Agenda
Committee on Resources for Self-represented Parties

June 6, 2017
12:00 to 2:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome, approval of minutes, recognition of exiting members	Tab 1	Judge Barry Lawrence, Chair
Subcommittee updates	Tab 2	All
Self Help Center		Mary Jane Ciccarello, Jessica Van Buren
Education/Outreach Subcommittee		Professor Hernandez Jaclyn Howell-Powers Lisa Collins Nancy Sylvester Mary Jane Ciccarello Tyler Cameron Shaunda McNeill Jessica Van Buren Judge Elizabeth Knight GUEST: Kim Free
Rural Services Subcommittee	Tab 3	Leti Bentley Mary Jane Ciccarello Sue Crismon Carol Frank Susan Griffith Judge D. Thomas Jessica Van Buren
Rule 16 Subcommittee		Nancy Sylvester Mary Jane Ciccerello Chris Martinez Virginia Sudbury Judge Lawrence Commissioner Sagers Commissioner Conklin Commissioner Patton
Existentialism Discussion:	Tab 4	Judge Barry Lawrence

CJA Rule 3-115		
Other Business		All

Committee Web Page

Proposed Bimonthly Meeting Schedule: Matheson Courthouse, 12:00 to 2:00 p.m. unless otherwise stated.

August 11, 2017
October 13, 2017
December 8, 2017

Tab 1

Minutes of the Committee on Resources for Self-represented Parties

April 21, 2017

Draft. Subject to approval

Members Present

Judge Barry Lawrence (chair), Judge Doug Thomas, Susan Griffith, Judge Catherine Roberts, Leti Bentley, Jacob Kent, Chris Martinez, Sue Crismon, Shaunda McNeill, Jessica Van Buren, and Virginia Sudbury.

Members Excused

Mary Jane Ciccarello, Carl Hernandez, Tyler Cameron, and Jaclyn Howell-Powers

Staff

Nancy Sylvester

(1) Welcome, approval of minutes, recognition of exiting member.

Judge Barry Lawrence welcomed everyone to the meeting. He then entertained a motion on the minutes. Judge Roberts moved to approve them and Judge Thomas seconded the motion. The committee unanimously approved the minutes.

Judge Lawrence then thanked Leti Bentley for her service to the committee and discussed a few of her accomplishments. Ms. Bentley expressed her appreciation for the opportunity to be involved with the committee and said it has helped her work with the Moab Valley Multicultural Center to be involved with the committee and the Self-Help Center. The committee then discussed how to replace her and asked how Ms. Bentley was recruited to the committee. She said Susan Vogel in the Self-Help Center had recruited her. The committee then discussed ways they could recruit for her position. Ms. Bentley and others suggested recruiting Kristin Johnson from Seek Haven in Moab, or recruiting from the Sorenson Center or 211—United Way. Judge Lawrence requested that Ms. Bentley contact Ms. Johnson at Seek Haven and discuss the opportunity. Ms. Bentley said she will follow up with Judge Lawrence and Ms. Sylvester. Judge Lawrence requested other suggestions via email from the committee members.

(2) Law school outreach and Bar panel discussion.

Judge Lawrence then described the panel discussions at the law schools regarding pro bono service opportunities. He said both Jaclyn and Carl said they went well. The idea

is to do them annually at the beginning of the second semester. They will talk about opportunities available now for law students to contribute and gain experience before and after graduation.

The committee then discussed what happens at the law schools in terms of student experience. Ms. Crismon said JoLynn Spruance at SJ Quinney funnels students into the clinics and once they are used to that, they go on to the court calendars.

Christopher Martinez then talked about pro se calendars and training law students. He said he has had a few come back after graduation and help with the calendars.

Ms. Crismon then noted that there is a database scheduled to launch with all of listed pro bono opportunities. An attorney or law student can sign up and get reminders about all of the opportunities.

Judge Lawrence then discussed how the flip side of this is getting attorneys at the end of their careers. They don't want to maintain insurance but want to stay involved. Judge Lawrence, Rick Davis, and Tyler Needham are pushing this now. There will be a panel discussion at the State Bar's Summer Convention on this topic.

Ms. Crismon brought up that some attorneys want to do their own pro bono projects. This is covered by insurance if it is done under the Bar. She said there was a Bar emeritus committee created out of these attorneys' projects.

The committee then talked about having more attorneys doing remote hearings. Ms. Sylvester said she had made a presentation to justice court judges last Friday on this topic.

Ms. Griffith mentioned that in her experience, a lot the retired attorneys want to do limited scope representation. The Timpanogos Legal Clinic has had a lot of success with those kinds of volunteers.

(3) Subcommittee updates.

Forms

Jessica Van Buren talked about the new Standing Committee on Court Forms. She said the highest priority is the Licensed Paralegal Practitioner (LPP) project because it is set to deploy in one year or less and LPP's can't practice without court approved forms. The committee then discussed where things are with the LPP committee. There was talk of cost-benefit analysis, getting people involved, ethics rules, exams, etc.

Self-Help Center

Jessica Van Buren and Mary Jane Ciccarello then updated the committee on the Self-Help Center. They said the Center immediately got a lot of calls once President Trump's new policies on immigrants were enacted. A lot of people have been worried about what is going to happen with their kids, businesses, etc., if they get deported. Ms. Ciccarello put on a CLE to address common issues and 80 attorneys came. It was standing room only. The Center determined that it needs to get attorneys educated so that it can refer people to them. Forms aren't enough; they need people trained. There is a packet of materials that Ms. Ciccarello made that is like a care plan. There is also a detailed booklet in English and Spanish that is designed for an attorney to explain to a client. Ms. Crismon said she'd bring it to one of the clinics she is staffing.

The packet covers all state court issues, not immigration. Issues include guardianship, custody, etc. Ms. Ciccarello said they are hearing from people who are preparing to be deported, not those who've been deported yet. Ms. Griffith requested that the packet be sent out to the committee.

Lawyer of the day

Ms. Ciccarello, Ms. Van Buren, and Shaunda McNeill then talked about the lawyer of the day program. Fiscal year to date, there have been more than 400 referrals from the Self-Help Center to the lawyer of the day. They expressed gratitude for volunteer attorneys and noted that Ms. McNeill helped with recruiting in the Young Lawyers' Division. The committee noted that retired attorneys would be great at this. The Self-Help Center first explains the situation to the volunteer lawyer and then asks if the lawyer can help. The nice thing is that the issue is already teed up for the lawyer, including background, so it is an efficient system.

Free Legal Answers

Ms. McNeill, Ms. Van Buren, and Ms. Ciccarello then discussed Free Legal Answers, which is run through the ABA website. They noted that a person signing up for it must first put in income questions, which may deter people, and you must tell the truth. When the Self-Help Center went to test it, they found that they weren't able to put in information because of that. The website is for civil questions only and for people that don't have an attorney. Ms. Griffith said she went to Equal Justice Network and they didn't have much info on it yet. So it's new and still developing. She noted that Lawyer of the Day is more immediate.

McKenzie Friends

Ms. Sylvester discussed the McKenzie Friends report that Ms. Ciccarello had found. McKenzie Friends is something that has been around in Great Britain since the 1970's and now British Columbia has adopted it. A McKenzie Friend is basically a support person for someone who is representing themselves. They are not a lawyer but can help the litigant organize their thoughts or offer emotional support.

Judge Thomas said he already allows this to happen informally in his courtroom. The committee then asked how we can move this forward more formally. We need buy-in from judges. The committee discussed making a presentation to judges and also discussed how this falls on the spectrum of court navigators.

Judge Thomas said he looks for some good reason why a person needs a support person in court with them. A protective order may be a good reason, or if someone has helped them organize their records. He said he sees this most in landlord tenant.

Ms. Bentley said she acts like a McKenzie Friend for the Moab Multicultural Center clients, except that she stays in the benches and takes notes. Ms. Sudbury said she will be making a presentation at AFCC with 2 Canadians that is on limited scope. She will ask them about their practices. The committee then discussed bringing Ms. Bentley to a presentation/discussion with the judges. The committee discussed a breakout session at one of the conferences. Ms. Bentley said that if judges have guidelines for interacting with navigators/McKenzie Friends, that would be really helpful. Judge Roberts then brought up the need for more training on sovereign nation people/constitutionalists.

Counsel in Termination of Parental Rights Cases

Judge Thomas then discussed the issues surrounding the lack of counsel in termination of parental rights cases. He said he typically raises the concurrent jurisdiction of both the district and juvenile courts with the parties. Indigent counsel is appointed in the juvenile courts but not the district.

