlog of criminal cases in New York City's criminal courts had risen to nearly 40,000.^[8] The buildup in other courts is even greater. For example, the current backlog in New York City's housing courts numbers in the hundreds of thousands. Based on discussions with various stakeholders, there is broad consensus that, due to the increased case backlog during the pandemic crisis, pressures on UCS will only continue to worsen in the coming months and years. Further, in areas of upstate New York, travel to and from courts can take hours, significantly impacting litigants, attorneys, and court personnel.

To address these issues, UCS should adopt technology that will increase the effectiveness of the courts. We



have considered how these technologies will decrease costs for litigants, attorneys, and the courts themselves, as well as save time for all and increase efficiencies within the judicial system. In order to achieve these goals, UCS should implement data-driven solutions, and ensure that it has adequate IT support and infrastructure to ensure that online court systems work well for both the courts and external users.

Ensure Fairness Across the Judicial System

However, as these recommendations and other future technological innovations are implemented, UCS and the Commission must consider how the changes will impact fairness across the judicial system. Fairness underpins our faith in the justice system. Technology has the potential to level the playing field and make proceedings more fair, or to exacerbate existing inequalities if poorly implemented. Great care must be taken to ensure that any recommendations consider the needs of *all* stakeholders, particularly those who have been historically underserved by the justice system. Courts are more than just a physical location — they are a service that allows us all to unlock the justice system. Accordingly, any changes to the court system will need to be made in service to the people.

Executive Summary (continued)

B. Recommendations

New York Courts Public Access Portal

- Recognizing the disjointed and decentralized nature of the court system, we recommend that the UCS website be redesigned and centralized to make it easier to navigate for all users—litigants, attorneys, and the courts.
- We also recommend the addition of new features, including a universal e-filing system, the consolidation of the e-courts systems like e-track and e-crim, and the ability to pay court fines and fees online or to request simple forms, such as certificates of disposition. While these proposals may involve significant costs at the outset, and we recognize the current budgetary crisis, these proposed innovations will result in a more efficient and cost effective court system in the long term.

Virtual Hearings

- The expanded use of virtual proceedings in UCS poses broad opportunities and challenges. Based on discussions with various stakeholders, it is important that expanding the use of remote proceedings on a

non-emergency basis should occur only after careful analysis and deliberation.

- In light of the myriad practical, constitutional, financial, and technical questions presented, the Working Group’s recommendations seek to provide a framework that can guide UCS in ensuring that the rights and needs of all parties are addressed.

Online Dispute Resolution

- This report explains the history of Online Dispute Resolution both across the country and in New York, as well as the benefits and risks associated with such platforms. We also address the ODR small claims pilot in development in New York County.
- Based on our research and outreach to stakeholders, we recommend immediately launching the small claims pilot, as well as some improvements to the small claims ODR system. In addition to analyzing the small claims pilot in New York County, we recommend developing additional pilot programs throughout New York.



New York Courts Public Access Portal

A. Summary of Current UCS Website



We heard from several stakeholders that the UCS website is disjointed and difficult to navigate. They reported that it is difficult for most lay users to find the information they need, whether it be their case number or the relevant court, or basic forms they are required to complete. Additionally, much of the website is in “legalese,” decreasing accessibility to the lay user.

While attorneys find the existing website useful for some purposes, its decentralized nature makes it difficult to navigate. For example, e-filing is available for a limited number of courts, and it is difficult to navigate to the webpages of certain individual courts.

Additionally, the website lacks many helpful features available on other court sites, discussed in more detail below (New Features).



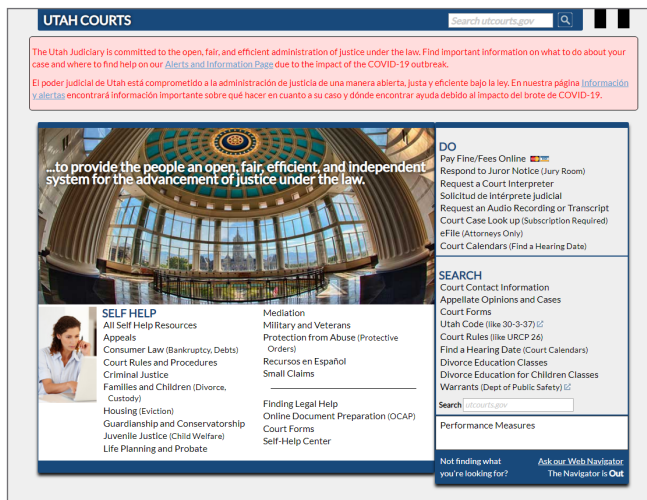
New York Courts Public Access Portal (continued)

B. Recommendations for a Centralized Court Portal

Structure

We recommend redesigning the UCS website to become a centralized, public-facing portal that helps litigants and attorneys more easily navigate the court system. The portal should be organized in a user-friendly manner.

Other states have structured their websites' landing page into distinct action categories. For example, the Utah State Court website organizes its links into three categories: Do, Search, and Self Help.^[9]

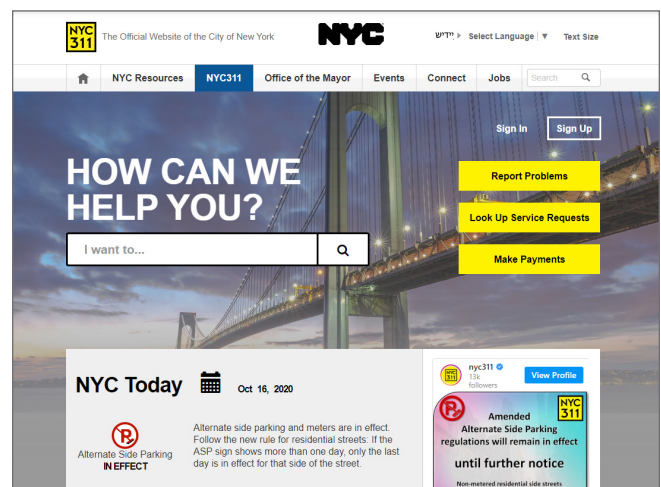


- Within “Do,” users are directed to links to pay court fines and fees online, respond to juror notices, request an interpreter, look up their case, and access the e-filing system.
- Within “Search,” users can access court contact information, important court forms, the Utah Code and relevant court rules, and access warrants.
- Within “Self Help,” users can find information on various legal topics, and are directed to useful resources for finding legal help, online document preparation assistance, court forms, and the self-help center.

We recommend redesigning the UCS website to become a centralized, public-facing portal that helps litigants and attorneys more easily navigate the court system.

- Helpfully, the website also has a “Web Navigator” that enables users to ask for help if they cannot find what they are looking for.

New York City has created a similar centralized portal called NYC311.^[10] This modern, easy-to-use website maintains all of the necessary information on New York City’s public systems in one place. Users can easily report hundreds of different problems (e.g., noise complaints, business reopening complaints, etc.), look up service requests that have been made, and make payments on anything from fines and parking tickets to public housing rent and property tax. The portal was designed using a Microsoft program, which is part of the courts’ existing Microsoft software.



New York Courts Public Access Portal (continued)

New Features

The UCS website also lacks many features that are standard in other court websites, and that help close the access to justice gap.



Universal E-Filing. Currently, only a select number of courts employ mandatory e-filing via New York’s current e-filing system, NYSCEF, and some still do not even have voluntary e-filing, requiring litigants and attorneys to go to court to file documents. In-person filing wastes attorney time, client money, and court resources, and is especially dangerous during the global health crisis we are currently experiencing. To alleviate some of these issues, many courts have adopted the Electronic Document Delivery System (“EDDS”), which allows users to send documents to a court or clerk, who will then file the document for the user. While EDDS was a necessary stopgap measure at the inception of the pandemic, we have heard problems of documents getting lost or not being properly filed. By implementing mandatory, standardized e-filing throughout the state, courts can save time and money and keep everyone safe. However, the existing exceptions for pro se litigants and technologically challenged attorneys should remain. Moreover, in order to bridge the digital divide, there should be kiosks at courthouses and community centers at which users can access the online court and e-filing systems.

