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When Accessing Justice Requires Absence from the Courthouse: Utah's Online Dispute Resolution Program and the Impact it Will Have on Pro Se Litigants

Julianne Dardanes

I. INTRODUCTION

According to the 2017 Justice Gap Report conducted by Congress's non-profit Legal Services Corporation (LSC), eighty-six percent of civil legal issues involving low-income Americans received scant or no legal assistance.¹ This is despite the fact that low-income Americans sought help from LSC-funded organizations alone for nearly two million legal issues that year.² The report estimated that only limited or no legal help was provided for more than half of those issues.³ The number of unrepresented ("pro se") litigants continues to rise,⁴ with low-income Americans constituting a significant portion of this population.⁵ Unfortunately, low-income Americans are often the least equipped demographic to represent themselves in court due to educational barriers, along with

¹ LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017).

² LEGAL SERVS. CORP., *supra* note 1, at 6.

³ LEGAL SERVS. CORP., *supra* note 1, at 6.

⁴ *Self-Representation Resource Guide*, NCSC.ORG, <https://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx> (last visited Nov. 11, 2020).

⁵ David Liu, *Civil Legal Aid by the Numbers*, AMERICANPROGRESS.ORG, <https://www.americanprogress.org/issues/general/news/2011/08/09/10080/civil-legal-aid-by-the-numbers/> (last visited Nov. 11, 2020).

many other mental health and situational challenges.⁶ The following example from a Chicago, Illinois state court illustrates this point. Sadly, there are millions more of its kind.

During the summer of 2019, one extremely emotional pro se litigant came before the Circuit Court of Cook County for the third time in two months because she could not meet rent for her low-income housing.⁷ She explained to the judge, as she did in her previous appearances, that she was unable to pay because she had been let go from her job and had three children to support.⁸ Needless to say, the woman could not afford a lawyer.⁹ Although the judge previously gave the woman pamphlets for local law schools that provide pro bono legal help, she was unable to persuade anyone to take her case.¹⁰ While the opposing attorney for the Chicago Housing Authority was sympathetic to her plight and open to reaching a mutually beneficial solution, he was frustrated that he had to keep coming in for continuances when no progress was being made.¹¹ The woman's lack of education and access to information, in the absence of counsel, were clearly the impediments to resolving the lawsuit.¹² Neither the judge nor opposing counsel wanted to initiate eviction proceedings, so the suit dragged on.¹³ This is exactly the

⁶ LEGAL SERVS. CORP., *supra* note 1, at 18, 19.

⁷ *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

⁸ *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

⁹ *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

¹⁰ *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

¹¹ *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

¹² *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

¹³ *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

type of case that would benefit from the Utah Online Dispute Resolution (ODR) program, which seeks to create greater access to justice and increase overall efficiency in the state court system.¹⁴

Due to the inefficiency of socioeconomically challenged litigants appearing pro se, this article proposes implementing Utah's court-mandated ODR program as a solution.¹⁵ Utah's ODR program for small claims is revolutionary because it is the first ODR system able to handle an entire dispute instead of only certain phases, such as mandatory mediation for a particular issue.¹⁶ Further, until recently, ODR has primarily been used by private companies to resolve consumer disputes rather than employed in the court setting.¹⁷ Two of the largest shortcomings of civil litigation are: 1) claimants lacking access to representation and information; and 2) overcrowded dockets.¹⁸ Utah's mandatory ODR program addresses both of these concerns.¹⁹ As to the issue of claimants without access to representation or information, Utah's system directs these parties to online resources tailored to the claim that they are filing or responding to.²⁰

¹⁴ Symposium, *Utah's Online Dispute Resolution Program*, 122 DICK. L. REV. 875, 876 (2018), <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/6>.

¹⁵ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 877.

¹⁶ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 880–82.

¹⁷ PEW TR., *Online Dispute Resolution Offers a New Way to Access Local Courts*, PEWTRUSTS.ORG (Jan. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts>.

¹⁸ CIVIL JUSTICE IMPROVEMENTS COMM. OF THE NAT'L CTR. FOR STATE COURTS, PROBLEMS AND RECOMMENDATIONS FOR HIGH-VOLUME DOCKETS 2 (last visited Oct. 24, 2019), <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Appendices-I.ashx>.

¹⁹ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 877–880.

²⁰ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT 7–8, National Center for State Courts (Dec. 2017), <https://cdm16501.contentdm.oclc.org/digital/collection/adr/id/63>.

It also assigns a facilitator who may provide limited legal advice to oversee the process from start to finish.²¹ With regard to the overcrowded dockets issue, Utah's program is self-serving.²² The more that simpler claims are resolved online, the more available courtrooms will be for lawsuits that require judges' attention the most. This means that there will be less valuable court time and resources wasted on repetitive continuances that accomplish little with regard to actually resolving lawsuits. Utah's ODR program has the potential to change the way the American legal system operates by better addressing the needs of sophisticated and unsophisticated parties alike.

Section II of this paper will discuss the problem of socioeconomically challenged parties appearing pro se. Section III will discuss ODR generally and outline Utah's program specifically. Section IV will analyze how Utah's ODR program will benefit the socioeconomically challenged pro se litigant and why doing so benefits the justice system at large. Section V will serve as a brief conclusion.

II. THE PROBLEM: SOCIOECONOMICALLY CHALLENGED PARTIES APPEARING PRO SE

In recent years, the number of people representing themselves in legal proceedings has skyrocketed.²³ Two identified reasons for this are scarcity of affordable legal services and the "do it yourself" attitude prompted by a modern, resourceful society.²⁴ Although in theory the idea of self-representation is a hallmark of democracy, many pro se litigants do not have access to the information that allows them to meaningfully do so. Further, a large number of pro

²¹ *Utah's Online Dispute Resolution Program*, *supra* note 14 at 882.

²² UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 5, 6.

²³ *Self-Representation: Resource Guide*, *supra* note 4.

²⁴ Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 CT. REV. 8, 8–10 (2003); Dean A. Frantsvog, *Pro Se Litigation: Is This Phenomenon Helping or Hurting Our Legal System?*, 7 J. OF BUS. & ECON. RES. 61, 62 (2009).

se litigants are uneducated.²⁵ Thus, even if equipped with the appropriate information, they may still have difficulties using it to adequately represent themselves in court. Another major reason for the trend of self-representation is the economic downturn of 2008.²⁶ The downturn exacerbated economic conditions even more for low-income Americans while simultaneously worsening issues in housing and domestic relations.²⁷ This gave rise to more cases in general, with a specific emphasis on populations hit the hardest by the recession.²⁸

According to the California bar's 2019 comprehensive statewide study on the need for civil legal assistance, the justice gap reaches even beyond the poor.²⁹ For example, fifty-five percent of Californians at all income levels experienced at least one civil legal issue in their household within the past year, and thirteen percent experienced six or more legal problems.³⁰ Eighty-five percent of all Californians received no legal help, or inadequate legal help, for the civil legal problems they experienced.³¹ The study identified that the justice gap

²⁵ Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 *FORDHAM L. REV.* 1109, 1119 (1987).