Judge Thomas said what typically happens is that a termination of parental rights is filed in connection with an adoption. The step parent files a motion to adopt and the biological dad objects, for example. This doesn't happen in every case. Father sometimes comes in with private counsel. But the district court has no funding to appoint indigent counsel. He said the objector either needs to find someone to represent them for free or walk across the hall and have the case heard in juvenile court. The problem is that the adoption can't be in juvenile court. Judge Lawrence noted that in

Third District, Locken and Associates said they will take the indigent parental termination cases.

AAA Taskforce

Ms. McNeill then gave an update on the Bar's AAA Taskforce. She said there are some new updates to the lawyer directory coming up. They will update it to show not just lawyers in rural areas, but also those who are willing to take cases in those areas. Ms. Ciccarello and Ms. Van Buren noted that the Self-Help Center and the Law Library use the website all the time.

Remote Hearings

The committee then discussed remote hearings. The idea was floated to create a form for people to request a remote appearance in order to institutionalize this practice. The committee discussed the current practice of remote hearings, including set aside telephone conferences.

Judge Thomas said they have quite a few remote hearings. He said people just file a motion requesting it and it is routinely granted. He said they don't have ability to do them via video, though. Ms. Sylvester mentioned Google capabilities.

Judge Roberts said she uses video all the time with remote jails. But there are problems with video feeds. She has requested the AOC to invest some money in this equipment.

Rural Services

Ms. Bentley then reported on rural services. She said things improved for the work she does as more conversations with the courts happened. She said she has had great results with the work they are doing. She said she noticed her clients (non-English speakers) would just plead guilty before she got involved because they wanted to just get the case over with and because in their countries, the government is corrupt. When applying for citizenship, a guilty plea would be hugely problematic. After she got involved, her clients would be more invested in the process, with better results in terms of compliance with court orders and fewer guilty pleas. Judge Lawrence asked what we can do moving forward to keep this effort going. Ms. Bentley said the conversations need to happen with the courts in the rural areas and more people in rural areas need to get involved in this work. The committee discussed how to do that, including speaking with other non-profits. Ms. Bentley noted that funding for MCC comes from private donors.

Ms. Bentley said Judge Romney in Provo contacted her about doing this same thing in Provo. She noted that Centro Hispano charges for their services; it is hard to get people to do it without charge. The committee then talked about BYU being involved. A member noted that the Jacobson Service Learning Center at BYU would be a good contact. Carl Hernandez is starting a clinic with the LDS church at Deseret Industries related to immigration issues. A member noted that the case types that have the highest need for court navigators are family law.

Ms. Griffith then gave an update on the Timpanogos Legal Clinic. She said they are hopeful that the clinic will secure a VOCA grant. VOCA funds used to be limited to preparing emergency orders, but they have now added family law orders.

The committee then discussed court navigators and determined that court navigators could not be court employees because of partiality issues and the amount of time court employees can spend with court patrons.

Rule 16 Subcommittee

Ms. Sylvester reported that there are no new updates on the Rule 16 subcommittee, but mentioned that Commissioner Sagers had come to the last committee meeting and provided an update.

Judge Thomas reported on the Domestic Case Process Improvement Subcommittee. He said it has been a very proactive committee. They have been focusing on different tracks for different cases. One of the tracks is pro se parties and the idea is to push everything forward and move cases quickly. The court needs to provide resources for them. In more populous districts, they are trying to make sure that they have appropriate resources, but they have noted that they don't have resources to do the same in rural districts. So they are trying to come up with the appropriate structure to assist pro se litigants. This includes timelines, notices as to what they need to do by certain dates, etc. They will also be given a list of resources, which will vary by location in the state. What won't be allowed to happen for pro se parties is letting cases sit. There will be corresponding litigation tracks depending on whether a case is complex, simple, default, or custody. They are looking to compress how long it is taking to get cases through the system. Right now the average contested custody case is taking 780 days. They are trying to move from a system where litigants and lawyers have control to one where the court has more control, like a criminal calendar. Every time a litigant comes to court, they will leave with an order. They also won't leave a court hearing without another one being set up. This is much the same way Commissioner Sagers has been

running her pro se calendars. Chris Martinez said he had concerns originally with rule 16 hearings and the pro se calendars, but they have been going well.

The committee discussed inviting the Rule 16 commissioners to the June meeting. The Domestic Case Process Improvement Subcommittee will have its recommendations to the Judicial Council in July. Ms. Sudbury asked whether they were talking about orders. Judge Thomas said attorneys will prepare protective orders before they leave. The court will fill out orders on the bench at the time of the hearing. Orders will be completed by the end of the hearing. He noted that sometimes orders don't come in from parties when the court asks them to do them.

Chris then talked about how some non-profit law firms are filling gaps that Legal Services can't fill, such as Open Legal Services, Choice Legal Services, and Non-profit Legal Services. Judge Thomas noted that pro se does not equal the need for pro bono, though. He brought up landlords who are requesting pro bono attorneys but have the ability to pay for a lawyer.

(4) Adjournment

The committee adjourned at 2 p.m.

Next meeting is scheduled for June 9, 2017 at 12 p.m. in the Judicial Council Room of the Matheson Courthouse.

Tab 2

UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON RESOURCES FOR SELF-REPRESENTED PARTIES
WHERE WE ARE / June 2017

SUBCOMMITTEE & STRATEGIC PLAN PRIORITY	WHO	WHAT
Support Self-Help Center	All	1) Navigator 2) Pro Se Calendars 3) Court staff training 4) Drafting Orders • Renew funding request to Judicial Council in April. • Idea of putting on notice attorney may be present (for Pro Se Calendars) • Idea of texting for notices (SL City grant money and CORIS rewrite) • Lawyer of the Day • One-on-one clerk training
Education/Outreach Subcommittee (combined with Rules/Legislation/ Funding and Lawyer Directories)	Professor Hernandez Jaclyn Howell-Powers Lisa Collins Nancy Sylvester Mary Jane Ciccarello Tyler Cameron Shaunda McNeill Jessica Van Buren Judge Elizabeth Knight	• Presentations to Law Schools on opportunities for students to assist pro se litigants • Presentation to Bar at summer convention on pro bono opportunities • Article on highlighting inactive rule for retired attorneys and other inactive rule promotion. • Survey monkey on needed training? (Spanish; judges; clerks; law school providers) • Analyze and improve the third year practice rule • Appointment of counsel in termination of parental rights in district court cases • Support opportunities for educating those who interact with self-represented parties (1-on-1 clerk training; justice court judges). • Take an informal survey of which districts accept email/faxes & which don't. • AAA Taskforce Updates • Monitor progress of Lawyer Directory

Rural Services Subcommittee	Leti Bentley Mary Jane Ciccarello Sue Crismon Carol Frank Susan Griffith Judge D. Thomas Jessica Van Buren	• Support the development and implementation of virtual services in rural areas • Develop and implement a court navigator program (New York program as model?) • Virtual Clinic grant – Susan & Sue • Survey gathering on navigator pilot project in Grant County – Jessica • Increase virtual connection between courts self-help center/library. Tried Vidyo (didn't work so well) - Carol • Use of phone appts./State Law Library - Jessica • Standards for remote access
Rule 16 Subcommittee	Nancy Sylvester Mary Jane Ciccerello Chris Martinez Virginia Sudbury Judge Lawrence Commissioner Sagers Commissioner Conklin Commissioner Patton	• Streamline domestic case processes • Bring in litigants earlier (when attorneys are still involved) • Proposed changes in required hearings • Proposed language changes on notices

JTC Resource Bulletin

Courts Disrupted

Version 1.0
Adopted 11 May 2017

Abstract

Technology and innovation have the power to improve as well as disrupt business processes in the court community. Innovative disruption from companies like Uber, Amazon, and Airbnb are shaping business practices in the private sector. The public sector, including courts, will not remain untouched by disruptive innovation. Court managers can leverage the concept of disruptive innovation to make justice available to a wider audience at a lower cost while preserving fairness, neutrality, transparency, and predictability in the judicial process.

Document History and Version Control

Version	Date Approved	Approved by	Brief Description
1.0	5/9/2017	JTC	Release document

Acknowledgments

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JTC Mission:
To improve the administration of justice through technology

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Introduction

The concept of disruptive innovation made its debut more than 20 years ago in a Harvard Business Review article. Researchers Clayton M. Christensen and Joseph L. Bower observed that established organizations may invest in retaining current customers but often fail to make the technological investments that future customers will expect.[1] That opens the way for low-cost competitive alternatives to enter the marketplace, addressing the needs of unserved and under-served populations.

