

DESIGNING A STATE COURT SMALL CLAIMS ODR SYSTEM: HITTING A MOVING TARGET IN NEW YORK DURING A PANDEMIC

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When I began helping the New York State Unified Court System design a pilot online dispute resolution (“ODR”) system back in October 2016, I never imagined more than four years would pass before a system was implemented. One reason our journey was so long is because our target kept moving. After completing a detailed credit card debt collection ODR platform, we had to change direction before implementation and focus instead on small claims cases. Then like the rest of the world, we suddenly had to deal with the COVID-19 pandemic. Although it took longer than anticipated, we achieved our goal and the New York State Civil Court Small Claims ODR platform went live on January 29, 2021. We learned a great deal along the way, and I hope it will be useful to share some of what we did and what we learned.¹ This short Article will not describe every detail of the small claims ODR system. It will instead focus on distinct stages of our ODR system design that required close attention.

A quick summary of New York’s new ODR system (the mobile-friendly Civil Court of the City of New York, Small Claims Part, Online Dispute Resolution System (ODR System)) will identify the different stages and orient the reader for the discussion that follows.² Like the in-person New York City Small Claims Court, the ODR system has a jurisdictional limit of \$10,000 or less. Because it is a pilot project, the ODR System initially will accept no more than one hundred cases per month. Although the System presently is capped at 100 cases, the Court is exploring an expansion into the 7th Judicial District in the Rochester area. That ex-

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¹ I am not writing this Article as a representative of the New York State Unified Court System. The opinions and observations are strictly my own.

² The description is accurate as of the date this Article is being written.

pansion probably will increase the case limitation to 200 cases per month if the expansion is implemented.

The ODR System has an initial detailed intake and registration stage that includes screening questions that disqualify cases either automatically (hard opt-out) or based on the parties' own assessment of their ability to proceed online (soft opt-out). This initial stage also includes two short mandatory animated educational videos explaining small claims cases and ODR. If a case is determined eligible for ODR, the parties participate in no more than three rounds of blind bidding. Claimants have up to three opportunities to enter the dollar amount they would like to be paid and a lower amount they would be willing to accept. Defendants also have up to three opportunities to submit the amount they would like to pay and the higher amount they would be willing to pay. If a Claimant's and a Defendant's bids overlap, the ODR system divides the overlap and reveals the settlement amount.

Once the settlement amount is determined, the parties engage in a structured negotiation process to establish payment terms. The Defendant can propose the payment method (check, credit card, or payment app), the number of payments, the first payment date, and the frequency of those payments. The Defendant can also propose what should be the consequences if the Defendant fails to make the scheduled payments. The Claimant will be able to enter an Affidavit Upon Default with the Civil Court for the default option the Defendant selects. Those options are judgment in the full amount originally sued for without further notice to the Defendant, less any payments made, together with interest and disbursements; judgment in the settlement amount without further notice, less any payments made, together with interest and disbursements; or place the case on the calendar for trial.

If the Claimant agrees to the Defendant's proposed terms, the ODR System auto-populates a settlement agreement that the parties can review and sign. If the Claimant does not agree to one or more proposed terms, the Claimant can make a counterproposal. If the Claimant wants to communicate directly with the Defendant, the parties can use a Conversation tab to exchange text-based proposals. If the parties still cannot come to agreement on the terms, then either party can request a mediator. If a party believes media-

tion would not be productive, that party can request a return to the court system to wait for a hearing date to be assigned.³

If the parties agree to all the terms but a party subsequently reconsiders and refuses to sign the auto-populated Stipulation of Settlement, then either party can request mediation. Whenever mediation is requested, both parties are required to expressly consent. Hyperlinks are offered to resources that provide information regarding the availability of legal services and that explain what happens during mediation.

In addition to the overview, a little history should also be helpful. As I explained in an article published in the Spring 2019 issue of the *Journal of Dispute Resolution*,⁴ I became involved in New York's ODR project as the American Bar Association liaison for an ABA Enterprise Fund Award provided to New York to support the creation of a pilot ODR system.⁵ At my first meeting with the court staff I was surprised to learn that we would be designing an ODR system for credit card debt collection cases. I expressed my concern that these cases may not be the most appropriate type for a pilot ODR program due to the extensive federal, state, county, and city regulatory environment surrounding debt collection. But because only a small percentage of consumer debtors were filing answers in credit card debt collection cases, the default rate was approximately 90%,⁶ and low-income parties were generally un-

³ As soon as it is deemed safe to return to a full schedule of in-person court hearings, the expectation is that court hearing dates will be assigned when a case is filed. See discussion later in the text.