²⁶ Lauren Sudeall Lucas & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer*, *THE CONVERSATION* (Sept. 21, 2017, 8:36 PM), <https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159>.

²⁷ LINDA KLEIN, ABA COALITION FOR JUSTICE, *REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS* 2 (2010), https://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf.

²⁸ Klein, *supra* note 27.

²⁹ ROCÍO AVALOS ET AL., 2019 CALIFORNIA JUSTICE GAP STUDY EXECUTIVE REPORT 6 (The State Bar of California, 2019), <http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf>.

³⁰ ROCÍO AVALOS ET AL., *supra* note 29.

³¹ ROCÍO AVALOS ET AL., *supra* note 29, at 7.

contains two components: a knowledge gap and a service gap.³² With regard to the knowledge gap, only thirty-two percent of Californians who experience a legal problem sought legal help for it.³³ This is largely because they did not know the problem had a legal component or remedy.³⁴ Also, they did not know where to obtain legal help.³⁵ Concerns about legal costs and pursuing legal action were additionally identified as reasons why Californians with actionable legal issues did not seek legal help.³⁶ With regard to the service gap, only thirty percent of those who sought help through legal aid could be served in that way.³⁷ This is due to the fact that legal aid organizations are understaffed.³⁸ The study showed that barriers faced by law students and lawyers such as cost of education and loans often times divert them from careers in legal aid.³⁹

III. THE SOLUTION: ONLINE DISPUTE RESOLUTION

Online Dispute Resolution has the potential to transform the way the American legal system deals with pro se litigants and access to justice issues at large. Although it may seem counterintuitive to bridge the justice gap by precluding people from appearing in court, requiring certain types of claims to begin online will actually provide quicker and more accessible legal solutions. As long as the programming and administration of ODR technology are done with attention to legal and ethical concerns, pro se litigants will benefit from having their claims resolved online. Instead of waiting months to appear before a judge, if they are even capable of meaningfully doing so, pro se parties will have the agency to seek immediate relief while

³² ROCÍO AVALOS ET AL., *supra* note 29, at 7.

³³ ROCÍO AVALOS ET AL., *supra* note 29, at 10.

³⁴ ROCÍO AVALOS ET AL., *supra* note 29, at 10.

³⁵ ROCÍO AVALOS ET AL., *supra* note 29, at 10.

³⁶ ROCÍO AVALOS ET AL., *supra* note 29, at 10.

³⁷ ROCÍO AVALOS ET AL., *supra* note 29, at 13.

³⁸ ROCÍO AVALOS ET AL., *supra* note 29, at 13.

³⁹ ROCÍO AVALOS ET AL., *supra* note 29, at 13.

receiving education on how to properly do so.⁴⁰ Represented parties opposing pro se litigants will benefit from this efficiency as well.⁴¹ Further, this process will clear up court dockets for cases that really should be handled by a judge.⁴²

A. BACKGROUND AND HISTORY OF ODR GENERALLY

In discussing ODR, the American Bar Association (ABA) defines alternative dispute resolution in general as “an alternative to the traditional legal process, which usually involves a court, judge, and possibly a jury to decide the dispute.”⁴³ The ABA goes on to say that “Online Dispute Resolution (ODR) uses alternative dispute resolution processes to resolve a claim or dispute,” and it “can be used for disputes arising from an online, e-commerce transaction, or disputes arising from an issue not involving the [i]nternet, called an ‘offline’ dispute.”⁴⁴ As is evidenced by this definition, the legal community at large views ODR as being separate and distinct from the traditional litigation process. This is because, until recently, ODR was viewed as a solution to solve disputes *before* they elevated to the level of formally filing a lawsuit.⁴⁵ The traditional definition of ODR implies a knowledge of, and willingness to seek out, ODR before the conflict has escalated, which is different from court-mandated ODR.

⁴⁰ See generally *Utah's Online Dispute Resolution Program*, *supra* note 14, at 880–81.

⁴¹ See generally *Utah's Online Dispute Resolution Program*, *supra* note 14, at 880–81.

⁴² See PEW TR., *supra* note 17.

⁴³ *What is Online Dispute Resolution? A Guide for Consumers*, ABA TASK FORCE ON ELEC. COM. & ALT. DISP. RESOL. TASK FORCE 1 (March 2002), https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/consumerodr.authcheckdam.pdf.

⁴⁴ *What is Online Dispute Resolution? A Guide for Consumers*, *supra* note 43, at 1.

⁴⁵ See generally, Ethan Katsh, *ODR: A Look at History: A Few Thoughts About the Present and Some Speculation About the Future*, MEDIATE, <https://www.mediate.com/pdf/katsh.pdf> (last visited Oct. 23, 2019).

ODR was developed circa 1990, with its origins rooted in the prediction that the internet would evolve into a forum ripe for conflict as its volume of users increased.⁴⁶ Even at the inception of the internet before social media and other networking platforms existed, people understood that the internet facilitated communication.⁴⁷ Because “dispute resolution, wherever and however it occurred, involved the communication and processing of information,” people also understood that Online Dispute Resolution “would not only be needed but it would also be feasible.”⁴⁸ After the World Wide Web was invented in 1989 and browsers became commonplace, the online population grew and so did the number of disputes.⁴⁹ Accordingly, several ODR projects were launched and conferences were held in order to streamline the development of a process equipped to handle the increasing number of internet disputes.⁵⁰ Online goods and services providers like eBay and Paypal also began implementing their own ODR systems created by Modria, Inc. to manage disputes, realizing that they had the resources to do so and that courts were struggling with jurisdiction issues resulting from online disputes.⁵¹

Nowadays, ODR is used to resolve disputes occurring both online and offline.⁵² There are numerous independent ODR platforms that mediate and facilitate negotiation for all kinds of disputes.⁵³ From individual start-ups to government-funded programs in Canada and Europe,

⁴⁶ Katsh, *supra* note 45, at 21.

⁴⁷ Katsh, *supra* note 45, at 21.

⁴⁸ Katsh, *supra* note 45, at 21.

⁴⁹ Katsh, *supra* note 45, at 22–23.

⁵⁰ Katsh, *supra* note 45, at 23–24.

⁵¹ Katsh, *supra* note 45, at 24.

⁵² Katsh, *supra* note 45, at 25.