Lower-cost alternatives over time can be enhanced, gain acceptance in well-served populations, and sometimes ultimately displace traditional products or services. This should be a cautionary tale for court managers. What would happen if the people took their business elsewhere? Is that even possible? What would be the implications to both the public and the courts? Should court leaders concern themselves with this possibility?

While disruptive innovation theory is both revered and reviled, it provides a perspective that can help court managers anticipate and respond to significant change. Like large businesses with proprietary offerings, courts have a unique customer base. Until recently, those customers had no other option than to accept whatever level of service the courts would provide and at whatever cost, or simply choose not to address their legal needs. Innovations such as non-JD legal service providers, online dispute resolution (ODR), and unbundled legal services are circumventing some traditional court processes, providing more timely and cost-effective outcomes.

While there is no consensus in the court community on the potential impact to courts (whether they are in danger of "going out of business"), there are compelling reasons for court managers to be aware of and leverage the concept of disruptive innovation. As technology dramatically changes the way routine transactions are handled in other industries, courts can also embrace innovation as one way to enhance the public's experience. Doing so may help courts "disrupt" themselves, making justice available to a wider audience at a lower cost while preserving fairness, neutrality, and transparency in the judicial process.

How Disruption Occurs

Digital disrupters unseat traditional businesses by appealing to consumers in one or more of three key areas: cost, customer experience, and/or platform.

Cost	Operational improvements, virtualization (e.g., e-readers instead of paper books and teleconference meetings instead of in-person gatherings), and innovative business models like group purchasing,

[1] Bower, J. L., and C. M. Christensen. "Disruptive Technologies: Catching the Wave." *Harvard Business Review* 73, no. 1 (January–February 1995): 43–53.

	"freemium" pricing, reverse auctions, and "pay-as-you-go" yield savings that drive down costs, creating a competitive advantage.
Customer Experience	Simplification, efficiency, and convenience improve the customer experience, luring consumers away from traditional offerings.
Platform	A unique digital space where providers and consumers can find each other easily and effectively through innovative technologies that leverage big data and human nature.

Offerings that reduce cost or improve the customer experience may attract some consumers but are not generally disruptive. When two or more of those benefits are combined, disruption is very likely to occur. Platforms have the potential to be particularly disruptive. They can be scaled rapidly at very low cost to create ever more connections between resources and those who need them. Disrupters' offerings are not just cheaper, they are very often simply better.

> Although their business models may focus on one type of value—low cost for example—most digital disruptors practice what we call "combinatorial disruption." They use digital technologies to fuse cost value, experience value, and platform value to deliver products and services that make offerings from incumbents immediately unattractive or obsolete.[2]

With platform value, an increase in the number of users benefits all the users. Facebook, Craigslist, Etsy, Snapchat, and Wikipedia, for example, work well because lots of people use them. In contrast, traditional courts work more slowly and less effectively when more people use them, opening the way for dramatic disruption.

> Digital disruptors are particularly dangerous because they grow enormous user bases seemingly overnight, and then are agile enough to convert those users into business models that threaten incumbents in multiple markets. [3]

Some industries are thought to be less vulnerable to digital disruption, which can create complacency in organizational leaders. Courts are particularly steeped in traditional and hierarchy, and protected in some measure by federal, state, and local statutes. The stakes are high for traditional businesses and entire industries, including courts, who may fall prey to their own lack of imagination. The timeframe from "business as usual" to

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[2] Bradley, Joseph, Jeff Loucks, James Macaulay, Andy Noronha, and Michael Wade. "New Paths to Customer Value: Disruptive Business Models in the Digital Vortex." *The Digital Transformation Playbook*, Global Center for Digital Business Transformation. November 2015. web. 13 March 2017.

[3] Bradley, Joseph, Jeff Loucks, James Macaulay, Andy Noronha, and Michael Wade. *Digital Vortex: How Digital Disruption Is Redefining Industries*. Issue brief. Global Center for Digital Business Transformation, June 2015. Web. 23 Mar. 2017.

disruption has been called a “digital vortex” because of the combination of speed and destructive force.

Technology-based Disruptors

While not all disruption will be of a digital nature, major disruption will occur as new technologies gather ever-increasing volumes of data that can be used in innovative ways to disrupt old processes. An increasing dependence on technology will create new responsibilities as well as vulnerabilities for courts.

Data

Data is at the heart of effective decision-making as well as digital disruption. In the past, courts could make claims that were difficult to verify or refute. While court records are public information, not all courts provide or permit access to their bulk data for analysis purposes. However, access to court data is becoming increasingly common. Disruption is likely to occur as innovators use court data to identify inefficiencies and hold courts accountable, even analyzing individual judge’s decisions to predict how they will rule in future litigation. Courts should mine their own data to glean essential insights, resolve inefficiencies, ensure fairness, and provide services to unserved and underserved populations.

Intelligent Automation

From threat detection to tax preparation, intelligent automation (IA) is being used to handle routine, repetitive tasks in many industries once dependent on manpower. While humans are necessary to address unique tasks, they are less accurate, efficient, and cost-effective than automation. IA has the power to bring efficiencies as well as increased accuracy to the judicial process.

Companies are increasingly using automated processes to complete routine customer service tasks, but must continue to provide sufficient human alternatives for situations that the automated process cannot anticipate or address. Consumers are increasingly accepting automated alternatives for tasks once performed exclusively by humans. A recent study of American tax preparation preferences, for example, reveals that the percentage of tax returns self-prepared using software is approximately equal now to the percentage that are prepared by accountants.[4]

Autonomics are systems designed to perform high-volume routine rules-based tasks that humans normally perform. Not only are these systems faster than humans, they are more accurate and cost a fraction of what it requires to handle the processes manually.[5] In the courts, autonomics might be used for redaction, document preparation, and inspecting electronic filings for compliance. While

[4] Kirkham, Elyssa. "43% of Americans File Taxes from the Comfort of Their Home, Survey Finds." *GOBankingRates*. ConsumerTrack, Inc., 25 Jan. 2016. Web. 18 Nov. 2016.

[5] Laurent, Patrick, Thibault Chollet, and Elsa Herzberg. Intelligent Automation Entering the Business World. Rep. Deloitte, n.d. Web. 22 Nov. 2016.

automation will disrupt entry-level clerical jobs, it can pave the way for higher-paying, more skilled, value-add roles.

Conversely, disruption due to autonomics could also increase some aspects of the court's work. Automated legal assistance will empower unserved and underserved audiences who were previously either unaware of their legal options or unable to exercise them due to the cost and/or complexity. For example, more than 160,000 parking tickets in London were successfully disputed in a matter of months using a free automated chatbot called DoNotPay. The website uses a series of questions to determine if someone qualifies for an appeal, and if so, creates the documents necessary to contest the parking ticket. In early 2016, the service was expanded to include New York City parking tickets. Within months of its release in March, the app had served more than 10,000 people.

Developer Joshua Browder has expanded his offering to address the issue of compensation for flight delays. Development is also underway to create a bot to help the newly evicted apply for housing assistance, and he is working with a human rights lawyer to craft a bot to help refugees apply for asylum.[6] The website's teenage developer sees bots as one way to "level the playing field for low-income and disenfranchised groups."[7]

Making a process quick, understandable, and inexpensive will increase access to that process. Courts should anticipate disruption from innovative legal assistance automation.

Online Dispute Resolution

Online Dispute Resolution (ODR) is a potentially disruptive automation that utilizes a unique blend of technologies to resolve customer complaints and other kinds of disputes without litigation. Disputes resolved using ODR may utilize fully-automated cyber negotiation, arbitration, cyber mediation, and traditional mediation using online technologies. Companies specializing in ODR include Modria, Arbitration Resolution Services, Youstice, Matterhorn by Court Innovations, and a host of others.[8]

This form of dispute resolution has already proven its effectiveness with organizations like eBay and PayPal. The private sector is not the only place where ODR is gaining acceptance. Canada has recently launched the Civil Resolution Tribunal to resolve property and small claims disputes. A Tribunal order carries the same force and effect as an order of the Supreme Court of

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[6] Macdonald, Cheyenne. "The Robot That Could Get You off a Parking Ticket: DoNotPay System Created by a Student Has Won 160,000 Disputes in London and New York." *Mail Online*. Associated Newspapers, 28 June 2016. Web. 22 Nov. 2016.

[7] Turner, Karen. "This Robot Lawyer Helps the Newly Evicted File for Housing Aid." *Washington Post*. The Washington Post, 9 Aug. 2016. Web. 18 Nov. 2016.