⁴ David Allen Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2 J. DISP. RESOL. 77 (2019). My celebration was admittedly premature.

⁵ *Id.* at 78. The grant was titled "Expanding Access to Legal Services through the Advancement of Court-Annexed Online Dispute Resolution." I did receive a modest portion of that grant based on hours that I worked as a System Designer. For the past three and a half years, the 1,000 plus hours I have worked have been pro bono. Consequently, some of my colleagues have questioned why I have invested so much time in this project. I believe it can set an example of how we can increase access to justice for persons who may have found it difficult or impossible to participate in traditional court proceedings. Additionally, I enjoy working with the New York court staff and Matterhorn by Court Innovations. I respect and appreciate the dedicated efforts of Assistant Deputy Counsel Diana Colon, who has worked harder on this project than any other New York State Unified Court System staff member. I also appreciate the support and advice we have received from the New York County Civil Court Clerk staff members, especially Assistant Deputy Chief Clerk Ananias Grajales.

⁶ N.Y. APPELSEED, *DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES* 22 (2010), https://www.ftc.gov/sites/default/files/documents/public_comments/protecting-consumers-debt-collection-litigation-and-arbitration-series-roundtable-discussions-august/545921-00031.pdf ("In cases filed in the five boroughs in October 2008, only 7.4% of consumer debt Defendants filed an answer.")

represented,⁷ it had already been decided that this was a troubling situation that an ODR system might be able to resolve.

There clearly was an access to justice problem, a situation that ODR can help address. Parties may not appear in court for a variety of reasons that can include shame, fear, lack of vacation time, transportation issues, no childcare, physical intimidation by the other party, or challenges related to disability. Providing parties who face those challenges with an option to appear in a virtual rather than physical environment can improve their ability to participate in a court proceeding.

During that first meeting I suggested that small claims cases would be a better choice for a pilot ODR project. New York, however, understandably wanted to find a solution to a serious problem as quickly as possible. In the *Journal of Dispute Resolution* article, I describe the credit card debt collection ODR platform we designed and the obstacles we encountered. I refer the reader to that article for the details, some surprising and some unsurprising. Suffice to say that after almost two years' work, the credit card debt collection ODR platform was not implemented. We were directed to turn our attention to another case type: small claims.

It then took more than two additional years of work after we stopped working on that first ODR pilot project to complete and activate the small claims ODR platform. We learned a great deal working on the credit card debt collection ODR system design, so fortunately the time we invested was not simply lost. We nonetheless found many new areas and issues that needed close attention.

Every state court system is different and any ODR system designer must first identify their system's interests and priorities. Because we had already unsuccessfully explored creating an ODR system for one type of case, we did not turn our attention to small claims cases until we reviewed case types and became confident that the ODR system we designed would be implemented. We understood that before beginning to design any court integrated ODR system, relevant statutes and court rules had to be identified. Any ODR system design either must not conflict with those statutes and rules, or the designers must find a way to create excep-

⁷ PERMANENT COMM'N ON ACCESS TO JUST., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 31 (Nov. 2015), http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/2015_Access_to_Justice-Report-V5.pdf ("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.").

tions or amendments. Deadlines for filing answers to the complaint may need to be revised to allow parties time to understand the ODR system and to negotiate using that system, for example.

We also had to determine a deadline for completion of the ODR process. Before the COVID-19 pandemic, court hearing dates were assigned when cases were filed. So, when we began designing the Small Claims ODR System, we knew each case would have a set date by which the ODR process had to end so that the parties could appear in court in person. That all changed when New York was hit hard by the pandemic. Court hearings had to be suspended and hearing dates no longer were (and currently, still are not) being assigned for cases filed. Lacking a hearing date to use as the ODR end date (which also might incentivize the parties to reach an agreement on their own terms), we had to decide how much time parties should be given to use the ODR system. We decided that two months would allow parties sufficient time to learn the platform and negotiate and still prevent the case from sitting idle before returning to the court docket.