⁵³ Marcy Einhorn, *Online Dispute Resolution: the “New Normal”*, MEDIATE, (May 2018), <https://www.mediate.com/articles/einhornm4.cfm>.

ODR is here to stay.⁵⁴ Commercial and contractual disputes, housing issues, divorce proceedings, family violence, wills, and powers of attorney are a few of the many areas where ODR is now implemented across the globe.⁵⁵ Courts are also beginning to rely on ODR to assist in resolving claims.⁵⁶ “Technology can be used to help move cases through some aspects of the resolution process, while other steps are handled by court staff Most court-based ODR today is a hybrid of human involvement and automation.”⁵⁷

That said, some courts are now using ODR to resolve certain claims in their entirety, as is the case in Utah.⁵⁸ For instance, California's Yolo County Superior Court recently launched an ODR program for debt and money-due cases in October 2019.⁵⁹ Similarly, the Michigan Supreme Court launched its MI-Resolve program in August 2019.⁶⁰ Michigan's program is “limited to cases alleging that money is owed and is being used in small claims, general civil, landlord-tenant, contract, and

⁵⁴ Jonathan Shieber, *FairClaims raises \$1.8 million to be a virtual 'Judge Judy'*, TECHCRUNCH, (June 12, 2017, 6:30AM), <https://techcrunch.com/2017/07/12/fairclaims-raises-1-8-million-to-be-a-virtual-judge-judy/>; Einhorn, *supra* note 37.

⁵⁵ Einhorn, *supra* note 53.

⁵⁶ ODR FOR COURTS, JTC RESOURCE BULLETIN (Nov. 2017), <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v%20final.ashx>.

⁵⁷ ODR FOR COURTS, *supra* note 56, at 3.

⁵⁸ *Utah's Online Dispute Platform Is Streamlining Small Claims*, LAW360 EXPERT ANALYSIS, LEXISNEXIS (May 05, 2019), <https://advance.lexis.com/api/permalink/6b02010b-cfd3-4466-b658-eb15ab52017c/?context=1000516>.

⁵⁹ Nicole Wilmet, *California's Yolo Superior Court Launches New Online Dispute Resolution Program*, MEDIATE.COM (Oct. 2019), <https://www.mediate.com/articles/wilmet-yolo-court.cfm>. This program uses the Modria, Inc. software discussed *supra* with regard to eBay and PayPal.

⁶⁰ Nicole Wilmet, *Michigan Supreme Court Launches New Online Dispute Resolution Program, MI-Resolve*, MEDIATE.COM (Aug. 2019), <https://www.mediate.com/articles/wilmet-new-ODR-program.cfm>.

neighborhood disputes.”⁶¹ However, MI-Resolve is not court-mandated, and persons wishing to use it may do so without formally filing a case in court.⁶² That said, “if parties do have a dispute filed, they may use MI-Resolve to try to reach a settlement before their hearing or trial date.”⁶³ Many other states have implemented both hybrid and all-encompassing ODR programs to resolve cases and legal issues that are “more transactional in nature, are less complex, and that occur in high volume.”⁶⁴

B. UTAH'S ODR PROGRAM

Utah's ODR pilot program addresses a subset of the aforementioned category of cases.⁶⁵ Utah Supreme Court Justice Deno Himonas spearheaded and implemented the pilot program in one of Utah's largest small claims courts, hearing disputes up to \$11,000, in June 2018.⁶⁶ Justice Himonas specified that “small claims” are not limited to debt collection, meaning the pilot includes cases regarding “any form of debt that's generated for whatever activity,” as long as the amount in question is no greater than \$11,000.⁶⁷ All small claims cases are required to go through the ODR system.⁶⁸ The technology for Utah's pilot program was built entirely in-house, with the possibility of it being open source for other states to adopt if the results are favorable.⁶⁹

As of right now, the Utah courts participating in the pilot are West Valley City Justice Court, Orem City Justice

⁶¹ Wilmet, *supra* note 60.

⁶² Wilmet, *supra* note 60.

⁶³ Wilmet, *supra* note 60.

⁶⁴ ODR FOR COURTS, *supra* note 56, at 2.

⁶⁵ Compare ODR FOR COURTS, *supra* note 56, at 2, with Utah's Online Dispute Resolution Program, *supra* note 14, at 878–79.

⁶⁶ Utah's Online Dispute Platform Is Streamlining Small Claims, *supra* note 58.

⁶⁷ Utah's Online Dispute Resolution Program, *supra* note 14, at 895.

⁶⁸ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 8.

⁶⁹ Utah's Online Dispute Resolution Program, *supra* note 14, at 898.

Court, and Carbon County Justice Court.⁷⁰ Once the National Center for State Courts reviews and analyzes the data, it will be publicly reported.⁷¹ This reviewing process began in May 2019.⁷² According to Justice Himonas, “between its launch last September and April 4, 2019, there were 1,021 case filings under the ODR program, and returns of service in 573 [of those cases], or 56%—[this] marked improvement over the baseline response rate of about 15%.”⁷³ Additionally, there were only ten cases of parties opting out of ODR altogether, four of which were by plaintiffs.⁷⁴

Once again, the policy purpose behind Utah's ODR program is to create greater access to justice and to help Utah's state court system stay technologically relevant.⁷⁵ “Small claims are an important but often overlooked piece of the access to justice puzzle.”⁷⁶ Further, “[a] large proportion of small claims cases are debt[-]collection cases, and defendants default in about 85% of these cases [Thus,] improving access to the resolution of small claims cases is often of the greatest benefit to people who are struggling financially.”⁷⁷

⁷⁰ *Utah Courts: Online Dispute Resolution (ODR) Pilot Project*, UTCOURTS.GOV, <https://www.utcourts.gov/smallclaimsodr/> (last visited Oct. 24, 2019).

⁷¹ *Utah's Online Dispute Platform Is Streamlining Small Claims*, *supra* note 58.

⁷² *Utah's Online Dispute Platform Is Streamlining Small Claims*, *supra* note 58.

⁷³ *Utah's Online Dispute Platform Is Streamlining Small Claims*, *supra* note 58.

“Returns of service” in this context means that the process server was able to successfully deliver to the defendant the documents containing the plaintiff's claim. According to paragraph three of Utah Supreme Court Standing Order No. 13 governing ODR, method of service is still governed by Utah Rule of Civil Procedure 4. Thus, the plaintiff is still required to serve the defendant in person or via mail. Utah R. of Civ. P. 4.

⁷⁴ *Utah's Online Dispute Platform Is Streamlining Small Claims*, *supra* note 58.

⁷⁵ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 876.

⁷⁶ *Utah's Online Dispute Platform Is Streamlining Small Claims*, *supra* note 58.