[8] "ODR Providers." *ODR.INFO*. The National Center for Technology and Dispute Resolution, n.d. Web. 13 Dec. 2016.

British Columbia.[9] For more detailed information about ODR and the Courts, see JTC Resource Bulletin "Online Dispute Resolution and the Courts."[10]

Changes in the Type and Quantity of Digital Evidence

Digital images are not disruptors: photographs have been in use in law enforcement and the courts since the 1840s. However, the volume of digital evidence being collected is increasing exponentially. The disruption-potential of digital evidence goes well beyond the dramatically increasing demand for secure digital storage to house millions of images collected from satellites, body-worn cameras, and consumer smart phones.[11]

In addition to burgeoning image data, there are ever more unique and complex kinds of digital evidence being collected, analyzed, and presented in court. GPS, DNA, text message, email, ATM transaction log, social media content, web browser history, neurobiological data, and other forms of digital evidence are dramatically changing the way courts gather, record, protect, and utilize evidence. Because digital evidence is searchable, it can be analyzed using automation. Digital forensics uses sophisticated algorithms for e-discovery document review, DNA sequence matching, and to detect cyber-crimes.

Of all the unique and complex varieties of digital evidence, neurobiological is one of the most daunting. Once limited to the realm of science-fiction, the use of neurobiological data as evidence has shifted to mainstream practice. Functional MRIs, cognitive impairment evaluations, and test results for genetic variants in DNA are all being used. Peer-reviewed scientific studies support the use of neurobiological evidence in certain circumstances, and it has already been used in routine state murder cases.

> We are now on the verge of a fundamental paradigm shift in which neuroimaging is becoming a highly significant part of the criminal justice process with the rapid advancement of forensic neuropsychiatry and neuroscience.[12]

As the type and quantity of evidence changes, so too will the number and variety of experts needed to handle and interpret the evidence. This in turn impacts court staffing and technology requirements.

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[9] See Civil Resolution Tribunal at www.civilresolutionbc.ca for more information.

[10] Joint Technology Committee. "Online Dispute Resolution and the Courts," *National Center for State Courts*. JTC Resource Bulletin, 30 Nov. 2016. Web. 17 Apr. 2017.

[11] For more information about the implications of digital evidence, see Joint Technology Committee. "Managing Digital Evidence in Courts," *National Center for State Courts*. JTC Resource Bulletin, 30 Nov. 2016. Web. 17 Apr. 2017.

[12] Gaudet, Lynn M., and Gary E. Marchant. "Under the Radar: Neuroimaging Evidence in the Criminal Courtroom." *Drake Law Review* 64.3 (2016): 577-661. *Drake Law Review*. Web. 17 Feb. 2017.

Cyberattack

Several recent cyberattacks have effectively demonstrated that when systems are compromised or unavailable, enormous disruption occurs. Clearly, the most important way to deal with this potential disruptor is to develop appropriate security measures to prevent as many unauthorized incursions as possible, and at the same time, to develop and rehearse an effective response plan for attacks that will inevitably occur. For more information about the implications of Cyberattack, see JTC Resource Bulletin *Responding to a Cyberattack*.[13]

Non-technical Disruptors

Consumers as well as organizations working to increase access to justice will increasingly demand lower cost, more customer-friendly and predictable alternatives to the current justice process.

> …persistent concerns about customer service, inefficiency, and bias are undermining the public's confidence in the courts and leading them to look for alternative means of resolving disputes or addressing problems that would have previously led them into the court system.[14]

Technology will play a role, but is not the only innovation with the potential to disrupt traditional court operations. The commoditization of legal services, unbundling of services, and the acceptance of Limited License Legal Technicians, for example, are interconnected potential disruptors.

Decrease in Case Filings

Over the past decade, many courts have experienced a steady decline in case filings. This may represent good news from many perspectives: less criminal activity, fewer abused and neglected children, and more potential litigants successfully using alternative dispute resolution. In some instances, the decline is tied directly to a successful justice initiative as in King County, Washington's Family Intervention and Restorative Services program.[15] Domestic violence case filings dropped 62% in the program's first year alone. However, another cause may be that court processes are simply too expensive, complex, and time-consuming.

> The roots of disruptive innovation lie in the serving of nonconsumption—areas in a sector where people have no access to the existing offerings

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[13] Joint Technology Committee. "Responding to Cyberattack." *National Center for State Courts*. JTC Resource Bulletin, 17 Feb. 2016. Web. 17 Apr. 2017.

[14] Gerstein, Bocian, Agne. "Public Trust and Confidence - Analysis of National Survey of Registered Voters." National Center for State Courts, 17 Nov. 2015. Web. 9 Nov. 2016.

[15] "Dramatic Drop in Juvenile Domestic Violence Case Filings Follows Launch of FIRS Program." *King County Youth Justice*. 29 Dec. 2016. Web. 05 Jan. 2017.

> because they are too expensive, inconvenient, or complicated to use and therefore the alternative to the innovation is nothing at all.[16]

No matter the causes of decreased case filings, the net effect is fewer cases to be processed.

Cost/Benefit Imbalance

Consumers value a favorable outcome in a dispute as well as the time and resources required to settle it. Traditional dispute resolution mechanisms favor those with sufficient resources to manipulate the system to delay and harass. Despite the court's mandate for procedural fairness and timely justice for all, many with just claims lack both the financial resources and time to resolve their issues.

Charles Dickens "purposely dwelt upon the romantic side of familiar things" with his tale of Jarndyce v Jarndyce, an inheritance case that drags on for so long that legal costs consume the entire estate before it is resolved. Despite the fact that *Bleak House* was published in 1853, it is hauntingly relevant and familiar today. Litigants today have more options than in 1853; however, litigation costs still routinely exceed the value of a large percentage of civil cases. [17]

Decoupling the Bar from the Court

Entrenched, historical differences between the court's interests and the bar's interests have many times constrained the court's options and limited innovation. For example, a jurisdiction's bar may oppose civil rules reforms designed to streamline processes that would ultimately better serve clients but reduce legal costs and law firm revenues.

> In our country, lawyers and judges regulate their own markets. The upshot is that getting legal help is enormously expensive and out of reach for the vast majority of Americans.[18]

New legal roles and non-legal paths to resolving disputes are two factors that are breaking the bar's monopoly on legal services. Disruption is already occurring. In the same way that Nurse Practitioners and Physician Assistants are increasingly handling routine medical care, licensed non-JD practitioners are beginning to handle routine legal matters in some jurisdictions. Lower educational costs for legal technicians reduce the entry-point cost for providers, who can then make a

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[16] Pistone, Michele R. and Michael B. Horn. "Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World," Christensen Institute. Clayton Christensen Institute for Disruptive Innovation, 15 Mar. 2016. Web. 10 Nov. 2016.

[17] For more on this issue, see *The Landscape of Civil Litigation in State Courts*.

[18] Hadfield, Gillian. "Lawyers, Make Room for Nonlawyers." *CNN*. Cable News Network, 25 Nov. 2012. Web. 18 Nov. 2016.

good living while charging clients much less than JD practitioners. This will make some legal services accessible to a wider audience.

> Under the new licensing models, some traditional lawyer work, such as representing clients in court, will likely remain the sole province of lawyers, whereas other aspects of the traditional lawyer work will increasingly be performed by non-lawyers…[19]

The state of Washington granted Limited License Legal Technician (LLLT) licenses to its first non-lawyer practitioners in 2015.[20] While LLLTs cannot appear in court, they can gather information from clients, prepare documents, give advice in family law situations, and assist self-represented clients.

> The use of non-JD legal assistants and nonlawyer dominated businesses is not a venture into uncharted waters. The United Kingdom has a long history of allowing a wide variety of differently trained individuals and organizations provide legal assistance, and studies show that the practice works very well. In many cases, people are better served by a nonlawyer organization that specializes in a particular type of legal help—navigating housing or bankruptcy matters, for example—than they are by a solo practitioner with a general practice.[21]

What is clearly a win for consumers is understandably a threat to the monopoly that has sustained the legal profession. Many state bar associations continue to work vigorously to defend the status quo.

> The Washington State Bar Association opposed the LLLT proposal right up until its approval by the Supreme Court. It argued that the rigorous training lawyers receive is essential to competently handling legal matters and protecting clients' best interests.[22]

California's 2015 Civil Justice Strategies Task Force explored innovations in other states, including Washington's LLLT, and recommended that the California State Bar consider designing a similar program.[23] Note that in California, it is the Bar and not the courts exploring the concept. Connecticut, New Mexico,

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[19] Pistone, Michele R. and Michael B. Horn. "Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World," Clayton Christensen Institute for Disruptive Innovation, 15 Mar. 2016. Web. 10 Nov. 2016.