We recommend the legislature adopt the legislation proposed by the UCS Office of Court Administration, which will allow Chief Judge DiFiore and Chief Administrative

Judge Marks to make e-filing mandatory across the state. We further recommend the e-filing system be standardized across all New York courts, and be integrated into the UCS website portal.

However, as some stakeholders pointed out, mandatory e-filing will need to be customized to meet the needs of each individual court. For example, while some Surrogate’s Courts recently started e-filing via NYSCEF, some attorneys expressed concern that certain quirks with the Surrogate’s Court’s index number system (e.g., adding letters after an estate’s index number to reflect different matters) were not fully compatible with NYSCEF. UCS should examine how its system interacts with each specific court and customize the program as needed to allow for the standardized and centralized e-filing system we recommend.

Centralization of E-Courts. Currently, UCS has a decentralized electronic courts system. Users must utilize different systems to search cases or produce calendars depending on their case’s court type and location. Additionally, there is a separate system called “eTrack,” which sends litigants notifications when activity occurs in a case. We recommend UCS combine these systems into a single eCourts portal that will allow users to easily search cases and dockets and sign up for notifications for case activity. If possible, this system would be combined with the state’s e-filing system, similar to the federal PACER system.

Standardization of Court Webpages. The different town and local courts, city courts, county courts, and other courts, each have unique webpages under UCS. These should be standardized, so that users familiar with one court’s website will have no difficulty operating a sibling court’s website.

Virtual Court Appearances. The portal should make it easy for users to access upcoming virtual court appearances, integrated with Microsoft Teams.

New York Courts Public Access Portal (continued)

New Features (continued)

Online Chat Bot. A live person or an AI chat bot can help users find what they are looking for.

Online Help Center and Law Librarian. Similar to Utah's Online Court Assistance Program, this software would effectively act as virtual clerks to help users find and fill out forms.

Pay Fines and Fees Online and Request Fee Waiver. Currently, many court fines and fees can only be paid in person or by mailing a check. This unnecessarily slows down the system and makes it cumbersome for litigants to pay. Moreover, it is often difficult for litigants to find where to send the check.

Request Certificates of Disposition and Other Simple Forms. In many jurisdictions, acquiring simple forms such as a Certificate of Disposition requires either sending an official request and payment by mail or going to the court house in person. This process can easily be handled online to minimize burden on users and courts.

Request Court Data. UCS's Department of Technology is often overwhelmed with requests for statistics from or about the judicial system. Implementing a formalized online data request process will streamline these requests.

Electronic Signatures for Judges. UCS should consider allowing judges to utilize electronic signatures. Doing so would greatly increase the ability of courts to operate remotely, as issuing certificates of disposition, filing decisions and orders through the e-filing system, and other judicial acts become much simpler if physical documents do not need to be signed and scanned, saving the court time and money. However, any such implementation must be mindful of security concerns, as there have been cases where a judge's signature has been illegally reproduced in hard copy, and it may be even easier to improperly affix electronic signatures. There may be some software which can alleviate these issues.

Redesign Forms and Make Them More Accessible.

The various forms that litigants need to fill out are often difficult to find, and written in legalese, making it difficult for laypeople to understand. Forms should be redesigned in simplified language, and, if needed, have clear explanations to help users understand the document.

Accessibility – Language Offerings. Over 5.5 million people living in New York speak a language other than English, and 2.5 million do not speak English well.^[11] To lessen the access to justice gap, the court's website should be available in as many languages as possible. For example, NYC311 is available in 108 different languages.

Accessibility – Request ADA Accommodations. Users should be able to request ADA accommodations easily through the website.

Expected Issues – Lack of Staff and Cost



The Office of Court Administration (“OCA”) currently lacks sufficient employees to roll out new tools, train and support judicial staff, current users, and the public, and address “never-ending” legislative mandates.

The OCA's budget is not sufficient to cover its current operations and needs. Any new projects will entail significant costs, despite their long-term cost-saving benefits, and will require either a diversion of current funds or legislation directing funds towards these projects. UCS and OCA should also look into potential external sources of funding, such as grants for new initiatives.

Virtual Proceedings

The immediate challenges posed by the COVID-19 pandemic have highlighted the increased need for court systems across the country to consider and expand the use of virtual proceedings.

Within UCS, the significant opportunities presented by virtual proceedings, particularly the significant efficiencies realized by many participants, warrant consideration of how to efficiently and fairly implement further reforms, allowing for remote participation by litigants, attorneys, and judges.

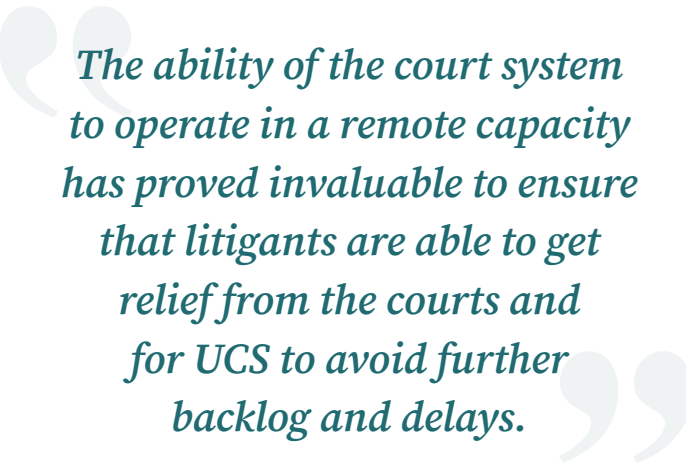
However, UCS must be mindful of how a shift to virtual proceedings may negatively impact many litigants,

considering the digital divide, privacy and security concerns, the impact on attorney-client communications during proceedings, and more.

We describe the main opportunities and challenges presented by the use of virtual proceedings. These considerations are informed by numerous conversations with attorneys, judges, and other important stakeholders. We then set forth specific recommendations intended to guide any future expansion of the use of these proceedings in the coming months and years.

A. Opportunities Presented by Use of Virtual Proceedings

Alleviate Pressures on Court System



The ability of the court system to operate in a remote capacity has proved invaluable to ensure that litigants are able to get relief from the courts and for UCS to avoid further backlog and delays.

Prior to the COVID-19 pandemic, UCS was contending with increased pressures arising from expanded caseloads and limited financial resources. Burgeoning caseloads have profoundly affected litigants' abilities to obtain necessary relief. For example, as of June 2020, the backlog of criminal cases in New York City's criminal courts alone had risen to nearly 40,000.^[12] The buildup in other courts is even greater. For example, the current backlog in New York City's housing courts numbers in the hundreds of thousands. Based on discussions with

various stakeholders, there is general consensus that, due to further accumulation of case backlog during the pandemic crisis, pressures on the courts will only continue to worsen in the coming months and years.

Remote proceedings present an opportunity to maximize the number of proceedings that can occur in a single day. Further, and as evidenced by past and recent crises including the pandemic and the September 11 attacks, the ability of the court system to operate in a remote capacity has proved invaluable to ensure that litigants are able to get relief from the courts and for UCS to avoid further backlog and delays.

Greater Access to the Courts

Litigants who, for example, lack flexibility in their work or caregiving arrangements may be able to more efficiently allocate their time when the time scheduled for their court hearing or proceeding is more definite.

Many people in rural communities throughout the state live far away from the nearest courthouse. The ability to participate in hearings remotely will reduce these individuals' travel time and associated travel costs.

Virtual Proceedings (continued)

Greater Access to the Courts (continued)



Moreover, virtual proceedings give lawyers and courts the opportunity to better serve a broader group of people. Without needing to travel to and from court or waiting several hours in court for a proceeding, costs will go down for clients, lawyers will have more time to assist a greater number of clients in need, and courts can use their in-person resources for more sensitive or complex hearings and matters. Additionally, if done properly, virtual proceedings could allow the court to expand its translation offerings to better serve non-English speaking communities.

By lessening the time required for judges, counsel, and litigants to be physically present in court proceedings, remote proceedings allow these parties to better allocate their resources. Cost savings include decreased counsel fees for commercial and private litigants arising from time spent waiting for court hearings.