⁷⁷ *Utah's Online Dispute Platform Is Streamlining Small Claims*, *supra* note 58.

1. LOGISTICS

Utah Supreme Court Standing Order No. 13 (“Standing Order”) governs the ODR pilot project.⁷⁸ Paragraph one focuses on general provisions.⁷⁹ This includes the duration of the pilot program (September 19, 2018 to whenever the Utah Supreme Court decides to rescind it), along with the purpose for the pilot (to “further the statutory goal of small claims: dispensing speedy justice between the parties”).⁸⁰ Paragraph two addresses beginning the case.⁸¹ As in a standard in-person case, the plaintiff must file an affidavit with the clerk of the court, provide his or her own contact information as well as that of the defendant (if known), and pay a filing fee.⁸² In addition, the plaintiff is required to register for the ODR system within seven days of filing his or her claim.⁸³ Paragraph three governs service.⁸⁴ Paragraph four addresses responding to a claim, requiring the defendant to register for an ODR account or seek an exemption from participating in ODR within fourteen days of being served.⁸⁵ If a defendant does not register for ODR or request an exemption within fourteen days, the court is authorized to enter default judgment for the amount requested.⁸⁶

⁷⁸ *Utah Courts: Utah Supreme Court Standing Orders*, UTCOURTS.GOV, <https://www.utcourts.gov/resources/rules/urap/Supctso.htm#13> (last visited Oct. 24, 2019).

⁷⁹ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸⁰ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸¹ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸² *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸³ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸⁴ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸⁵ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸⁶ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

Paragraph five outlines requesting an exemption from ODR.⁸⁷ The only way to do so is by proving undue hardship, which it defines as a party not being able to “access the online system or participate in the online process without substantial difficulty or expense.”⁸⁸ If the court grants the exemption, a trial date will be scheduled.⁸⁹ Paragraph six then discusses facilitators, who are assigned to cases for the purpose of helping move the dispute along.⁹⁰ It specifies that the facilitators’ role is to “guide the parties through ODR and to assist them in reaching a settlement. To advance these goals, the facilitator may provide information to a party regarding procedure and evaluate the claim or any defenses.”⁹¹ The facilitator is assigned to the case within seven days after at least two parties have created ODR accounts.⁹² The facilitator is also responsible for explaining the process and setting deadlines.⁹³ All information that the parties share with the facilitator is confidential “and will not be disclosed beyond the facilitation phase without the approval of the party providing the information.”⁹⁴ Paragraph six also tasks the facilitator with preparing a complete and concise trial document in the event that the parties are unable to settle.⁹⁵

Paragraph seven discusses the settlement agreement if the parties are able to agree on one.⁹⁶ At the request of the parties, the facilitator is responsible for preparing the form

⁸⁷ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸⁸ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁸⁹ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹⁰ Beth Graham, *Utah Small Claims Court Begins Pilot ODR Program*, KARL BAYER, (Feb. 06, 2019), <https://www.disputingblog.com/utah-small-claims-court-begins-pilot-odr-program/>.

⁹¹ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹² *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹³ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹⁴ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹⁵ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹⁶ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

setting forth the settlement terms.⁹⁷ One limitation here is that “performance[-]related terms . . . will not be enforceable by the court in the event of a breach.”⁹⁸ That said, the court may enter a judgment on the agreement if the parties elect to do so or if the debtor fails to comply.⁹⁹ Paragraph eight allows the facilitator to terminate the facilitation process if it is clear that the parties are unable to reach an agreement.¹⁰⁰ If the plaintiff fails to respond to the facilitator within ten days after beginning the process, paragraph nine authorizes the facilitator to notify the defendant of his or her right to file a request to dismiss the case.¹⁰¹

Paragraph ten allows the creditor to file a request for the court to enter a judgment if the debtor breaches the settlement agreement.¹⁰² Paragraph eleven specifies that the Utah Rules of Small Claims Procedure are applicable to all ODR cases.¹⁰³ Finally, paragraph twelve allows the defendant to informally raise counterclaims during facilitation.¹⁰⁴

2. PROCEDURE

After creating an ODR account, parties then complete the four-fold ODR process which includes: “[G]uided education and evaluation of claims and defenses, communication with the other party, individualized assistance by a trained ODR facilitator, and settlement or adjudication of the dispute[.]”¹⁰⁵ This is done entirely online, via computer or mobile device, at the convenience of

⁹⁷ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹⁸ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

⁹⁹ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

¹⁰⁰ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

¹⁰¹ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

¹⁰² *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

¹⁰³ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

¹⁰⁴ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 78.

¹⁰⁵ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 3.

the parties and the facilitator.¹⁰⁶ If the parties are unsatisfied with the ruling, they may appeal it *de novo* from the Utah small claims court to the district court.¹⁰⁷

A. EDUCATION AND EVALUATION

Many times, parties are unable to resolve their disputes not for lack of ability to find common ground, but instead because they do not understand what courts are generally able to with their claims.¹⁰⁸ After filling in the basic personal information necessary about the party and the claim, the first step in Utah's program is education and evaluation.¹⁰⁹ Parties are "directed to answer some simple questions that will provide relevant information about their claims and defenses."¹¹⁰ The parties' responses to these questions are saved and may later be used to "help populate necessary documents if need be."¹¹¹ For plaintiffs, there is a guided evaluation option to help them determine if their claim is in fact a small claims case, or should be filed elsewhere instead.¹¹² After this determination is made, "[t]he system helps to educate the plaintiff with what information is important regarding their claim based on their answers to a series of triage questions."¹¹³ When the education step is complete, "the individual will be able to set up their MyCase account with the courts in order to e-file the

¹⁰⁶ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 3; *See Utah's Online Dispute Resolution Program, supra* note 14, at 895.

¹⁰⁷ *Utah's Online Dispute Resolution Program, supra* note 14, at 882.

¹⁰⁸ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 9.

¹⁰⁹ *See* UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 9.

¹¹⁰ *Utah's Online Dispute Resolution Program, supra* note 14, at 882.

¹¹¹ *Utah's Online Dispute Resolution Program, supra* note 14, at 882.

¹¹² UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 9.