The lack of an automatic, hearing-imposed end date for the ODR process meant we had to decide what to call the process termination date. The court chose to call it the “Online Settlement Deadline.” I had suggested the “ODR End Date” because I felt the phrase was literally descriptive, and it did not suggest that the parties were necessarily expected to settle their case using the ODR process. The court’s chosen phrase will serve its purpose, however, and if the court wants to very gently encourage parties to reach a consensual settlement agreement that phrase will support that desire.

Another issue we confronted was determining how the system would be built: whether by developing the ODR platform in-house or by turning to an external ODR vendor. A court ODR system designer must understand both the court’s current offline processes and the potential and limitations of the available technology. The in-house option allows a court system to create a design tailored specifically to its needs and processes. But in almost every situation the court will be required to hire additional staff who have the skills to build every element of that program. The court system also must consider what resources and expenses will be necessary to maintain and update that in-house platform. An external vendor, on the other hand, can offer an ODR template that will allow the court to activate its platform relatively quickly. It may be chal-

lenging to adapt that existing platform to any court's specific needs, however, and some changes or adjustments probably can only be made by that external vendor and not by the court acting independently. We initially drafted the Request for Proposals to solicit external vendors to work on the credit card debt collection project, but we were required to change our focus to small claims cases, Matterhorn by Court Innovations⁸ then was selected for the Small Claims ODR System pilot project based upon a competitive Requests for Proposals process.

The New York Civil Court system presented some unique challenges concerning the initiation of claims. The court system is not fully digitized and when we began the small claims ODR project it was not possible to initiate small claims cases online within the court system itself.⁹ It makes little sense, of course, to create an ODR system where the cases cannot be initiated online, so we had to design an intake process. Service of process presented a special challenge because it is still possible to initiate a case by filing a claim in person with the Small Claims Court Clerk's office. Consequently, we decided to unify the service of process procedure. Regardless of whether a case is initiated using the ODR intake system we created or the Small Claims Court Clerk's office, the Small Claims Clerk's office will send notice to the Defendant that a case has been filed with the court (a summons). If a case is filed in person, the court clerk's office will send out a notice to the Defendant including both the information that it has been sued and instructions about how to participate in the ODR system.

Not all cases are appropriate for ODR, and screening systems must be developed. In the New York ODR system, there are several automatic disqualifiers for the pilot project. Cases with histories of domestic violence or orders of protection, or cases where attorneys represent one party or both parties, are excluded from the pilot project for example. Specific subject matters also are not eligible for ODR. Claims for employment wages, cases against New York City municipalities or agencies, and cases with counterclaims (which would require a separate, additional filing fee payment) are not eligible for ODR. The types of cases eligible for ODR may be expanded in the future.

⁸ MATTERHORN BY CT. INNOVATIONS, <https://getmatterhorn.com> (last visited Mar. 26, 2021).

⁹ Small Claims Court has used private external vendors for filing cases. One of those is nCourt which is still involved with the new small claims ODR system.

When a case is filed in person, the court clerk will determine eligibility by asking the eligibility questions. For cases that are initiated online, we had to design the platform so that whenever a party answered one of the disqualifying questions affirmatively, the platform would automatically inform the parties that the case is ineligible for ODR. The system must not only inform parties that their case is not eligible, it also must affirmatively prevent parties from attempting to use the ODR system.

Careful attention must be paid to the eligibility questions. As noted above, cases are immediately deemed ineligible if parties answer that they have an attorney representing them, there is a history of domestic violence in this case, or if there is an order of protection against either of the parties. These are the hard opt-out questions, and they are quite straightforward.

Drafting the soft opt-out questions required careful judgments about how easily parties should be able to exit the system. In the New York ODR System, the Defendants are asked if they are comfortable saying what they think and standing up for what matters to them, whether they have any difficulties accessing the internet via computer or smart phone, and whether they have challenges with reading text or seeing text on a computer or smart phone. They also are asked whether they have difficulty reading or writing in English, and whether there is any other reason why it might be difficult to use ODR to resolve their case online before their court Online Settlement Deadline.