[20] "Practicing Law without a Law Degree Now Permissible in Washington State." *In-Practice with CNA - A Practitioner's Perspective on Emerging Legal Trends*. CNA Financial Corporation, Apr. 2016. Web. 11 Nov. 2016.

[21] Hadfield, Gillian. "Lawyers, Make Room for Nonlawyers." *CNN*. Cable News Network, 25 Nov. 2012. Web. 18 Nov. 2016.

[22] Ambrogi, Robert. "Who Says You Need a Law Degree to Practice Law?" *The Washington Post*, 13 Mar. 2015. Web. 11 Nov. 2016.

[23] Rodriguez, Luis J., Chair. *Civil Justice Strategies Task Force Report & Recommendations*. Rep. State Bar of California, 2015, Web. 25 Nov. 2016. p. 53

Mississippi, Utah, and a growing number of other states are studying the possibility as well.[24]

The LLLT program was intended to serve the population that could not afford legal counsel. However, law firms are also embracing the use of LLLTs as a more cost-effective method of handling a variety of tasks once performed exclusively by lawyers.

In addition to having more options in legal service providers, clients also have the power to further control the cost of litigation through unbundled legal services. Sometimes referred to as *limited scope representation* or *discrete task representation*, unbundled legal services allow the client to take responsibility for some case preparation tasks, reducing the overall cost of legal representation. The attorney and client agree to the scope of the attorney's involvement and may also agree to a set price for the attorney's services.

The Massachusetts Court System pioneered the concept of unbundled services with its Limited Assistance Representation program in 2009.[25] The Alaska Court System's Family Law Self-Help Center uses unbundled legal services in its Early Resolution Program (ERP). The program provides free, unbundled legal assistance and/or mediation in some pro se family law cases.

> The court system anticipated that early intervention in the case process and the help of legal professionals could encourage parties to settle their issues rather than go through a protracted court trial. The result would be faster resolutions in which the parties create their own solutions after benefitting from legal advice, mediation or a settlement conference, and a lessening of workload for the courts.[26]

The program relies on a combination of lawyers, volunteers, mediators, and judges. The Family Law Self-Help Center provides training while the Alaska Legal Services Corporation recruits attorneys and provides malpractice insurance.

Since the 2009 pilot in Anchorage, the Alaska Court System ERP program has been expanded to three more Alaska state courts. More than 800 cases have been resolved. The process is quick, and participants frequently leave the courtroom with issues resolved and final paperwork signed. ERP is helping Alaska state courts reduce the stress of divorce litigation on participants in that

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[24] McKinley, Sands. "Legal Technicians Across the US." Blog post. *On the Future of Law*. Sands McKinley, 18 June 2015. Web. 25 Nov. 2016.

[25] For more information, see the Massachusetts Court System Limited Representation (LAR) Program at http://www.mass.gov/courts/programs/legal-assistance/lar-gen.html

[26] Marz, Stacey. "Early Resolution for Family Law Cases in Alaska's Courts." *Alaska Justice Forum*, 31.1-2 (2014): Web. 18 Nov. 2016.

process, and at the same time is freeing up court resources to address more complex cases.

Mandatory Arbitration Clauses

By contractually mandating that any dispute be resolved via arbitration, employers and businesses reduce the potential cost of resolving a conflict. That is one factor in the trend of fewer case filings. Where arbitration is mandated, however, it loses some of the real as well as perceived benefits. That also effectively denies employees and consumers the right to a fair hearing. In the case of sexual harassment claims, mandatory arbitration can "shield serial harassers from accountability, perpetuate predatory behavior and silence victims."[27] A 2014 Executive Order prohibits federal government contractors from mandating arbitration for sexual harassment and discrimination claims. Future legislation to either limit or strengthen individual projections may significantly impact the number of case filings.

Restorative Justice

While a variety of alternative mechanisms for dispute resolution are gaining acceptance in civil justice areas, courts are also testing alternatives to traditional justice in some criminal and juvenile delinquency cases. Restorative Justice is an approach to criminal justice that focuses on repairing the harm to an individual or community versus paying a debt to society.

> With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have inflicted the harm must be central to the process.[28]

There are several approaches to Restorative Justice including Victim-Offender mediation and Victim-Offender Reconciliation. Texas has pioneered several restorative justice initiatives, resulting in diversion of numerous criminal cases from the traditional criminal justice system. King County, Washington's FIRS program utilizes de-escalation counseling to reunite youthful offenders with their families. Studies confirm the approach is beneficial to victims, perpetrators, and the community with quantifiable benefits including better outcomes for victims, significantly reduced likelihood of reoffending for perpetrators, and reduced costs and caseloads for courts.[29]

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[27] Martin, Emily. "Keeping Sexual Assault Under Wraps Forced Arbitration Shields Employers like Fox News from Scrutiny and Undermines Women's Rights." US News. *U.S. News & World Report*, 28 Sept. 2016. Web. 11 Nov. 2016.

[28] Braithwaite, John. "Restorative Justice." *War * Crime * Regulation*. John Braithwaite, n.d. Web. 13 Dec. 2016.

[29] Levin, Marc. "Restorative Justice in Texas: Past, Present & Future." *Center for Effective Justice*. *TexasPolicy.com*. Texas Public Policy Foundation, Sept. 2005. Web. 13 Dec. 2016.

Civil Justice Reform

Reporting requirements under the 1990 Civil Justice Reform Act are providing metrics that motivate courts to address delays and reduce costs in civil litigation. Jurisdictions have undertaken a variety of reform initiatives since then, addressing some issues with specific case types or delays at stages in the litigation process. Despite a decade and a half of improvement efforts, studies repeatedly show that at least 80% of civil legal need goes unmet in low-income populations.[30]

The 2015 report *The Landscape of Civil Litigation in State Courts* observed that high value tort and commercial contract disputes are often the focus of criticism of the American civil justice system, but found the majority (75%) of all judgments were less than $5,200. The United States currently has a judicial process that is designed for the 1% - the most complex, most high-dollar litigation. Unfortunately, that prices the other 99% out of the market.

> For most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case.[31]

Courts should use automation wherever possible to streamline case processing for the high volume of simple cases, thus making skilled, human resources more available for complex cases. Business rules can help triage cases into the appropriate pathway.

Court-specific Obstacles to Preparing for Disruptors

Courts have unique characteristics that impact both the kinds of disruptions they will experience and the responses they are prepared and able to make.

Jurisdiction and Venue

Courts located in metropolitan areas often struggle to handle their caseloads while many rural courts have few cases and untapped capacity to address more. Workload balancing is common in the private sector, but jurisdictional and technical boundaries prevent most forms of workload sharing in the courts. In addition, court rules or statutes prescribe the kinds of cases that can be dealt with in each court. For example, small claims courts limit the dollar value of cases. Arbitrary limitations designed for a time when litigants were required to file

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[30] "Remarks by Attorney General Eric Holder at the Legal Services Corporation 40th Anniversary Event." *Office of Public Affairs*. The United States Department of Justice, 16 Sept. 2014. Web. 02 Mar. 2017.

[31] Hannaford-Agor, Paula, J.D., Scott Graves, and Shelley Spacek Miller. *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*. Report. National Center for State Courts and State Justice Institute, 2015. Web. 17 Feb. 2017.

and attend court proceedings in person prevent justice-seekers from choosing the venue and format of proceedings.

Perspective

The way courts view and treat their customers can be a catalyst for disruption as well as a barrier for preparing and responding effectively. Until now, courts have not had to compete for business. Consumers had no option but to utilize the courts to resolve issues. With no competition, there has been little incentive for courts to improve quality or even assess customer satisfaction. Having nothing to compare itself against can make any monopoly vulnerable to sub-par performance and overall inefficiency as well as self-congratulation.

> Voters continue to express concerns about customer service, particularly when it comes to innovation and use of technology… Only 51 percent say state courts "provide good customer service to people in the court system," down from 55% in 2014 and 53% in 2015… [J]ust 39 percent say ["innovative"] describes state courts well, while 54 percent say it does not; these numbers represent a six-point drop from a year ago, with the losses relatively consistent across demographics. Reflecting these concerns, a plurality continue to say "state courts are not effectively using technology to improve their own operations or how they interact with the people they serve." Previous research has consistently identified this failure to keep up with the technological advances that customers have now come to rely on as a primary driver of low customer service ratings and questions about the courts' efficiency and value to taxpayers.[32]

The courts' perspective is that alternatives to the traditional justice process create vulnerability for consumers. However, consumers already experience vulnerability (real and perceived) within traditional legal processes. If there are reasonable options, consumers will readily abandon the higher-cost solution, even if that means risking a potentially lower quality outcome. When consumers see an alternative as both more fair *and* less costly, they may completely abandon the traditional process.