¹¹³ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 9.

claim and generate a court approved summons to be served on the defendant.”¹¹⁴

The first question asked of a defendant is how he or she would like to respond to the claim.¹¹⁵ The answer choices are as follows: 1) “I want to set up a payment plan or make an offer to settle the claim”; 2) “I have already paid this claim”; 3) “This claim is part of a bankruptcy”; 4) “This is not my debt”; 5) “I want options to respond to the claim”; or 6) “I’m not ready to respond to the claim yet.”¹¹⁶ Depending on the answer choice selected, the system then takes defendants through additional questioning to glean more information about their situation.¹¹⁷ This sub-questioning allows defendants to further explain their situation or give a bankruptcy case number before communicating directly with the other side.¹¹⁸ At this point, defendants may reach out to the facilitator to ask questions.¹¹⁹

B. COMMUNICATION

Once the parties reach the communication stage of the ODR process, they may message each other about the case using the program’s chat function.¹²⁰ While the facilitator is available during this stage, the parties are given the opportunity to interact in a virtual one-on-one chatroom before enlisting a mediator.¹²¹ Also, “[p]arties are informed during the [c]ommunication stage that information shared is considered confidential in order to help promote cooperation

¹¹⁴ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 9.

¹¹⁵ *Utah’s Online Dispute Resolution Program*, *supra* note 14, at 883.

¹¹⁶ *Utah’s Online Dispute Resolution Program*, *supra* note 14, at 883.

¹¹⁷ *Utah’s Online Dispute Resolution Program*, *supra* note 14, at 885–86 (illustrating this point).

¹¹⁸ *Utah’s Online Dispute Resolution Program*, *supra* note 14, at 885–86.

¹¹⁹ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 10.

¹²⁰ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 10.

¹²¹ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 10.

during these discussions.”¹²² If a settlement is reached during the communication stage, the facilitator will help the parties create the settlement agreement that will be signed and filed entirely online.¹²³ “If a settlement agreement isn’t filed and the case isn’t resolved within roughly thirty-five days, the facilitator will set the case for trial either in-person or online, depending on the complexity of the case.”¹²⁴

C. FACILITATION AND TRIAL PREPARATION

The facilitator’s purpose is to “assist the parties through the ODR process and to inform them of appropriate options.”¹²⁵ The facilitator does not represent the courts or parties.¹²⁶ Most importantly, “[t]he ODR Facilitator will provide the type of individualized assistance and education that will help to uncover the real issues that are preventing the dispute from being settled.”¹²⁷ This gives the facilitator wide latitude in deciding how to best assist the parties in the dispute.¹²⁸ Unlike a mediator, the facilitator’s role is more focused on keeping the parties informed about their claim rather than getting them to reach a settlement.¹²⁹ To that end, the facilitator must assist the parties in creating a Trial Preparation Document within thirty-five days of beginning

¹²² UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹²³ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹²⁴ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹²⁵ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹²⁶ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹²⁷ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹²⁸ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹²⁹ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

the ODR process if they are unable to resolve their dispute.¹³⁰ The Trial Preparation Document “outlines the claims and defenses, as well as facts and evidence on which the parties agree and disagree.”¹³¹ Its purpose is to “prepare the parties and the assigned judge for an in-person or online trial.”¹³² Documents, videos, and audio files may be uploaded and submitted as evidence if the trial will take place online.¹³³

D. ADJUDICATION

If the parties cannot reach a settlement within the allotted time, the case will be transferred from the facilitator to a judge and a trial date will be set for either online or in-person proceedings.¹³⁴ An in-person trial must be scheduled within seven to twenty-one days, whereas an online trial will begin immediately after the parties submit all the evidence along with the Trial Preparation Document.¹³⁵ After a trial date is set, the parties lose access to their previous messages from the communication stage when they were trying to reach a settlement.¹³⁶ In its place is an “On the Record” chatroom for the trial.¹³⁷ “An online trial has no set time period, in order to allow parties to respond and present their cases at their own convenience, although they must obey the

¹³⁰ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11–12.

¹³¹ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹³² UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11.

¹³³ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 11–12.

¹³⁴ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 12.

¹³⁵ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 12.

¹³⁶ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 12.

¹³⁷ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 12.

judge's deadlines and expectations"¹³⁸ After the order is issued, the parties will have access to information about appeals, motions to enforce settlement agreements, supplemental order proceedings, and judgment collection.¹³⁹

C. POSSIBLE ISSUES WITH UTAH'S PROGRAM

As with any revolutionary technological advancements, there is bound to be criticism and concern as to its implications for society. This section will attempt to identify these points of contention and propose possible solutions and counterarguments to them. While Utah's program is an exemplary beginning for court-mandated ODR, there is always room for improvement.

1. LEGAL CONCERNS

Paragraph four of the Utah Supreme Court Standing Order No. 13 authorizes the court to enter a default judgment against a defendant who fails to register for an ODR account or request an exemption within fourteen days of being served.¹⁴⁰ People may question whether a default judgment should be entered against someone potentially for the sole reason of not having access to technology.¹⁴¹ While exemptions are allowed, the pro se party must prove "undue hardship" in order for the court to grant an exemption.¹⁴² Standing Order No. 13 says that "[u]ndue hardship exists when a party cannot access the online system or participate in the online process without substantial difficulty or expense[.]" but it does not specify what constitutes

¹³⁸ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 12.

¹³⁹ UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT: FINAL REPORT, *supra* note 20, at 12.

¹⁴⁰ Utah Sup. Ct., *Standing Order No. 13*, UTAH COURTS (Sept. 19, 2018) [hereinafter *Standing Order No. 13*].

¹⁴¹ Orna Rabinovich-Einy & Ethan Katsh, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 CARDOZO J. CONFLICT RESOL. 637, 637–39 (2017).

¹⁴² *Standing Order No. 13*, *supra* note 140.

“substantial difficulty.”¹⁴³ This gives judges the discretion to decide, on an ad hoc basis, whether a particular party’s situation is sufficiently compelling to grant an exemption. Judges with busier dockets may be inclined to deny exemptions more frequently, thus blocking certain pro se litigants from the court system entirely.¹⁴⁴ If an undue hardship really does exist but the court denies the exemption, certain defendants may be forced to accept a default judgment against them.

However, the exemption issue can be combatted by giving judges clearer guidelines as to what constitutes an undue hardship.¹⁴⁵ If judges are given more specificity in this regard, it will be more difficult for them to pass off cases they do not want to deal with to ODR.¹⁴⁶ While each situation and hardship are likely to be unique, there are millions of fact patterns involving pro se defendants already on the common law record that can be analyzed to ascertain certain types of undue hardships.¹⁴⁷ For instance, if the distraught woman about to lose her housing, as discussed in Part I *supra*, did not have internet access at home and did not have a car or money to take public transportation to a public computer every day while her claim was being resolved, she should be granted an exemption from ODR.¹⁴⁸ Many cases are probably more nuanced than that; however, setting basic guidelines would keep the justice system from unduly

¹⁴³ *Standing Order No. 13*, *supra* note 140.

¹⁴⁴ Sonja Ebron, *The Judge Wants You Off the Docket*, COURTROOM5 (Aug. 18, 2016), <https://get.courtroom5.com/judge-wants-you-off-the-docket/>.