While, as discussed below, there are significant costs associated with establishing, implementing, and maintaining a remote court system, the potential cost savings of reducing in-person proceedings and lost time and wages from delays are well worth the up-front costs.

Innovation in Court Proceedings

By relaxing the in-person requirement for court proceedings, use of virtual proceedings will allow for speedier outcomes and more complete consideration of the merits. For example, courts could schedule shorter, more frequent proceedings that allow them to more closely and efficiently manage their proceedings. Similarly, courts could more easily take short adjournments to allow parties to narrow disputes or to quickly fill in gaps in an inadequate record.

Virtual proceedings could also make it easier to hear from witnesses or advocates who would otherwise be unavailable due to physical distance or lack of time (e.g., social worker, parole officer, doctor). Such proceedings could also make it easier for litigants to introduce certain kinds of evidence, for example, live video of damaged property, recorded audio, or live screen sharing of a website. Additionally, they could be used to supplement the ODR methods described below, allowing for synchronous mediation and/or proceedings to supplement the mostly asynchronous ODR methods. It is important to note that any innovation will need to take account of existing rules and practices, which may need to be amended in a way that allows for innovation while also protecting important fairness and due process considerations.

Virtual Proceedings *(continued)*

B. Challenges Presented by Use of Virtual Proceedings

Access to Justice Considerations

Numerous stakeholders expressed reservations about the expansion of virtual court proceedings, particularly in criminal cases. There are significant variations in the abilities of people to access and use the technology required for virtual hearings. Such differences can worsen existing inequalities among litigants of different races, incomes, ages, disability status, and geographic locations. Language translation services may also be adversely impacted if sufficient steps are not taken to address the needs of litigants on a virtual platform. Access to justice concerns also relates to technological limitations, including the availability of required devices, the quality of broadband connections, and technological proficiency.

Quality and Confidentiality of the Attorney-Client Relationship

One of the chief challenges to remote proceedings is the ability for clients to meaningfully interact with their counsel. Some remote proceedings have been conducted in a way that makes confidential communications between client and attorney impossible. Many attorneys we spoke to noted the difficulties that arise from not being able to pass notes with their client during a proceeding, or of not being able to explain the judge's decisions contemporaneously.

Even where provisions are made for separate attorney-client breakout rooms, technical limitations and requirements may lessen the ability of attorneys and their clients to freely communicate without court assistance.

This concern is particularly felt in criminal proceedings where the defendant may be in custody and lack access to a private area to speak with his or her attorney. In those circumstances, even if the technological medium

for communications is secure, it does not guarantee privacy or confidentiality for users. Accordingly, while UCS already allows litigants without reliable access to the internet to utilize court resources for their virtual proceedings, this offering should be expanded to allow UCS to serve a greater number of litigants and to better meet the special needs of criminal defendants. This can include special rooms in jails and community centers where an individual may access the necessary tools and speak privately with their attorney. Moreover, after the pandemic has ended, virtual proceedings may be more effective if counsel is physically with their clients.

Privacy and Security

Certain litigants may desire greater privacy than at-home settings may provide. For example, sensitive issues like domestic violence and child abuse may not be best addressed in at-home settings away from the court and in close proximity to the victim's abuser. There is also greater risk of unauthorized recording when proceedings take place virtually. And while court proceedings are generally open to the public, the use of online technologies may facilitate the unauthorized recording or dissemination of sensitive litigant information, particularly in closed proceedings.



Virtual Proceedings *(continued)*

Cost

Expansion of existing virtual capabilities and the implementations of a comprehensive remote proceedings system will inevitably require investment in technology, training, staffing, and public outreach. Successful implementation of this system will require considerable funds to ensure that any expansion of remote proceedings is effective and equitable, and does not harm litigant rights. Moreover, allocation of sufficient resourcing, whether through existing UCS funding or additional funds procured through legislation, may be challenging given current fiscal conditions in New York. Nonetheless, the potential long-term cost savings are well worth it.

Lack of Analysis of Potential Repercussions

One of the primary concerns about the expansion of the use of virtual proceedings is the deficiency of meaningful study of potential effects on the outcomes in judicial proceedings. Potential negative repercussions

warranting further analysis include fairness and due process concerns arising from virtual proceedings, such as a defendant's ability to present his/her case in person to a judge, the diminished ability to confront and cross-examine one's accuser, and being able to bring support from family and the community to proceedings. While studies have been conducted to analyze the effects on outcomes in remote proceedings,^[13] much of the research is outdated and lacks real-life settings as the basis for the research. Existing research suggests that potential disparate outcomes may be seen in the setting of bonds in criminal bail hearings, immigration and deportation hearings, and witness credibility assessment.^[14] However, in order to both confirm these findings and examine the myriad other potential effects, further study will be needed before UCS can be assured that existing research findings firmly support or contradict the use of remote proceedings on a broad scale.

C. Recommendations

Evaluate and Analyze Experience with Remote Proceedings During the COVID-19 Pandemic

In order to leverage learning and experience from the ongoing pandemic, UCS should devote resources to gathering and analyzing data from remote proceedings, including variations in outcome, timing of decisions and proceedings, and anecdotal reviews of the experience of various stakeholders, particularly those of litigants themselves. Such information can be gathered from interviews and surveys of stakeholders and reviews of statistical data. We further recommend partnering with one or more nonprofit organizations or academic institutions to assist in this research.



Virtual Proceedings (continued)

Prioritize Types of Cases and Stages of Proceedings Best Suited for Virtual Proceedings

Virtual proceedings should be prioritized for use in matters and types of proceedings where the benefits are likely to be greatest, and the costs and risks likely to be the lowest. In making this prioritization, the following factors should be considered:

- The extent to which there is a **backlog of cases** that could be cleared through more expeditious proceedings;
- The availability of, and access to, **sufficient internet access** by litigants and participants in the type of proceeding (or sufficient alternatives for those without access);
- The relative **benefits to parties** associated with participating remotely. For example, courts in rural areas might prioritize virtual proceedings for parties where travel to the courthouse represents a significant burden;
- The potential **burdens to parties** of virtual proceedings, such as the technical challenges to parties who are indigent, not technically proficient, or may require services (e.g., simultaneous translation) that are difficult to supply in virtual proceedings;
- Whether the parties are likely to be **represented by counsel**, recognizing that counsel may be in a better position to satisfy the technical requirements of virtual proceedings; and
- The extent to which **cross-examination and credibility determinations** are important to fair resolution of the dispute, recognizing that they may be more difficult in virtual proceedings than in live ones.

These considerations suggest that certain matters, such as commercial disputes between sophisticated and mutually represented parties, may be more compatible with virtual proceedings than others, such as felony

criminal matters involving an incarcerated defendant. Similarly, the considerations suggest that for any type of matter, certain proceedings, such as an initial conference or other procedural hearing, may be more compatible than other proceedings, such as hearings involving the consideration of witness testimony or other types of complex evidence. Given the complexity of the various considerations, it may be advisable to develop guidelines and principles that can be applied by judges when deciding what proceedings should be conducted virtually and how to conduct such proceedings.



Ensure That Platforms for Virtual Proceedings Support Minimum Requirements

For virtual proceedings to succeed, UCS must develop a set of technical specifications and requirements for any remote proceeding platform. Such technical specifications should include:

- **Reliable display of audio and video;**
- Support for **confidential communications** between client and counsel, and between the parties and the court;
- **Queuing system** to verify that all necessary parties are present in a hearing and alert other parties of their place in the queue for the commencement of their virtual proceeding;

Virtual Proceedings (continued)

Ensure That Platforms for Virtual Proceedings Support Minimum Requirements (continued)

- Support for reliable **introduction and viewing of evidence**;
- Sufficient capabilities and coverage for **language translation services**;
- Public **access to proceedings** in a manner that does not compromise the privacy interests of the parties; and
- Ability to create a **complete judicial record** of the proceedings

Special consideration should be given to technical requirements that may be imposed on participants, including those that may not have access to high-speed internet or technology sufficient to access the platform. This can potentially be addressed by low-bandwidth and dial-in-only options. Consideration should also be made for backup procedures in the event of technical failures or limitations.