> Concerns about inefficiency and unfairness are deep-seated and real. Such concerns may be making the public enthusiastic about alternatives to traditional dispute resolution…[33]

Rather than dismissing consumer mistrust as irrelevant or working to block consumer choices in the guise of consumer protection, courts can actively seek to better understand consumer needs and preferences, then act to meet those

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[32] *2016 Poll: The State of State Courts*. Presentation. The National Center for State Courts, Nov. 2016. Web. 2 Mar. 2017.

[33] Gerstein, Bocian, Agne. "Public Trust and Confidence - Analysis of National Survey of Registered Voters." National Center for State Courts, 17 Nov. 2015. Web. 9 Nov. 2016.

needs. Responding to consumer dissatisfaction with disruptive innovation is a "win:win" approach.

Protectionism

Bars and courts set standards and requirements that effectively stifle innovation. In the 2016 report *Disrupting Law School: How disruptive innovation will revolutionize the legal world*, authors Michele R. Pistone and Michael B. Horn of the Christensen Institute identify root causes of "nonconsumption" of legal services.

> Access to a lawyer is expensive and out of reach for many potential customers because the market for legal services is opaque, the provision of legal services has been restricted through licensure, and the services themselves have traditionally been provided on an individual, customized basis.

Law schools are scrambling to adjust their budgets to a decreasing number of students as the market for lawyers continues to decline. Courts, as well as law schools, must adjust. "Old school" lawyers and court managers may attempt to protect the status quo. However, tech-savvy, prescient organizations will protect jobs by embracing and facilitating innovation, rather than ignoring or attempting to impede change.

Statutes and Rules

Legislative/governing bodies rarely review their historical work looking for statutes or rules that prevent or limit the effective use of processes and technology to meet today's business requirements. They have an even more difficult time writing statutes and rules that are future-proof. Yet that is exactly what must happen for courts to be nimble in responding to disruptions.

"Lowest Common Denominator" Thinking

One issue that limits disruptive innovation in courts is the perception that every process or technology must be designed for the lowest common denominator: the least capable, least tech-savvy, most vulnerable potential audience. Offering multiple paths to the same resource is a better option than limiting development to technologies than can be backward compatible.

Organizational Structure and Hiring Processes

Court administrators report to and serve at the will of a chief judge or justice who is well-qualified to render legal judgements but may have no training or experience in corporate management, administrative functions, or information technology. Court administrators are professional managers who typically have never practiced law or served as a judge. Yet both need to understand their individual and mutual responsibilities for leading the court as an organization. The work of both court administrators and chief judges/justices must be informed by a common strategic vision, leading court improvement initiatives with

enthusiasm and clarity, even when IT initiatives necessarily challenge the traditional ways courts have functioned. This unity of purpose is also essential for working effectively with the court's justice system partners, whose work will also be transformed by these changes. To further complicate the working relationship, judges must maintain an awareness of how their actions might affect their ability to be re-elected.

Organizationally, the CIO is often not a member of the executive management team, limiting his or her ability to help the court leverage technology to meet the court's overarching goals. Recruiting and retaining well-qualified technology staff is already challenging within current salary constraints, coupled with the difficulty of recruiting obsolete skillsets and the painfully slow pace of public sector recruiting. Many current court job descriptions do not accurately reflect the technology requirements of today's jobs, and HR professionals estimate that job descriptions accurately written today will be obsolete in less than five years.

Reporting structures, job descriptions, hiring processes, and policies will need to change as fewer transactions occur within the courthouse itself and more work is done remotely and/or virtually. Court managers will need to prepare supervisors to effectively manage remote or virtual workers and work arrangements. Policies may need to be created to better define expectations of a remote workforce. Technology leadership must be positioned with sufficient authority and visibility within the organization. Court managers should begin now to adapt organizational structures, staffing practices, and policies to address this looming disconnect.

Procurement Practices

Court procurement practices and organizational budgets are structured around buying "things" but technology is an ongoing investment (a "process"). Purchase decisions may be made by individuals with no understanding of the product or service to be acquired. Managers with ultimate responsibility for the outcome of projects or initiatives may have only limited authority to make purchase and/or hiring decisions. Government procurement processes are often lengthy, which can be antithetical to innovation. Lengthy payment cycles may preclude all but the largest companies from doing business and some routine purchases are made from pre-negotiated contracts that discourage competition.

Court managers who have handled a large capital investment project during their tenure may have inappropriate expectations that can be a significant obstacle to innovation. Like building construction projects, technology project milestone deadlines help ensure the project progresses and is ultimately delivered. While both facilities and technology projects have a beginning, technology projects often don't have a hard-stop building-equivalent "end."

With building projects, the contractor makes a final walk-through, hands over the keys, and often never sets foot in the building again. Similarly, technology projects may include a final test and cut-over to a "final" build. However, at

almost the same moment that a new system “goes live,” efforts should begin to evaluate and enhance that system. Technology projects should be scoped and staffed for continual, iterative adjustment. The ability to respond quickly to changes in technology and processes, and to make frequent, ongoing improvements are essential components of an organization’s digital agility.

Technology changes at a pace dramatically accelerated from that of other industries. Court technology is not an island unaffected by rapidly changing operating systems, security risks, hardware standards, and consumer expectations. Innovations (both sustaining and disruptive) that involve technology will require on-going, iterative adjustment and improvement. Court managers must expect and budget for that ongoing development to ensure solutions remain useful and relevant, as well as functional.

Funding

Resources are notoriously constrained in the courts. Often the public demands changes that would be costly to implement but then votes against measures to provide funding. As the 2016 public opinion survey “The State of State Courts” confirms, the public’s perception of the courts is that they do a poor job of implementing technology and that public funds are poorly used.

The survey goes on to confirm that consumers expect the courts to adapt to new technologies, and that the lack of technology innovation in courts is a driving cause of poor customer service. Consumers recognize the difference between their interactions in the private sector and their interactions with the courts. The courts’ failure to embrace technology advances is increasing consumer dissatisfaction with the courts.

The gap is widening between what people experience with technology in the courts and what they experience with technology in the private sector. When effectively utilized, technology can help courts cut costs while improving service. Courts may need to reallocate existing funding to put sufficient resources into implementing technology so that long-term cost savings can begin to be realized.

Unions

Because disruptive innovation has the potential to impact the number and scope of jobs in the courts, unions are important partners. Some estimate that as much as half of the work done today will be performed by robots by 2055.

> The effects of automation might be slow at a macro level, within entire sectors or economies, for example, but they could be quite fast at a micro level, for individual workers whose activities are automated or for

companies whose industries are disrupted by competitors using automation.[34]

Courts are an industry that could experience fast disruption as technology and innovation are used to address bottlenecks and inefficiencies in court processes.

Recommendations

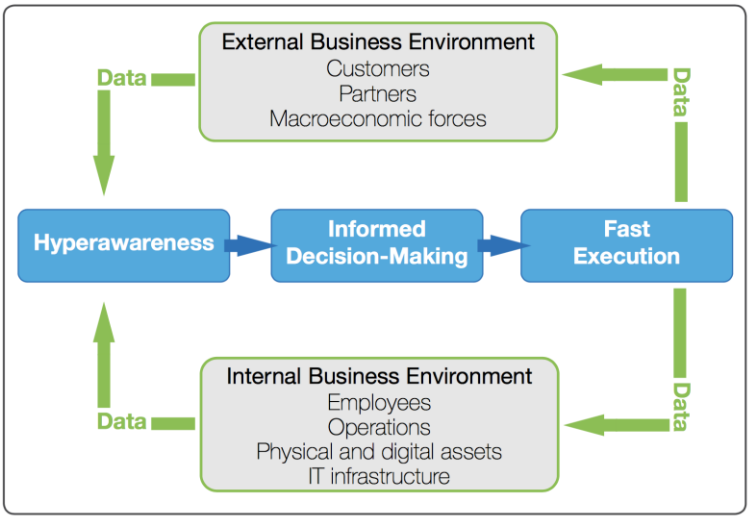
Disruptive innovation is ultimately about change. Courts must accept the need for change and become better and faster at changing. To avoid serious disruption, they must develop **digital business agility** - the capacity to use digital means to change.[35] Researchers at the Global Center for Business Transformation define digital business agility as the technology-enabled capabilities of hyperawareness, informed decision-making, and fast execution.