¹⁴⁵ See, e.g., *The Federal Child Support Guidelines: Step-by-Step: Step 8: Determine if There is Undue Hardship*, CAN. DEP’T OF JUST., <https://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/step8-etap8.html> (Aug. 23, 2017).

¹⁴⁶ See Ebron, *supra* note 144.

¹⁴⁷ See JUD. ETHICS COMM., *Op. No. 76 Ethical Issues for Judges When Self-Represented Litigants Appear In Court (Canons 3B & 2A)*, CAL. JUDGES ASS’N 1 (Dec. 2018), <https://www.caljudges.org/docs/Ethics%20Opinions/Op%2076%20Final.pdf>.

¹⁴⁸ *Sonya v. Chi. Hous. Auth.*, No. 2019 CH 06557 (Ill. Cir. Ct. May 29, 2019) (Westlaw, Clerk of the Circuit Court of Cook County).

manipulating exemption standards at the expense of the pro se litigant. There also might be cases that are simply better suited for in-person litigation, such as more complex suits or ones with issues of first impression.¹⁴⁹ Another exception could be added that gives judges the power to stop a case from automatically going to ODR if they think extenuating circumstances are present that make it ripe for litigation.

Along with this, paragraph five of the standing order which governs ODR exemptions says that the court “shall provide the requesting party the form necessary to request an exemption[,]” but does not specify when this exchange takes place.¹⁵⁰ If the party is mandated to file or respond to a claim entirely online without even an in-person status hearing, how are they supposed to petition the court for an exemption? This aspect of the rule could be clearer in order to avoid confusion that may deter parties who actually have an undue hardship from obtaining an exemption. Especially for unsophisticated pro se parties, petitioning the court on their own may seem like an ominous task.¹⁵¹ They also may not understand how to do so.¹⁵² An easy fix for this concern is that the Standing Order could be amended to require an initial status hearing before a judge with both parties present prior to the ODR proceeding. One status conference per ODR claim likely would not burden the court immensely and would provide the benefit of streamlining claims so that both parties are clearly aware what is expected of them.¹⁵³ Having a judge explain the ODR process to the

¹⁴⁹ Noam Ebner & Elayne E. Greenberg, *Strengthening Online Dispute Resolution Justice*, 63 WASH. U. J.L. & POL'Y 65, 105 (2020).

¹⁵⁰ *Standing Order No. 13*, *supra* note 140.

¹⁵¹ See JUD. ETHICS COMM., *supra* note 147, at 1.

¹⁵² See JUD. ETHICS COMM., *supra* note 147, at 1.

¹⁵³ *How Courts Work: Steps in a Trial: Pretrial Conferences*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_conference/.

parties would also likely make them take ODR more seriously as a legal proceeding.¹⁵⁴ In turn, this would give ODR more weight to skeptical parties. At least during the beginning stages of implementing ODR, this initial hearing with a judge would make people more trusting of the change.

Additionally, people may question the fourteen-day time period to respond.¹⁵⁵ It could be argued that this not enough time for a low-income individual unfamiliar with technology to access the internet and create an account. Further, under the Federal Rules of Civil Procedure, a defendant gets at least twenty-one days to answer before a final default judgment is entered against her.¹⁵⁶ Here again, the Standing Order can easily be amended to give pro se litigants a longer time to figure out how to access the internet and make an account.¹⁵⁷ It could even be extended one week to mirror the twenty-one-day limit of the Federal Rules of Civil Procedure.¹⁵⁸ Additionally, the Standing Order could be amended to require that the complaint contain step-by-step directions on how to set up an ODR account.¹⁵⁹ That way, once defendants are served, they will have all the information upfront and will not have to waste time trying to figure it out on their own. Low-income pro se litigants are likely the ones that could be most burdened by ODR,¹⁶⁰ so

¹⁵⁴ Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 510–11 (2015).

¹⁵⁵ *Standing Order No. 13*, *supra* note 140.

¹⁵⁶ FED. R. CIV. P. 12(a)(1)(A)(i) [hereinafter FRCP 12(a)].

¹⁵⁷ Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 352–53 (2016) (discussing court provided instructions to pro se litigants).

¹⁵⁸ FRCP 12(a).

¹⁵⁹ J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2012 (2017) (citing James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 259–60 (2012)).

¹⁶⁰ *But see* Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67 BUFF. L. REV. 89, 121 (2019) (explaining that low-income families may have a hard time traveling to in-person court).

special safeguards should be put in place to make sure they are still gaining fair access to the justice system.

Another possible complaint is that paragraph seven of the Standing Order allows parties to enter into settlement agreements without the facilitator signing off at all.¹⁶¹ Especially in cases where there is unequal bargaining power, does it really comply with due process to mandate an unsophisticated party to participate in ODR and then have them enter into a court-enforceable agreement absent it being reviewed by anyone?¹⁶² Especially in cases where the other party has an attorney, this could be seen as a form of duress.¹⁶³ The pro se party would likely be confused about the settlement process and who is looking out for their interests.¹⁶⁴ For in-court settlements, the judge is in charge of making sure that the sophisticated party does not take advantage of the unsophisticated one.¹⁶⁵ On the other hand, under Utah's ODR program, if the parties agree to settle early on, the facilitator does not even see the case.¹⁶⁶ The more advanced party could pressure the pro se party into accepting a settlement under false pretenses that they are not going to get any better; meanwhile, the pro se party has no one looking out for her interests.¹⁶⁷ Facilitators are meant to

¹⁶¹ Sela, *supra* note 157, at 355–56 (discussing court management of settlement talks).

¹⁶² Ayelet Sela, *Can Computers Be Fair?: How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO STATE J. ON DISP. RESOL. 91, 102–05 (2018).

¹⁶³ See Dominique Allen, *Against Settlement? Owen Fiss, ADR and Australian Discrimination Law*, 10 INT'L J. OF DISCRIMINATION & L. 191, 196 (2009).

¹⁶⁴ Sela, *supra* note 162, at 125–48.

¹⁶⁵ John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 70–141 (2002).

¹⁶⁶ *Standing Order No. 13*, *supra* note 140.

¹⁶⁷ See Holland & Hart, *Ethical Issues Surrounding Pro Se Litigants*, JDSUPRA (Jan. 30, 2019), <https://www.jdsupra.com/legalnews/ethical-issues-surrounding-pro-se-81858/> (calling pro se litigation a “perfect storm of confusion”).

combat this issue, but if they do not ever see the case, they will not be able to.

A counter argument to this concern is that it is also a concern in cases that do not involve ODR. Unfortunately, there is always a chance that unsophisticated parties will be taken advantage of in settlement agreements. Additionally, the pro se party is not forced into settling prior to the facilitator getting involved. As long as it is initially made clear that settling at the beginning stages is not mandatory, and not doing so will not hurt the pro se party's case, due process concerns will be minimized. There is only so much the justice system can do to protect unsophisticated parties, and at a certain point they must be responsible for protecting their own interests.