Consider Financial Resourcing Needs

While a transition to remote proceedings may result in significant cost savings, in order to create an effective and functioning remote proceedings system, UCS will need to consider the costs of implementing, maintaining, and promoting said system. Such costs will need to include adequate tech support, outreach to different stakeholder groups, alternative technology access points for vulnerable populations, and the costs of developing a functioning platform, regardless of whether it relies on existing technology or a new vendor. UCS should create partnerships with the relevant legislative and budget oversight functions to evaluate available funding. UCS should also consider outside funding, such as grants, from both non-profit and corporate partners, that may help offset the costs of new innovations.



Special consideration should be given to technical requirements that may be imposed on participants, including those that may not have access to high-speed internet or technology sufficient to access the platform.

Take Steps to Equalize Access to Justice

In analyzing virtual court proceedings, there are a number of considerations relevant to their impact on the access to justice gap, including variations in geography (rural vs. urban), income and wealth disparities, incarcerated populations, disabled populations, non-English speakers, homeless populations, and self-represented litigants.

Accessibility cannot meaningfully vary by group. This may mean partnering with and securing funding for organizations that can facilitate meaningful access to adequate technology (e.g., schools, libraries, legal aid societies, etc.) as well as provision of adequate training and support for those using the technology. Any use of public locations to support access to technology should ensure participant privacy and safety. UCS should continue to meaningfully engage with constituents and advocates for vulnerable populations to ensure that appropriate input is provided at each step of the process. This dialogue should include community service providers, such as nonprofits and social workers, who often have the best grasp on the needs of a community.

Virtual Proceedings (continued)

Take Steps to Equalize Access to Justice (continued)

Courts should also provide meaningful opportunities for litigants to choose in-person options. However, courts must consider whether any remote hearing program should be restricted to participants electing to opt-in to the program after sufficient disclosure of process and differences from in-person options. Litigants should also never be penalized for choosing to not move forward with a virtual proceeding.

Finally, criminal defendants will need to have guaranteed access to technology for whatever virtual proceedings are implemented. This can be accomplished through providing services at a pretrial services office, where defendants can report to in order to use appropriate technology and have private conversations with counsel at no cost.

Legislative and Legal Considerations

UCS will need to consider any needed changes to statutes or rules governing proceedings necessitated by the expansion of virtual proceedings. It will also need to coordinate with appropriate contacts at the

legislature to ensure passage of required changes, and consider and address potential constitutional concerns arising from use of remote proceedings and potential due process challenges. This is especially true in the context of criminal proceedings, as there are constitutional concerns, including the Sixth Amendment and the Confrontation Clause.

Coordinated Rollout and Continued Technical Support

UCS must ensure that there is sufficient notice and publicity for any expansion of virtual proceedings with specific, targeted efforts to educate relevant stakeholders including vulnerable groups. It should consider the creation and dissemination of training materials specifically created for each type of system user, and confirm that sufficient technical support is available to address needs arising from expanded use of UCS technical resources. Moving forward, UCS will need to ensure that an office or system is in place to process ongoing feedback and make continual improvements to virtual proceedings, as there is likely to be significant learning in this area in the coming years.



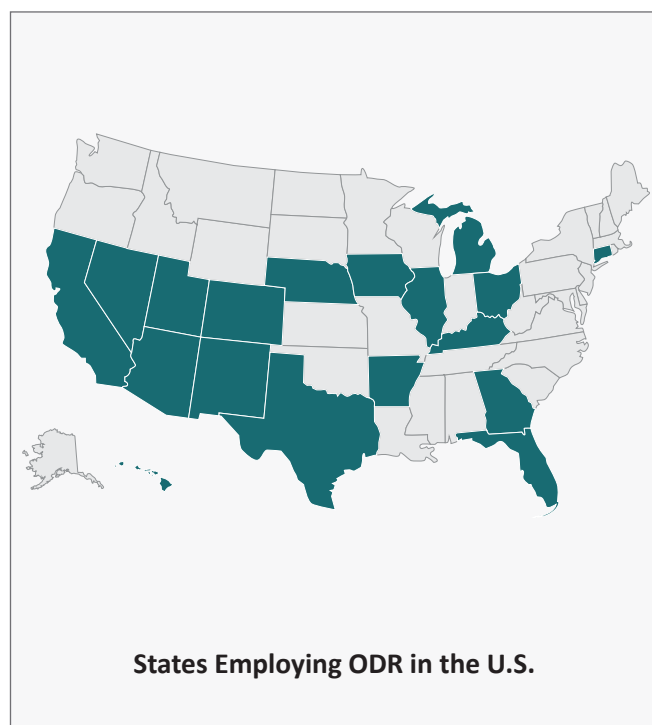
Statewide Online Dispute Resolution

A. Overview of ODR

What Is ODR?

Online Dispute Resolution (“ODR”) is the out-of-court settlement of disputes through technology. ODR platforms can range in sophistication from full-scale online software that guides users through an entire mediation to traditional mediation taking place via video conferencing.^[15]

ODR has been around since the early 1990s as the rise of the World Wide Web and online commerce led to an increase in online disputes. Initially, ODR was most widely and effectively used in the e-commerce space, as online retailers like eBay boomed and low-value, high-volume disputes became commonplace. These companies invested millions of dollars to develop ODR platforms for consumers, and various third-party companies emerged to fill the market need for resolving online disputes.^[16]



Online Dispute Resolution (“ODR”) is the out-of-court settlement of disputes through technology.

ODR eventually found its way to the courtroom, with courts around the world implementing ODR systems to tackle a wide range of legal issues ranging from minor traffic infractions to sensitive family disputes. In certain spaces, ODR has completely replaced court proceedings. For example, the *Civil Resolution Tribunal Act* made ODR part of British Columbia law in 2012 by creating a new entity, operating outside of the courts, called the Civil Resolution Tribunal (“CRT”) to resolve small claims and specific strata property disputes.^[17] In June 2017, the CRT was officially launched and saw incredible early success, handling 14,000 cases in the first seven months alone.^[18] By February 2018, 700 of these cases had been resolved with roughly 85% settling and only 12 seeking tribunal assistance.^[19] The European Union and a select number of non-European Union countries employ similar, independent ODR systems to resolve disputes, such as low-level consumer problems, outside of the courts.^[20]

Courts in the U.S. have been slower to transition to ODR. Ohio became the first state to implement an ODR pilot to handle small claims disputes in 2016. Since then, at least 17 additional states have successfully launched ODR programs.

Statewide Online Dispute Resolution (continued)

What Are the Benefits of ODR?^[21]

Accessibility. The fully remote nature of ODR proceedings allows courts utilizing ODR to better service underserved communities, including rural residents who have difficulty traveling to court or individuals with mobility limitations. It also alleviates the burden on litigants who have to take time off work or find childcare in order to attend proceedings, which disproportionately harms low-income individuals.

Convenience. Parties can resolve disputes quickly, asynchronously, and without needing to physically attend court. This has been shown to increase participation and decrease defaults.

Cost Savings. In the long term, ODR is a much cheaper alternative, both for courts and parties, than traditional litigation.

Efficiency. ODR has the potential to significantly reduce case backlogs and enhance court efficiency, particularly when cases are handled entirely outside of the court by independent tribunals or similar entities.

Reduced Safety Concerns. For certain groups, like victims of domestic violence, an entirely online platform would allow for safe dispute resolution without the individual risking physical or emotional harm. In the midst of COVID-19, remote proceedings also minimize the risk of spreading the virus.

What Are the Risks of ODR?^[22]

Accessibility. Many groups, such as homeless, low-income, or rural individuals, do not have access to reliable internet while others, such as the elderly, may not be comfortable with online technologies. Individuals with language limitations and disabilities can also be harmed if ODR platforms fail to effectively offer translation and ADA-compliant features.