Hyperawareness:
The ability to detect and monitor changes in both the internal and external business environments.

Informed decision-making:
The ability to make data-driven decisions in response to those changes.

Fast execution:
The ability to act quickly and effectively on decisions.

Figure 1: Digital Business Agility



Source: Global Center for Digital Business Transformation, 2015

This triad of digital capabilities is often most apparent in small start-up companies and is nearly antithetical to the operational processes of most courts. Tradition, hierarchy, and organizational deference of court staff to their leadership pose significant challenges to developing digital business agility. The changes necessary to anticipate and effectively address potential disruptors are varied but are heavily affected as much by court culture, tradition, and mindset as by technology.

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[34] Manyika, James, Michael Chui, Mehdi Miremadi, Jacques Bughin, Katy George, Paul Willmott, and Martin Dewhurst. "Harnessing Automation for a Future That Works." *McKinsey & Company*. Global Insights, Jan. 2017. Web. 14 Feb. 2017.

[35] Bradley, Joseph, Jeff Loucks, James Macaulay, Andy Noronha, and Michael Wade. *Disruptor and Disrupted – Strategy in the Digital Vortex*. Global Center for Digital Business Transformation. November 2015. web. 30 March 2017.

Nurture a "can do" mindset

One of the biggest obstacles to innovation in the courts is a culture of low expectations. Some innovations will violate current rules, upset the status quo, and stretch court leaders and staff in uncomfortable ways. Rather than dismissing innovations that cannot readily be implemented, identify what must change and then work to change it. Identify and work to change court rules and statutes that limit innovation and the use of technology. In many instances, the obstacle to innovation is not a law or rule, but rather a mindset. Executive leadership is important in changing court culture to a "can do" mindset.

Create an environment that facilitates innovation

Court leaders must create a culture that gives space and opportunity for innovation. Mini "hack-a-thons" (collaborative, competitive development events) and "shark tanks" (relatively small financial incentives awarded to employees who suggest improvements) can encourage employee-driven innovation. Pilot projects and prototypes can be used to test innovative ideas. Assess the organization's digital agility. Address gaps in decision-making data access and quality.

Develop and deliver change management training related to reporting structures, job descriptions, hiring processes, and policies in anticipation of workforce shifts as fewer transactions occur within the courthouse and more work is done remotely. Engage union representatives in conversations about the way technology is shaping the number and scope of jobs in courts.

Encourage Bench-Bar sessions on the role and value of technology, new legal roles, non-legal paths to resolving disputes, and increasing access to legal services. Identify and fund a grass-roots initiative. Allocate staff time for creativity and collaboration.

The court's Chief Information Officer (CIO) does not have to drive all aspects of technology innovation, but must be an active partner to facilitate success. Include the Chief Information Officer in periodic meetings with the executive management team. Empower the CIO to guide the organization in identifying technologies to facilitate innovation.

Allow for failure

Closely tied to the concept of facilitating innovation is the idea that occasional failures are a healthy, entirely necessary, and expected part of innovation. Not every innovation will be successful immediately and some may not succeed at all.

A "no fail" court culture will dampen innovation and limit the scope of improvement efforts. Staff who are fearful of failing will not put forward innovative ideas. Court leaders must develop a higher tolerance for risk, as well as an appreciation for the long-term benefits of having occasional failures. Breaking

projects into smaller components can reduce the political repercussions of a failed effort.

Listen to the least / newest

Often, court managers look to seasoned court staff for input when evaluating court processes. However, that approach may inadvertently limit innovation. Staff with the most experience are also staff with the least exposure to the processes and approaches currently used by other organizations. Additionally, staff with less experience ("rookies") have a fresh perspective and will approach tasks differently than those in the "veteran comfort zone."[36] That difference can be key to innovation. Invite and encourage feedback from all levels, but pay attention to outsider/unique and/or dissenting voices. Ensure their ideas are not filtered out.

Challenge assumptions

Court managers must ensure they do not make development decisions based on false assumptions, particularly about access to technology. Begin measuring court consumer needs and preferences. Develop strategies and solutions to meet consumer preferences and address dissatisfaction. What may have been true of technology access and adoption just 3-5 years ago is likely not true today. For example, many expect that technology is less available to those with limited financial resources or in rural settings. However, cell phone ownership today is widespread even within homeless populations.[37] Digital resources make courts more accessible to rural populations who may be limited by the cost and inconvenience of traveling to the courthouse.

Digitize, digitize, digitize

The first layer of improvement and the foundation of informed decision-making will come as courts digitize every aspect of every process that can be digitized. Information becomes digital value that can be used in a variety of ways to deliver a better experience at a lower cost. At the same time, ensure digitization efforts don't simply automate ineffective processes. If a process performs poorly prior to the application of technology, digitization efforts may magnify rather than diminish issues. Evaluate a process before digitizing it.

Enhance data gathering and analysis tools

Tied in part to the "digitize everything" imperative, accurate, validated data is essential for informed planning and decision-making, and is essential for a court to develop digital agility. Sharing information more widely throughout the court can help every department hone ever more effective business processes and give individual contributors the ability to make better day-to-day decisions. Courts

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[36] Wiseman, Liz. *Rookie Smarts: Why Learning Beats Knowing in the New Game of Work*. New York, NY: Harper Business, an Imprint of HarperCollins, 2014. Print.

[37] Reitzes, Donald C., Josie Parker, Timothy Crimmins, and Erin E. Ruel. "Digital Communications Among Homeless People: Anomaly Or Necessity?" *Journal of Urban Affairs* 0 (2016): 1-17. Web. 27 Feb. 2017.

may need to first enhance data gathering and analysis tools before undertaking some initiatives.

Embrace tech standards

Systems built on industry-accepted standards are more flexible and less expensive to develop, implement, and maintain. Adhering to standards such as the National Information Exchange Model (NIEM)[38] and OASIS LegalXML Electronic Court Filing (ECF)[39] make it possible for courts to utilize technology solutions from multiple vendors or some that are designed for other industries. For more information on technology standards, see JTC Court Technology Standards at NCSC.org.

Design for increasingly tech-savvy users

Innovations very often are tied to new technologies, but court systems are often designed to be backward compatible with outdated operating systems and/or to meet the expectations of the least tech-savvy potential user. Rather than developing systems that could be used comfortably by a 75-year old using a 7-year old computer, use the most current technologies and address the user experience expectations of the tech-savvy.

Transaction and communication preferences are different for various demographics. Build user choice and better help resources into the process. For example, digital natives generally prefer asynchronous communication: websites, text, and chat at any time of the day or night. Individuals less comfortable with technology often prefer to deal with someone either in person or by phone during traditional business hours. Some court functions or case types may be far more common in certain demographics, for example, speeding tickets versus elder abuse cases. A mobile-friendly app may be the disruptive innovation to address the payment of traffic fines, while an automated case triage leading to a court clerk may be an innovation more suited to elder abuse cases.

The cost advantages of streamlining and automating some processes for the majority of cases can free up clerical resources to better address more complex cases. Clerks can then be more available to assist those who (for any number of reasons) cannot utilize technology or who prefer personal (human) assistance.

Outsource

The court's core competency is making fair, neutral decisions, not designing and maintaining technology. As technology continues to evolve, courts can leverage vendor innovations more quickly and inexpensively than developing, maintaining, and protecting systems in-house. Customizable off the shelf (COTS) and hybrid development (vendor solution with in-house customization) approaches can also extend the court's technology capabilities. While Court Managers and CIOs must

[38] See https://www.niem.gov/

[39] See https://www.oasis-open.org/standards#ecfv4.01

understand technology, they must now be highly skilled at managing vendor relationships, third-party contracts, data licensing, and procurement processes.

License court capabilities

Courts can license some court functions, making it possible for vendors to create systems to meet needs the courts are unable (or unwilling) to address. For example, efileTexas.gov is that state's e-filing portal. From the official website, filers choose an electronic filing service provider (EFSP) from a list of certified free or for-pay providers. Texas Administrative Office of the Courts hosts the filing manager portal. For-profit service providers facilitate e-filing and provide a variety of additional related for-pay services.

Consumers now have options, and that has created healthy competition, leading to more user-friendly e-filing options. The portal enables both filers and the courts to efficiently process documents and fees.