When Defendants indicate they may have difficulties using the ODR system, they should not be automatically disqualified. ODR system designers must make every effort possible not to take control of the dispute away from the parties. Even if Defendants indicate they are not comfortable conversing online or have difficulties or challenges described in the questions, they still can decide for themselves if they would nonetheless like to continue with the ODR system. A person who has challenges reading or seeing text on a computer, or who has difficulty reading or writing in English, for example, may regularly work closely with another family member or close friend who assists them to overcome these challenges.

We therefore decided that in New York the parties should be able to decide whether they still would like to proceed regardless of how they answer the soft opt-out questions. To enable these decisions, Defendants are asked to confirm that they want to continue each time they indicate they have one of the identified possi-

ble challenges or difficulties. Claimants cannot see Defendants' responses to these questions.

Any small claims court system design must provide clear instructions to the parties regarding how to proceed if a case is determined to be ineligible for ODR. As the New York ODR system was originally designed, it would have instructed the parties to appear in court on their assigned hearing date. Because hearing dates are not currently being assigned, when a case is deemed ineligible the system now sends an instruction that the New York City Civil Court, Small Claims must be contacted as soon as possible, and it provides the phone number to call.

Court systems must decide at the outset the geographical boundaries for their ODR system. The New York Small Claims ODR system has strict geographical eligibility requirements. The pilot program is limited to New York County, which consists of Manhattan and a small portion of the Bronx (zip code 10463). To be eligible for the pilot ODR system, one party must be in New York County. If only the Claimant lives in New York County, the Defendant must be located in one of the five New York City boroughs. If the Claimant is not located in New York County, the Defendant must live, work, or have a place of business in New York County. Every effort has been made to ensure the ODR System is as user friendly as possible. To enforce these rather unusual geographic requirements without hopelessly confusing the system users, we had to draft a short series of succinct screening questions.

If a court decides to use blind bidding, the process I mentioned earlier, as part of its ODR system it will have to make some interesting and important decisions. In the first round of blind bidding in the New York System, the maximum dollar amount the Claimant can bid is auto populated and limited to the amount for which the Claimant sued. Claimants also submit a minimum amount that they are willing to accept to settle the dispute. We can call these amounts the Claimant's maximum and minimum. The Defendant responds by indicating the amount it would like to pay and the amount it would be willing to pay. This is the Defendant's maximum and minimum. Assume the amount the Claimant sued for is \$800 and after the first round of bidding there is no overlap in the bids. In the second round Claimant decides it wants to resolve the dispute as quickly as possible and enters a bid stating it would like to receive \$500 but is willing to accept \$300. The Defendant's second bid reveals it would like to pay \$400 but is willing to pay \$600. The system could compare the maximum amounts for both

parties, split the difference, and the Claimant would receive \$550. This result should only be chosen if the intention is to favor Claimants. Alternatively, the system could compare the parties' minimums and the Claimant would receive \$350. This obviously would favor Defendants. It may be more reasonable to compare the least desirable result for both parties; that being, the Claimant's minimum and the Defendant's maximum. If the system considers the Claimant's minimum bid of \$300 and the Defendant's maximum bid of \$600 and divides that \$300 overlap evenly, the Claimant will receive \$450. That is the comparison and the division that the New York ODR System will make.

Once the system designers decide which overlap should be used, they still must decide how that overlap should be distributed. Designers must determine whether the system should divide any overlap in the bids evenly, in other words split the overlap equally, as the New York ODR System does. Alternatively, the difference could be split in various percentages depending upon whether the court believes the Claimant, or the Defendant, should be favored.

The degree to which a court system is digitized will significantly affect ODR system design. Court systems have different payment processes, for example, and any ODR system designer must understand those payment and refund processes and integrate those processes seamlessly into the ODR system. When a Claimant initiates a small claims ODR case in New York by filing its complaint in person with the Clerk of Court's office, fee collection is not an issue because a court clerk collects the fee at the time of filing and determines eligibility for ODR at that time. The New York Unified Court System has developed an electronic filing system (NYSCEF), but it is not yet available for the Small Claims court. So for cases initiated online using the New York Small Claims ODR platform, a party might be deemed ineligible to proceed after submitting the required filing fee. For cases that begin on the ODR platform, external vendor nCourt collects the fees and provides refunds as a subcontractor to the Matterhorn contract. The ODR system had to be designed considering both the possibility that cases initiated online could be found ineligible after the payment of the filing fee and the abilities of nCourt's technology.