Privacy and Confidentiality. ODR, like all online and cloud-based platforms, is subject to heightened risks of data and privacy breaches that may harm users. ODR platforms also create written records which parties can utilize in privacy-destroying ways.

Costs of Implementation. Building an effective ODR platform can be very labor- and cost-intensive, which might make the creation of ODR platforms challenging despite the potential long-term savings.

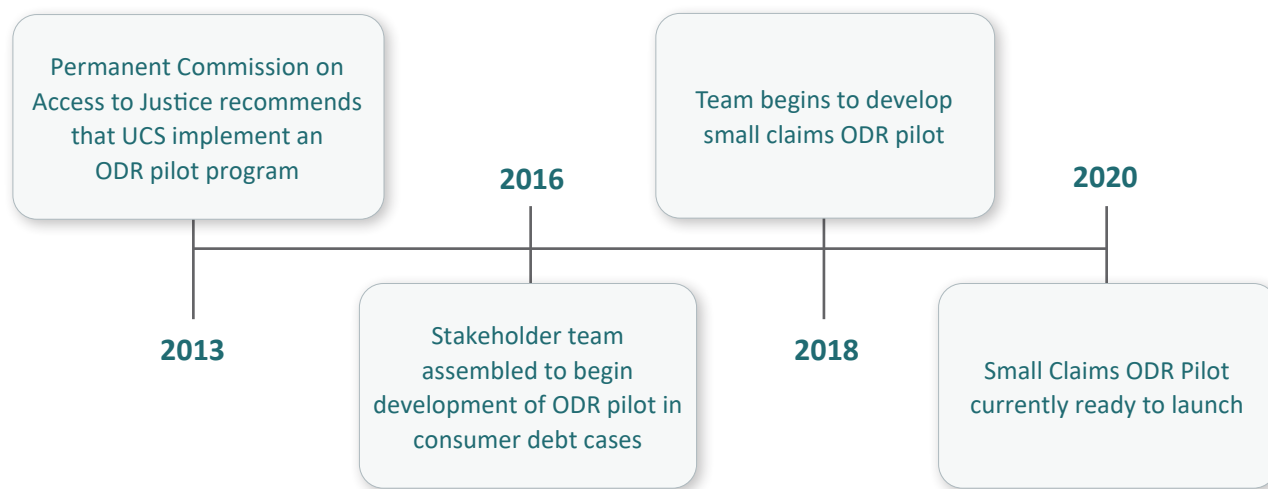
Impersonal. Communications through online mediums do not convey nonverbal cues such as pitch, tone, personality, or volume, which may erode trust and cooperation between litigants and their counsel and among parties. ODR may also make it harder for mediators to build rapport with parties.

Exacerbation of Power Imbalance. ODR has the potential to exacerbate existing power imbalances. ODR also does not give parties the ability to present defenses to a claim, but may imply that a defendant owes money on a claim regardless of a lack of court-issued judgment.

Statewide Online Dispute Resolution (continued)

B. ODR in New York State

History of ODR in New York State



The idea to develop an ODR pilot in New York was born out of the 2013 report from the Permanent Commission on Access to Justice,^[23] which recommended that UCS implement an ODR pilot program.^[24] Counsel to the Permanent Commission, in partnership with OCA, applied for grant funding for the ODR pilot. Once funding was obtained in 2016, a stakeholder team comprised of Counsel to the Permanent Commission, the NYC Civil Court, the Department of Technology, the Office of Alternative Dispute Resolution, the Office of Justice Initiatives, the Community Dispute Resolution Centers Program, the National Center for State Courts, the American Bar Association, and civil legal services providers began working on the development of the pilot.

The Permanent Commission recommended an ODR pilot for consumer debt matters due to the significant amount of unrepresented litigants in this case type.^[25] Ultimately, however, the team decided to pull the consumer debt ODR pilot due to concerns raised by various consumer advocacy organizations that the already existing power imbalances between debt

collectors and consumers present in consumer debt cases would be amplified by ODR. The team instead shifted gears and began developing an ODR pilot centered on small claims.

Current Status of ODR in NYS

Over the past two years, the team, led by Diana Colón, Assistant Deputy Counsel for UCS, has been working to develop a Small Claims ODR pilot for New York. In 2018, the team sent out a request for proposal (“RFP”) to designers and providers of ODR platforms in an attempt to hire an experienced partner to assist in developing the pilot. The ODR platform Matterhorn^[26] was selected due to its experience in developing and launching court-specific ODR programs, and the customizability of its platform. Pending a few additional approvals, the New York County Small Claims ODR pilot, under the Honorable Justice Anthony Cannataro, is ready to launch.

Statewide Online Dispute Resolution (continued)

B. ODR in New York State (continued)

Qualification for and Referral to ODR Pilot

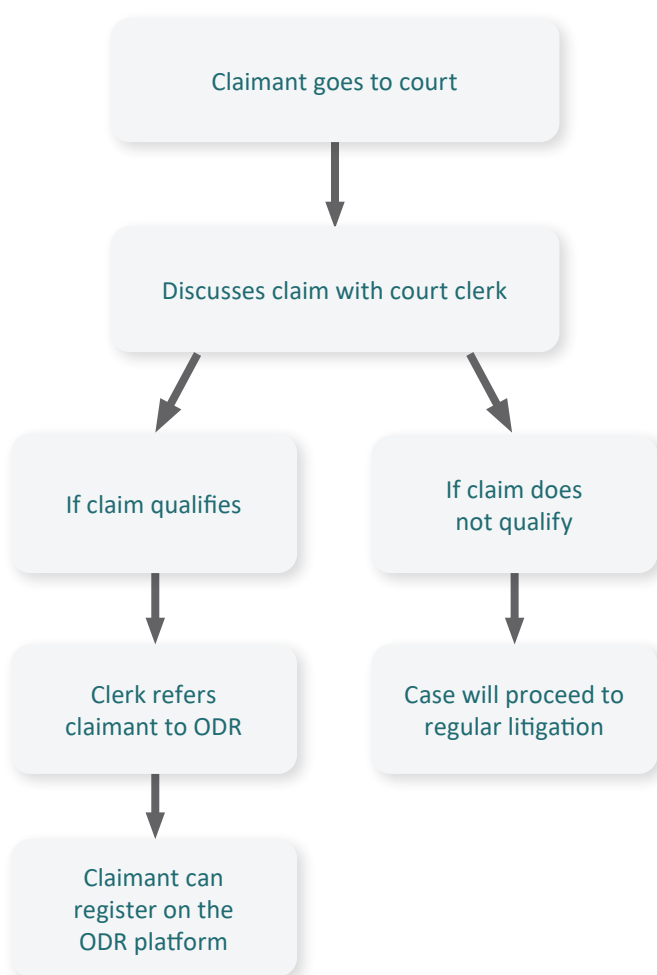
The team also developed protocols for the types of cases that would qualify for the pilot in an attempt to maximize its success. The current pilot is therefore limited to small claims disputes^[27] involving the purchase and sale of goods and services,^[28] where both parties are unrepresented.

Additionally, qualifying cases will be automatically “opted-out” of the pilot if the parties have a history of violence or

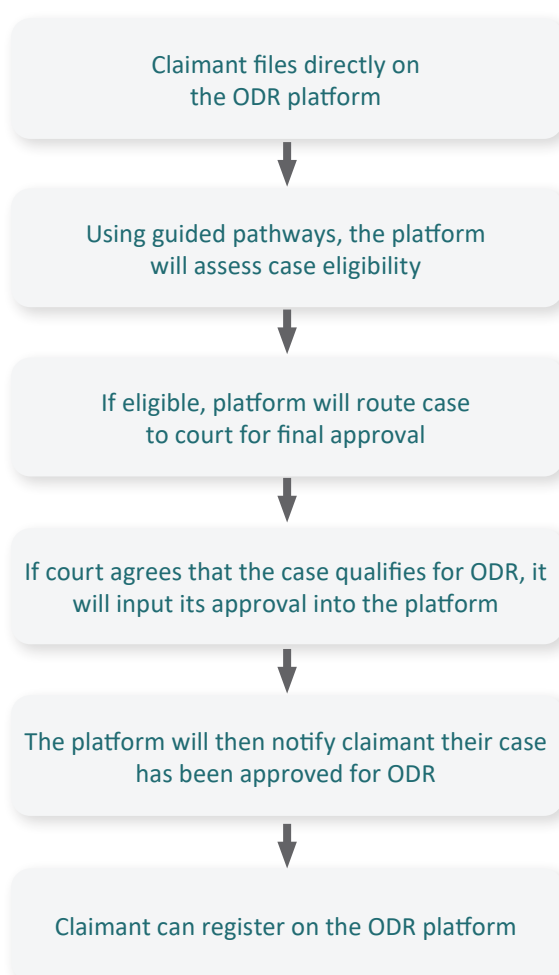
Orders of Protections. Parties with accessibility, literacy, mental health, and other similar considerations will also be opted out of the program, though they have the option of opting back in if they feel comfortable doing so.