2. ETHICAL CONCERNS

Aside from legally recognizable issues, people may claim that there are other aspects to Utah's program that just do not smell right. For instance, even if there is truly no "undue hardship" worthy of exemption, should there be an exception for parties who really do not want to participate in ODR?¹⁶⁸ Forcing an already disadvantaged pro se litigant to comply with a process that they are not comfortable with might seem wrong. If Americans already burdened in society begin to view our justice system as a farce due to mandatory ODR, the program will have the opposite result as Justice Himonas intended.¹⁶⁹ Certain pro se litigants may even be discouraged from filing claims altogether after realizing they will be forced to use ODR.¹⁷⁰ Instead of creating greater access to justice, this phenomenon could impede it.

To address this concern, the Standing Order could be amended to allow any party to petition the court for an

¹⁶⁸ *Utah Courts: Utah Supreme Court Standing Orders*, *supra* note 140, at 5.

¹⁶⁹ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 876.

¹⁷⁰ David Allen Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2019 J. DISP. RESOL. 77, 87 (2019).

exemption despite the undue hardship aspect. However, this may dilute the ODR process. Another possible solution for parties that cannot prove undue hardship but who would still be burdened or frustrated by ODR is for courts to partner with local public libraries to set up designated computer areas for ODR. Parties who live far from the nearest courthouse may live closer to a public library. Libraries also sometimes have longer hours,¹⁷¹ including on weekends,¹⁷² making them more flexible for the parties' schedules.¹⁷³ Library staff could also be trained to assist ODR participants with simple aspects of the program technology. This would give extra support to low-income pro se litigants while still reaping the benefits of ODR.

Furthermore, the Standing Order does not establish standards for training or choosing facilitators. The facilitators play an instrumental role in the ODR process, especially when one of the parties is uneducated.¹⁷⁴ Further, the program does not require facilitators to be licensed attorneys.¹⁷⁵ Should some other metric be established for determining qualifications to supervise this kind of proceeding? An easy fix for this concern is to create a more stringent training program for facilitators.¹⁷⁶ This could be done by adopting a similar approach as employed in Michigan's MI-Resolve program, discussed *supra*, with

¹⁷¹ See *Chicago Public Library Locations*, CHI. PUB. LIBR., <https://chipublib.bibliocommons.com/locations/list/> (last visited Nov. 13, 2020).

¹⁷² See *Chicago Public Library Locations*, *supra* note 171.

¹⁷³ See *Chicago Public Library Locations*, *supra* note 171. Thus, the woman from the introductory example would have weekend or evening options at a library.

¹⁷⁴ See generally *Utah's Online Dispute Resolution Program*, *supra* note 14, at 882.

¹⁷⁵ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 882.

¹⁷⁶ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 892. See also Wilmet, *supra* note 60.

regard to mediators.¹⁷⁷ There, court-appointed mediators are required to complete at least forty hours of State Court Administrative Office approved training and a ten-hour internship.¹⁷⁸ Adopting similar or more stringent training requirements could be beneficial for facilitators that are not licensed attorneys and/or not as experienced in the court system.

Additionally, willing current and retired judges could help build and implement the training program. In ODR, the facilitators replace judges in their role as third party neutrals.¹⁷⁹ Thus, experienced judges' input could be highly beneficial in creating a successful facilitator training program. In order to further identify focus areas for training, courts could start by having their IT departments review and analyze the data from past ODR claims where the facilitator got involved. While there will likely be a learning curve at the beginning, this process would ensure long-term growth because it would show where facilitators are doing well and where they could improve.

Another major ethical concern involves the technology itself. One issue that comes about here is the procedural method of the ODR system chosen.¹⁸⁰ The argument is that seamless court-mandated ODR systems, as opposed to those that are broken up into distinct processes for separate stages or aspects of the dispute, pose a risk of exposing confidential information shared in previous stages to later stages where it is inappropriate to divulge.¹⁸¹ While it is user-friendly to have a system that carries over information to avoid wasting time with reentry, safeguards

¹⁷⁷ See discussion *supra* p. 10 and note 60.

¹⁷⁸ Wilmet, *supra* note 60.

¹⁷⁹ See *Utah's Online Dispute Resolution Program*, *supra* note 14.

¹⁸⁰ Darin Thompson, *Legal and Procedural Aspects of ODR in a Justice System*, SCL (Sept. 8, 2014), <https://www.scl.org/articles/3173-legal-and-procedural-aspects-of-odr-in-a-justice-system>.

¹⁸¹ Dorcas Quek Anderson, *Ethical concerns in court-connected online dispute resolution*, 5 INT'L J. OF ONLINE DISP. RESOL. 20, 29–33 (2019).

should be in place that filter out certain sensitive information.¹⁸²

One cognizable example is if users enter information about their claims during the initial explanatory stage but do not want particular aspects later included during the negotiation and mediation stages or trial (if the case reaches that point). In that scenario, if carried over, the information is then in a permanent online forum that can be accessed at any point throughout the settlement process. Thus, while more convenient and accessible to the user, the seamless approach threatens procedural fairness and informed consent. However, Utah's ODR program limits this risk by notifying the user at the beginning stage that any information shared there will not become part of the official court record.¹⁸³ Additionally, at the later stage where both parties enter the chatroom, it is made clear that none of the exchanges there will become part of the record if the case proceeds to trial.¹⁸⁴ Further, "[i]n the event that negotiation does not lead to a settlement, the parties are specifically asked to indicate which documents that were shared should be made public for the next stage."¹⁸⁵ Once a trial date is set, the chatroom becomes inaccessible by either party.

Another identified concern regarding Utah's ODR program is that it allows the facilitator to give legal advice in limited circumstances, thus "transforming the court's role from an impartial and detached adjudicator to a more proactive problem-solver."¹⁸⁶ While this is great for the low-income, pro se party who cannot afford an attorney, it also

¹⁸² Anderson, *supra* note 182, at 30.

¹⁸³ Anderson, *supra* note 182, at 30.

¹⁸⁴ Anderson, *supra* note 182, at 30.

¹⁸⁵ Anderson, *supra* note 182, at 29.