In designing the New York ODR process, we had to decide at what stage Claimants would be required to pay filing fees. One typically would expect those fees to be paid the same time that the case is first filed. When New York small claims cases are initiated in-person, that is what happens. But when a Claimant initiates a

case online, a decision had to be made whether to require the payment of the filing fee at that moment of first contact or allow a Claimant to proceed through the intake and eligibility screening requirements before the payment of any fees. A strong argument can be made that Claimants initiating a case should be required to pay the filing fee before beginning the registration and screening process. If the case is deemed ineligible for the ODR process, then the fee should be refunded. That can be done easily if the court itself is accepting fee payments online. When payments are being processed by an outside vendor, however, that refund process adds another step of required coordination to the ODR system design.

In the New York ODR System, Claimants must pay the filing fee when they initiate the case. nCourt will hold that fee and not deposit the fee into the court's bank account until the New York Court Clerk's office confirms that the case is eligible for ODR. If the case is not eligible for ODR, nCourt will refund the fee to the Claimant. That refund process has been established but it took additional planning. Court systems have different payment processes and any ODR system designer must understand those payment and refund processes and prepare to integrate those processes seamlessly into the ODR system.

An ODR system that allows parties to access a third-party mediator or facilitator when they believe it will be helpful will make it more likely that a dispute will be resolved. The New York ODR System allows parties to request mediation immediately after completing the blind bidding process, and after completing the structured negotiation process if they have failed to reach agreement regarding payment and default terms for their agreed-upon settlement amount.

If a court system has employees or volunteers who serve in a court-managed mediation program, then the court ODR system can create or include its own mediation case management system within the ODR system design. The New York State Unified Court System funds the Community Dispute Resolution Centers (CDRCs) Program. Two CDRCs are participating in the ODR pilot project. To integrate the CDRCs into the New York ODR platform, dashboards were created for each CDRC. The Court does not, however, interact with the case management systems of the CDRCs. Because this design feature involves an external entity in a court process, great care had to be taken to ensure confidentiality. The New York ODR system limits access to the facts of each case - only the assigned mediator and the mediation center's ad-

ministrator has access. The ODR system allows mediators to speak with the parties simultaneously or individually and privately. Mediators have been trained to use the platform to ensure that confidential communications are protected.

CONCLUSION

Designing and implementing an ODR system may take longer than anticipated. I certainly never imagined that it would take more than four years to activate a New York pilot ODR system design. But as discouraging as that process sometimes has been, it has forced us to look extremely closely at every step, and even the selection of every word presented to users in the Civil Court of the City of New York, Small Claims Part, Online Dispute Resolution System design. The New York State Unified Court System presents several unique challenges for an ODR system design. Because the court system is not fully digitized and relies on both human and external entity intervention, the system designers had to understand the human tasks required to be performed by the Clerk of Court's office and the technological capabilities of nCourt and the New York court system. The system designers also had to respect and integrate the case management systems of two external community mediation centers. Case filing, fee payment, and service of process in some court systems may be manageable using existing technology. Mediators and mediation cases also already may be managed by the court system. But it is not unlikely that, as is true with the New York State Unified Court System, it may be necessary to rely on external entities at some point in the ODR process.

This short Article obviously does not address every aspect of the New York Small Claims ODR system. The hope is that nonetheless it will introduce prospective users to the possibility of creating an ODR System and help when it comes to designing an ODR system for small claims. Although the New York ODR System is now operative, the work on the system is not complete. Cases will be followed closely to see how effectively the system functions. We will attempt to determine whether modifications are needed to make the system function more productively and whether we can make it even more user friendly.

I have learned a great deal during the past four years. I am grateful for the opportunity to work closely with the New York

State Unified Court System staff and with Matterhorn by Court Innovations. Above all, I hope we are improving access to the Civil Court of the City of New York, Small Claims Part.