Claimants will be referred to the ODR pilot either by filing their claim at the courthouse if it meets certain jurisdictional requirements, or by directly filing their claim on the ODR platform.

Entering ODR Option 1



Entering ODR Option 2



Statewide Online Dispute Resolution (continued)

B. ODR in New York State (continued)

Once a case has been referred to the ODR Pilot, the court mails a summons to the defendant which includes the date of the scheduled court hearing, notice that the case has qualified for ODR, and information for how the defendant can access the ODR platform if they would like to proceed with ODR.

Assuming the defendant agrees to ODR, they will register with the ODR platform and both parties will be notified that the ODR process has begun. If a case does not qualify, or if the defendant does not agree to ODR, the case will proceed to traditional litigation.

The screenshot shows the homepage of the Civil Court of the City of New York Small Claims Part Online Dispute Resolution Platform. The header includes the court's name and a 'Log In' link. The main content area has a 'Welcome' message and a 'I want to...' section with three options: 'Register for ODR', 'Respond to Mailed Summons', and 'File Claim'. Each option has a brief description and a corresponding button. There is also a search bar with fields for 'Index Number' and 'Hearing Date'. The footer contains links to 'Online Dispute Resolution', 'About Civil Court of the City of New York', and 'Questions?'. The 'Online Dispute Resolution' section lists three steps: 'Access Expert System', 'Negotiate Settlement', and 'Sign Agreement'.

Design of ODR Platform

The ODR Pilot has two stages: education and negotiation.

Education Space. The education space provides users with links to resources to help them navigate both ODR and the small claims process. The education space includes two animated videos that users must watch before they can proceed to the negotiation space. While

this is the first step to ODR, these information resources are free and open to the public.

The screenshot shows a video player with the title 'Welcome to online dispute resolution!'. Below the title is a subtitle: 'Start by watching the short explainer video. Then, acknowledge that you have seen the video to continue.' The video frame shows a cartoon character with blue hair and a white shirt, holding a sign that says 'FILE CASE ONLINE'. The video progress bar shows '0:03 / 2:07'. Below the video frame is a checkbox with the text 'I acknowledge that I have read this section and viewed the how-to video.'

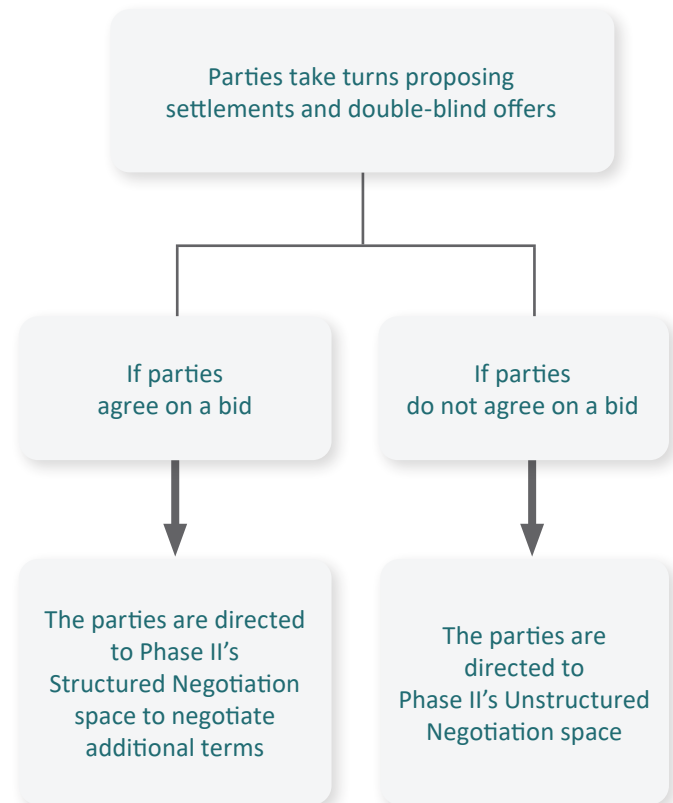
Negotiation Space. Once in the negotiation space, users can attempt to resolve their disputes through three phases: automated negotiations, structured and unstructured negotiations, and online mediation. Negotiations occur asynchronously, so users can respond to, and engage with, the other party and the mediator on their own time. Parties can also opt out of ODR at any point.

The screenshot shows the 'NYC Small Claims Court' negotiation interface. At the top, there are three tabs: 'Round 1', 'Round 2', and 'Round 3'. Below the tabs, there are two input fields: 'Amount you wish to receive: \$ 1200' and 'Minimum amount you would accept: \$ 800'. A 'Propose' button is located at the bottom right.

Statewide Online Dispute Resolution (continued)

B. ODR in New York State (continued)

Automated Negotiations. In the first phase, automated negotiations, the parties are asked to settle disputes through a double-blind bid system, in which the claimant and defendant are asked to specify the lowest and highest amounts they would be willing to settle for, respectively. If the bids are within a certain range of each other, the system will make a settlement offer to both parties that is in the middle of this range, and the parties will then move to the second phase, a structured negotiation space, where additional settlement terms can be negotiated. During this initial phase, the parties are not able to communicate outside of bidding.