¹⁸⁶ Anderson, *supra* note 182, at 35.

may present issues regarding impartiality.¹⁸⁷ “There is the risk of the courts being seen as assisting one party more than the other or intervening excessively to the extent of compromising its evenhandedness. The court’s impartiality is integral to public confidence, particularly in common law court systems that are more adversarial in nature.”¹⁸⁸ While “[t]his danger may not be an acute concern in small claims or claims involving self-represented disputants,” thus keeping Utah’s ODR program safe at least for the purposes of this article, it may be an issue if Utah’s ODR program is implemented in other types of cases with sophisticated parties and where more is at stake.¹⁸⁹

IV. ANALYSIS AND RECOMMENDATIONS

Utah’s ODR program with the above suggested additions should be implemented nationwide in state courts for small claims. Doing so would alleviate the struggles that pro se litigants face. In turn, this will clear up court dockets for more complex, high priority cases requiring the sharp legal minds of judges. Utah’s ODR program essentially replaces the judge with the facilitator for the case management portion leading up to trial.¹⁹⁰ A judge will only be needed when it is absolutely certain that the parties are unable to settle. Rather than educating the pro se litigant and making sure the parties are on equal footing, as many judges currently do in cases where the pro se party is clearly operating at a disadvantage, judges’ roles will be restored to deciding the actual issues in dispute.¹⁹¹ Further, licensed attorneys will no longer have the frustrating task of opposing pro se litigants who are not equipped to represent themselves. Even the most patient and well-intentioned

¹⁸⁷ Lisa Hinz, *Pros and Cons of Using Internal and External Facilitators*, UNIV. OF MINN. EXTENSION, <https://extension.umn.edu/public-engagement-strategies/pros-and-cons-using-internal-and-external-facilitators> (last visited Nov. 13, 2020).

¹⁸⁸ Anderson, *supra* note 182, at 35.

¹⁸⁹ Anderson, *supra* note 182, at 35.

¹⁹⁰ *Utah’s Online Dispute Resolution Program*, *supra* note 14.

¹⁹¹ *Utah’s Online Dispute Resolution Program*, *supra* note 14.

lawyers understandably become frustrated when they are unable to do their job because of limitations on the other side. The unfortunate reality is that pro se litigation is often an impediment to court efficiency.¹⁹² Streamlining these claims using a fair ODR system will allow both parties to reach a result they are more satisfied with while limiting frustration throughout the process.

Utah's program will benefit the judicial system at large because more pro bono resources can be allocated to those who need them the most.¹⁹³ Litigants whose claims are relatively simple and can be quickly resolved will be handled by the ODR process with the help of the facilitator. The pro se litigants in those cases will also reap the benefits of not having to pay to come to court.¹⁹⁴ On the other hand, more pro se parties with complex claims or operating under undue hardship will rightfully receive the benefits of pro bono assistance. As previously mentioned, more than half the low-income pro se litigants who seek help with legal issues are turned away.¹⁹⁵ This could be alleviated by court-mandated ODR because hopefully, those whose claims could go to ODR would no longer need the assistance of an attorney. As such, those whose claims could not be efficiently managed by court-mandated ODR would move up in the line for legal assistance.¹⁹⁶ This solution would better allocate the resources devoted to helping those that need it most. The only additional cost would be implementing the ODR technology and hiring and training facilitators, which could be considered startup fees.

¹⁹² Mary Talley, *Confessions of a Deputy Clerk of Court: Pro se Litigants and Court Efficiency*, FENTRESS INC. (May 26, 2016), <https://blog.fentress.com/blog/pro-se-litigants-court-efficiency/>.

¹⁹³ *Utah's Online Dispute Resolution Program*, *supra* note 14.

¹⁹⁴ *Utah's Online Dispute Resolution Program*, *supra* note 14.

¹⁹⁵ LEGAL SERVS. CORP., *supra* note 1, at 6.

¹⁹⁶ *Utah's Online Dispute Resolution Program*, *supra* note 14.

Along with being implemented in other small claims courts across the nation, once developed further, Utah's program could also be implemented to resolve other types of claims. Examples of other types of claims that could benefit from court-mandated ODR are numerous. Once the initial kinks of the program are smoothed out, it can be applied to situations where more is at stake. This could include landlord/tenant, personal injury, and separation/divorce cases, among many other areas.¹⁹⁷ One area where courts will probably hesitate to implement court-mandated ODR is in child support and custody cases.¹⁹⁸ This is probably due to the fact that they are unwilling to hand over control of such an important decision. However, maybe "special facilitators" who are highly knowledgeable in the area can be appointed for those types of cases.¹⁹⁹ Court-mandated ODR should also be implemented in cases where one of the parties is pro se due to socioeconomic challenges, regardless of the type of claim and subject to the judge's discretion. This would have a monumental impact on the statistics listed at the beginning of this article. While there are still many low-income Americans that would need pro-bono assistance with their cases, the number would decrease significantly. The facilitators in Utah's ODR program could push these disputes along faster than a judge while helping the pro se party navigate the complicated legal system.

V. CONCLUSION

One thing is abundantly clear: Online Dispute Resolution is here to stay.²⁰⁰ That said, the future will likely

¹⁹⁷ *Utah's Online Dispute Resolution Program*, *supra* note 14, at 877.

¹⁹⁸ *But see* Kevin Bowling et al., *Improving Child Support Enforcement Outcomes with Online Dispute Resolution*, NCSC, https://www.ncsc.org/_data/assets/pdf_file/0013/27103/improving-child-support-enforcement.pdf (last visited Nov. 13, 2020).

¹⁹⁹ *Utah's Online Dispute Resolution Program*, *supra* note 14.

²⁰⁰ 2019 ODR International Forum: 'Online Dispute Resolution is Here to Stay,' STATE JUST. INST., <https://www.sji.gov/2019-odr-international-forum-online-dispute-resolution-is-here-to-stay/> (last visited Nov. 13, 2020).

hold better technology and innovative processes for implementing it in the court system. With that come moral and legal concerns that must be safeguarded. It will be important for the American justice system to keep these concerns in mind as technology continues to advance. Ensuring that justice is not compromised by efficiency will be the greatest challenge of court-mandated ODR.

Utah's court-mandated ODR program will help millions of low-income Americans more adequately represent themselves in the court system. Along with educating them on their claims, its use of a facilitator authorized to provide them with limited legal help will inevitably increase efficiency.²⁰¹ This could be the difference between a woman and her three children keeping their housing or instead living on the streets of Chicago. With safeguards that adequately protect the rights and interests of both parties, including further explanations and clarifications in the Standing Order, intensified training for facilitators, and a careful monitoring of technology, Utah's ODR program should be implemented in all state courts throughout America. If the program has success for small claims, it should be expanded to and adapted for other areas like housing, domestic relations, and personal injury. This will allow greater access to justice in a system ripe for change. In this case, the problem of people being kept out of court could also be the solution for them to get the justice they deserve.

²⁰¹ *Utah's Online Dispute Resolution Program*, *supra* note 14.