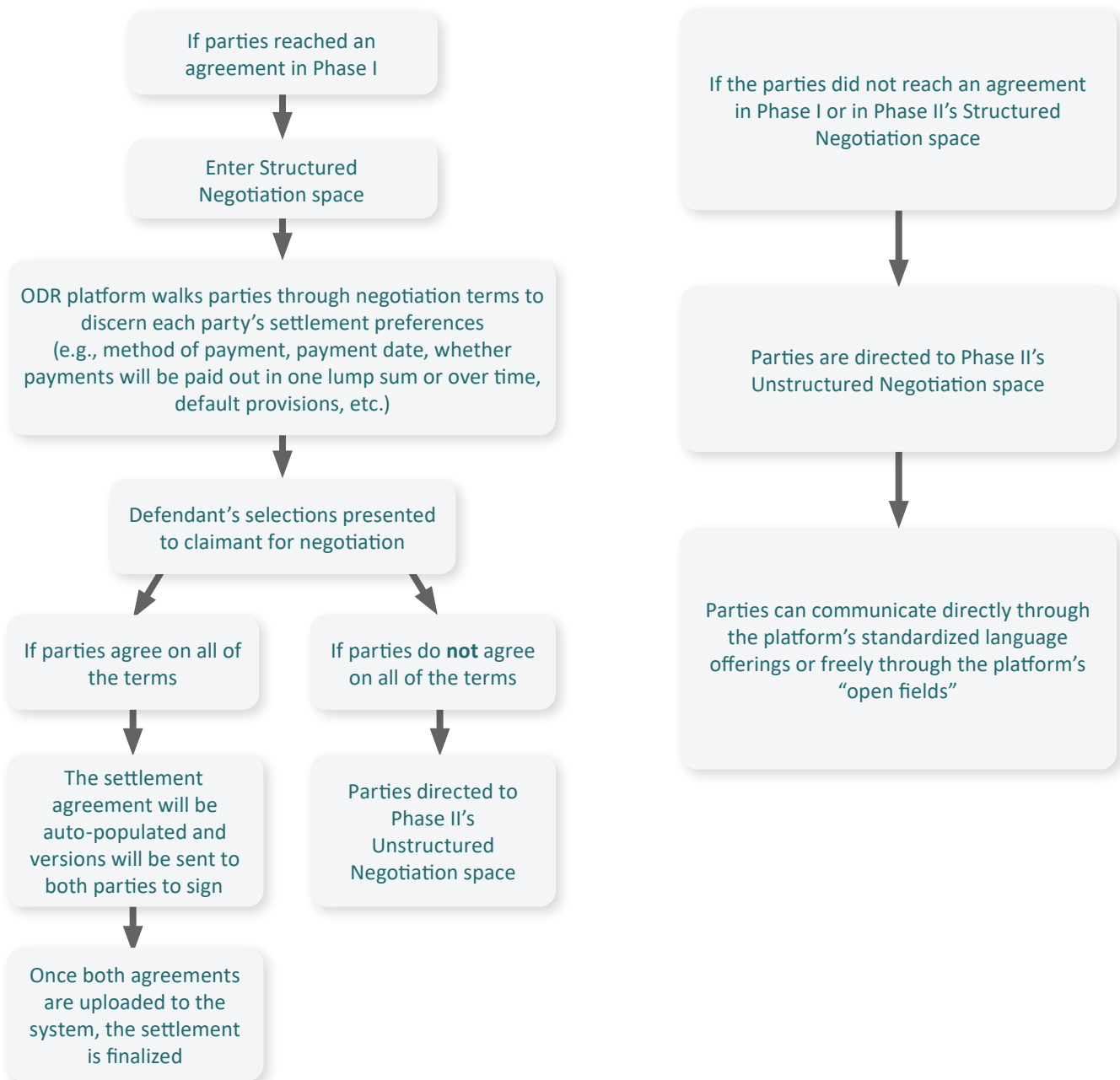


Statewide Online Dispute Resolution (continued)

B. ODR in New York State (continued)

Unstructured Negotiation Space. If the parties do not reach an agreement, they will be directed to an unstructured negotiation space. Here, each party has the opportunity to communicate directly with the other party, through either pre-scripted or free-form

communication. If the parties are still unable to reach a settlement in this phase, the case will be assigned to a trained ODR mediator who will assist the parties in reaching a resolution.



Statewide Online Dispute Resolution *(continued)*

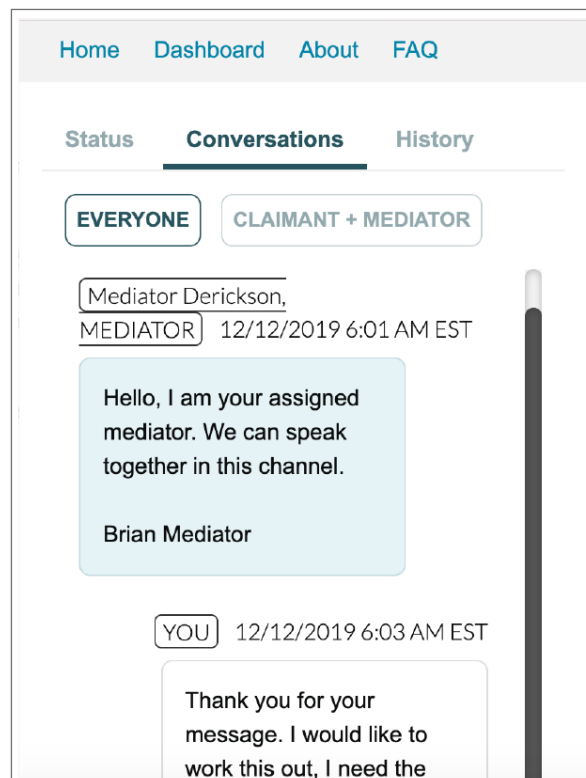
B. ODR in New York State (continued)

Mediation. If the parties come to a resolution, the mediator creates a settlement agreement using the pilot’s auto-population technology. While the mediator can arrange for private agreements (e.g., public apologies, agreement to stop disparaging business on social media, non-monetary compensation, etc.), such agreements cannot be included in the formal settlement agreement. If the parties fail to settle, the parties will proceed to traditional litigation.

The pilot’s mediators are all either staff or volunteers from the New York Peace Institute and the EAC Long Island Dispute Resolution Center. Both mediation centers are a part of the Judiciary-funded Community Dispute Resolution Centers Program. Each participating mediator has many years of experience mediating small claims disputes, has been trained in the applicable laws and procedures of small claims court and has been trained in ODR platform functions, and has mock experience mediating disputes on the platform. As part of their mediation certification, mediators have also undergone cultural competence and diversity training.

The pilot will be formally evaluated by the National Center for State Courts (“NCSC”) following its first

year of operation. Execution of the Pilot will also entail an iterative process for ongoing revisions of the ODR platform as needed, especially to meet the needs of the platform’s users.



C. Recommendations for Launching and Expanding ODR in New York State

Based on our outreach and research, the Working Group makes the following recommendations for improving and expanding access to ODR in New York:

Immediate Launch of the New York County Small Claims Pilot. Continuous monitoring will be needed to ensure the New York County Small Claims Pilot meets the needs of claimants and alleviates pressure on court resources, as discussed above. Nonetheless, given our review of the Pilot’s proposed design, and our assessment of ODR offerings in other states, we believe

that the New York County Small Claims Pilot has a high likelihood of success. Our assessment is also that the Pilot is, and has been, ready for launch. We therefore recommend the immediate launch and implementation of the Pilot program.

Improvements to New York County Small Claims Pilot. While we endorse and encourage the immediate launch of the New York County Small Claims Pilot, we make the following recommendations for enhancing the Pilot once it has been launched:

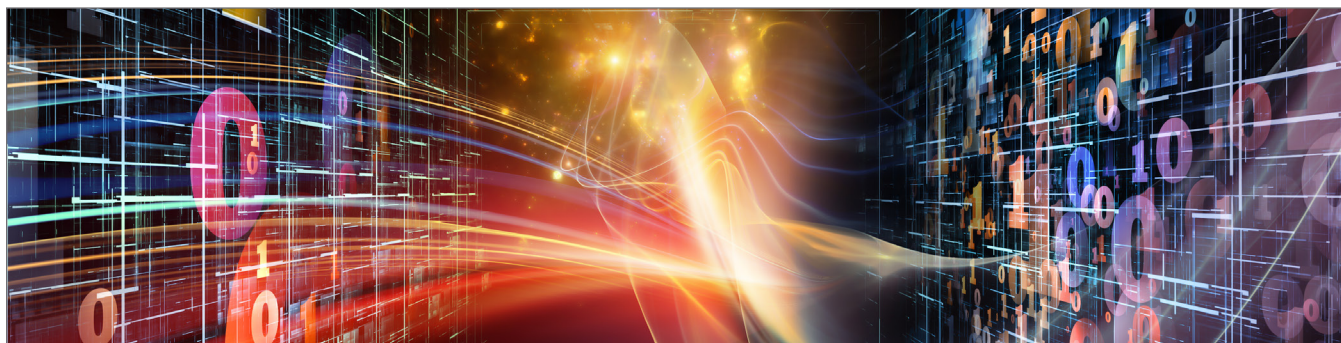
Statewide Online Dispute Resolution *(continued)*

C. Recommendations for Launching and Expanding ODR in New York State (continued)

- **Reroute Pending Cases.** Current eligible, pending cases should be rerouted to the ODR Pilot to alleviate court backlog caused by the COVID-19 pandemic and grant parties swift resolution of their disputes.
- **Increase Language Capabilities of ODR Offerings.** Currently, the ODR Pilot's education and negotiation platforms are only available in English. This should be expanded to facilitate use among non-English speakers. Future ODR pilots should be created with this consideration in mind to maximize access to justice.
- **Making ODR Automatic.** Based on our conversations with experts and on existing research, we recommend that ODR be an automatic part of the small claims process. Research suggests that this increases participation and success, and allows for the speedier resolution of disputes. Individuals who cannot access, or who are uncomfortable with, ODR should still be allowed to opt out, however, and cannot be penalized for not using ODR.
- **Additional Pilots Using Proposed Parameters.** Additional pilots can have the same, restrictive parameters as the New York County Small Claims Pilot (matters related to the purchase and sale of goods, two unrepresented parties, etc.).
- **Additional Pilots Using New Parameters.** Alternatively, depending on a specific court's needs, pilots may also benefit from expanded parameters. These can include allowing a greater number of claims to qualify for ODR pilots and/or including cases where both parties are represented.
- **Additional Pilot Software Design.** In creating additional pilots, UCS will have three options:
 - (1) Hire a new vendor to design and run the pilots,
 - (2) Continue its relationship with Matterhorn,
 - (3) Design its own software from scratch.

Given cost and time considerations, we recommend that additional pilots partner with Matterhorn to capitalize on the already existing relationship and Matterhorn's New York expertise. However, UCS should, in conjunction with the creation of new pilots with Matterhorn, begin exploring the feasibility of designing its own software. While we do not recommend that this exploration slow down the creation of much needed, additional ODR pilots, we believe this may be a more cost-effective effective, long-term solution to the unique problems faced by New York courts and litigants.

Expand Small Claims ODR Pilots Throughout New York State. Small claims has already been identified as an area in need of, and compatible with, ODR services within the state. We therefore recommend that the state create additional small claims pilot ODR programs to be launched in those courts with the greatest needs.



Statewide Online Dispute Resolution *(continued)*

C. Recommendations for Launching and Expanding ODR in New York State (continued)



Develop Additional ODR Pilots for New York. Given the global success of ODR in handling a wide array of case types, we believe UCS would benefit from experimenting with ODR programs outside of small claims cases. We recommend UCS develop additional ODR pilots for minor civil offenses, minor landlord/tenant matters (such as the return of a damage deposit), contract cases, and local neighborhood disputes, which have all been successfully implemented in other states.^[29] Matterhorn has already developed these types of programs, so its experience in implementation and in working with OCA will help get new pilots running quickly. Such pilots could help with the backlog of cases exacerbated by the COVID-19 pandemic and help litigants reach speedier resolutions to their disputes.

Considerations for Additional ODR Pilot Creation. In implementing additional ODR pilot programs, the state should be mindful of various guiding principles:

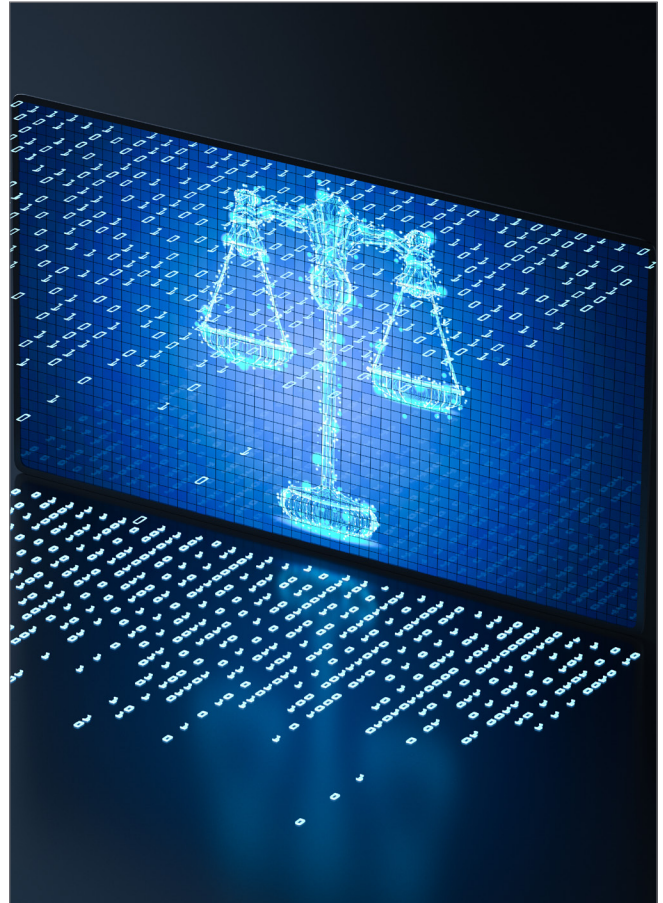
- Additional pilots *must* consider the justice needs of vulnerable groups such as the elderly, disabled, low-income, homeless, immigrant, etc. Special care should be given to ensure that individuals without access to reliable internet, or who are not literate in such technologies, are not penalized for being unable to participate.

- Pilots should alleviate growing case backlog and resource constraints on courts to ensure efficient and appropriate use of court resources.
- Courts should have extensive communication and collaboration with a wide range of stakeholders, both inside and outside the courthouse. Special care should be given to work extensively with community and legal service providers who are often the best source of information about the needs of particular communities.
- Courts and users must have the appropriate IT support and infrastructure to host and participate in ODR.

Creating an Independent ODR Tribunal. Given the success of British Columbia's CRT, and other similar independent bodies, and the successful, global use of ODR, we believe that UCS has the potential to be on the cutting edge of online court innovation by launching a similar ODR tribunal with jurisdiction over certain, low-level cases. For example, all traffic violations could be handled outside of the court system by an independent body, freeing up court resources and benefiting litigants. Small claims and low-level consumer disputes can also be successfully adjudicated by an independent tribunal, as modeled by British Columbia and the European Union. As with all ODR platforms, litigants must always have the option to seek court relief free from prejudice if and when they so choose. Nonetheless, an independent ODR tribunal will greatly enhance access to justice, for all of the reasons outlined in this report, and allow court resources to be directed to more sensitive cases. All of the same considerations discussed above for implementing additional ODR pilots apply to the creation of an independent ODR tribunal. Additional considerations and specific recommendations will be the topic of subsequent reports.

Conclusion

Technology can be a powerful tool in improving access to justice across the state and across demographics. The COVID-19 pandemic has created a unique opportunity for New York Courts to reimagine themselves and prudently use technology to advance justice. Courts are not just a physical location — they are our access point to the justice system, and UCS must embrace online courts as an opportunity to expand access to justice. While these improvements will inevitably require significant up-front investments, they will reduce costs and increase efficiency in the long run. Most importantly, they will make it easier for people to participate in the justice system. In implementing these improvements, UCS must focus on the needs of its most vulnerable populations to avoid exacerbating existing injustices and inequities. Procedures such as centralizing the courts' online systems into a public access portal, expanding e-filing throughout the state, examining the use of virtual court proceedings, and launching an online dispute resolution platform will mitigate the courts' access to justice issues and help to create a more fair, impartial, and accessible legal system for all.



Procedures such as centralizing the courts' online systems into a public access portal, expanding e-filing throughout the state, examining the use of virtual court proceedings, and launching an online dispute resolution platform will mitigate the courts' access to justice issues and help to create a more fair, impartial, and accessible legal system for all.

Acknowledgments

We would like to thank the following individuals for sharing their time, experience, and expertise with us:

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Special thanks to George Sun, Sharon-Cindy Meister, and the rest of the Paul, Weiss Graphic Services department for their incredible work in preparing this report.

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Citations

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24. PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2013) (“use of online dispute resolution services should be considered on a voluntary basis for unrepresented litigants in a pilot program for consumer credit matters.”).
25. PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2015) (“Consumer debt has emerged as an area that would be particularly appropriate for a pilot ODR program, available to both represented and unrepresented parties. Low-income parties are generally without counsel in these proceedings and many such proceedings are brought in small claims parts.”).
26. Matterhorn is used by several state court ODR programs including courts in California, Michigan, Ohio, and Texas.
27. The current jurisdictional threshold to bring small claims cases in NYS is \$10,000, up from \$5,000 when the team began developing the pilot.
28. All other small claims disputes (landlord/tenant issues, suits against the government, suits involving third parties, etc.) do not qualify to be part of the pilot.

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Initial Report on the Goals and Recommendations for New York State's Online Court System.

Produced by the Online Courts Working Group of the Commission to Reimagine the Future of New York's Courts