Leverage private sector innovations

Not all court solutions must come from court-specific solution providers. Explore innovations that are working well in the private sector. Customizing an off-the-shelf (COTS) product can save courts both time and money. British Columbia's Ministry of Justice uses a customized version of the Salesforce platform in its highly successful Online Dispute Resolution (ODR) process. Common consumer platforms like Salesforce, Microsoft Dynamics CRM, YouTube, LinkedIn, Evernote, Yammer, Flickr, and others are being used effectively by local, state and federal entities.[40] Many organizations offer unique versions of their products that align with government privacy and security regulations.

Embrace model revised statutes and rules

Laws and court rules governing privacy and access differ from state to state and even from county to county within some states. This creates complexity that increases the cost of system development and limits what vendors can deliver. Courts must work to remove language that constrains technology innovation. Participating in state and national initiatives to create uniform laws and court rules can benefit the local court as well as the broader court community.

Electronic documents were a reality before there were laws in place to permit the use of electronic signatures. Today, however, an electronic signature now carries the same legal standing as a handwritten signature in most jurisdictions in the US, throughout Europe, and in other parts of the world.

It is inherently inefficient for each state to have its own statutes, rules and practices around privacy and access. Where possible, court managers should

[40] For example, see the U.S. National Archives on Flickr or the United States Court of Appeals for the Ninth Circuit on YouTube.

participate in and/or ratify the efforts of organizations like the National Conference of State Legislators to craft model rules and uniform statutes.

Crowdsource

Wikipedia may be the first major digital crowd-sourced reference work, but the concept of crowdsourcing is not new. The Oxford English Dictionary was launched in the mid-1800s on the efforts of volunteer readers who copied passages from books to illustrate word usage.[41] It may be commonplace in the future for court-related questions to be fielded by fellow citizens. Instead of being the sole source of legal information, future courts may simply monitor forums to provide quality control.

Conclusion

Not every court innovation has to be disruptive. Courts can and should work to consistently improve existing processes, reduce costs, and enhance the customer experience. CIOs should work closely and collaboratively with judicial leaders and court managers to lead their organizations in selecting and implementing technology to meet organizational objectives. However, improving existing processes within the courts may bring incremental benefit but ultimately constrain real innovation. Gary Heil wisely observed that "Edison did not start out to improve the candle."[42]

Courts are likely to be more comfortable with sustaining innovation – doing just enough to experience the benefits of improvement. In spite of improvements, some disruptors will succeed: some aspects of the court's day-to-day "business" will disappear. While courts will not go out of business, case filings will continue to decrease at an accelerated rate, leading to funding cuts. Partner agencies will limit their exposure to organizations that could entangle and impede their operations. While keeping a "business as usual" approach is an option, courts may find themselves scrambling to respond to changes in "crisis mode" that could have been addressed in a more measured way.

Public dissatisfaction with the courts is growing and as a result, the courts' "customers" are increasingly bypassing traditional justice options. That is not, of itself, a bad thing. Some court functions and case types may be more efficiently and cost effectively handled by innovators outside the court community. To perform their essential role in ensuring access to justice, courts must ensure they retain control over three essential categories of cases:

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[41] Lih, Andrew. *The Wikipedia Revolution: How a Bunch of Nobodies Created the World's Greatest Encyclopedia*. London: Aurum, 2010. 67-68. Print.

[42] Bell, Chip R., and Oren Harari. "Coyotes Follow Procedure; Roadrunners Experiment." *Beep! Beep!: Competing in the Age of the Road Runner*. New York: Warner, 2003. Print.

Common law	Nearly 99% of civil cases are routine and can be addressed fairly in a variety of forums. Instead of focusing on those cases, courts must ensure they retain the very small percentage of key cases that make or change common law.
High stakes	Courts must ensure they retain “high stakes” cases where lives or large amounts of money are at stake. High stake cases also include criminal cases where the outcome might mean an individual is sentenced to prison or jail.
Power asymmetry	Ordinary citizens must be able to defend themselves from wrongs committed by governments or large corporations. Courts must ensure they retain cases that address issues of power asymmetry. Without a neutral forum, democracy cannot thrive.

Courts must begin now to have serious conversations about their mission and scope, and what they need to do to retain and successfully perform their essential role as an institution in a competitive environment. Retaining those essential roles will require not just improvement but transformation.

Digital business transformation is a journey that will require change in the fundamental business model, leadership mindset, and technology deployment of the courts in a quest to quantifiably improve performance. This is an imperative driven by the inevitability of digital disruption. The first step in digital business transformation is for courts to accept the need for change.

Tab 3

Self-Represented Litigation Network

Remote Appearances of Parties, Attorneys and Witnesses

A Review of Current Court Rules and Practices

Prepared for the Self-Represented Litigation Network
SRLN.org
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Introduction

In July of 2016, the Self-Represented Litigation Network published *Serving Self-Represented Litigants Remotely – A Resource Guide* describing how eight jurisdictions use remote service delivery technologies to provide assistance to self-represented litigants (SRLs) – allowing SRLs to access information, forms and other assistance without having to travel to a courthouse. The data collected for that publication showed that the provisions of services remotely was of benefit to both the court and the SRL. Significant interest was expressed concerning the related question of whether SRLs (and lawyers) could conduct court business without going to a courthouse. This effort is intended to collect available information on this topic.

The topic covers both remote appearances of parties and attorneys at court proceedings and the remote presentation of evidence for those proceedings. It covers both types of appearances by telephone and by videoconference.

This summary report presents the author's conclusions about the current state of remote appearances in the United States based on his review of existing state statutes and federal, state and local court rules on the topic and discussions with knowledgeable persons throughout the country. The report has two appendices – a compendium of all the statutes and rules identified by Lindsay Welton, a talented third year law student at the University of New Mexico College of Law, and compiled by the author, and a technology assessment *Use of Telephonic and Video Conferencing Technology in Remote Court Appearances*, prepared by Vince Morris and Stewart Whaley of Open Access Law Firm, PLLC of Little Rock, Arkansas.

The information in the statutes and rules compendium, while filing many pages of text, was compiled using basic legal research tools of court rules using three search terms – "appear," "telephone" and "video." If statutes were mentioned in the rules, we included them. We invite states and local courts to provide us with information that should be, but has not been, included in this compendium.

We include footnotes that reference materials in the statutes and rules compendium. The footnotes are not in "blue book" format. However, they contain the identifier used in the compendium; consequently, it is easy for persons to find the reference material supporting the statements made in this report in the compendium.

Readers must also be aware that the information contained in a report of this kind is time dated. Its accuracy and utility will begin to diminish the moment it is published as rules and practices change and evolve.

Remote appearances – endorsement by the Conference of Chief Justices

In its *Call to Action: Achieving Civil Justice for All*, the Conference of Chief Justices' Civil Justice Improvement Committee set forth a convincing series of findings concerning the makeup of the civil calendar of trial courts in the United States and made a series of thirteen recommendations for dramatic change in the procedures used in handling civil cases. The last recommendation includes the following:

> **Recommendation 13.4 Judges should promote the use of remote audio and video services for case hearings and case management meetings.**

The commentary supporting this recommendation reads as follows:

> Vast numbers of self-represented litigants navigate the civil justice system every year. However, travel costs and work absences associated with attending a court hearing can deter self-represented litigants from effectively pursuing or defending their legal rights. The use of remote hearings has the potential to increase access to justice for low-income individuals who have to miss work to be at the courthouse on every court date. Audio or videoconferencing can mitigate these obstacles, offering significant cost savings for litigants and generally resulting in increased access to justice through courts that "extend beyond courthouse walls." The growing prevalence of smart phones enables participants to join audio or videoconferences from any location. To the extent possible and appropriate, courts should expand the use of telephone communication for civil case conferences, appearances, and other straightforward case events. If a hearing or case event presents a variety of complexities, remote communication capacities should expand to accommodate those circumstances. In such instances video conferencing may be more fitting than telephone conferencing. The visual component may facilitate reference to documents and items under discussion, foster more natural conversation among the participants, and enable the court to "read" unspoken messages. For example, the video may reveal that a litigant is confused or that a party would like an opportunity to talk but is having trouble getting into the conversation.

The full report was approved by the Conference of Chief Justices in 2016.

Remote appearances – pros and cons

Remote court appearances provide many benefits to multiple entities.

By allowing persons to appear by telephone or videoconference, courts reduce the number of persons coming to court, finding parking, going through security screening, requiring directions

to offices and courtrooms, and filling small courtrooms. While there is no data on this matter, there is little reason to believe that the actual time required to complete a court proceeding is increased or decreased by remote appearance. The time of court staff may be increased marginally by the need to handle telephone and videoconferencing equipment. On the other hand, judges may appear telephonically or by video in rural courthouses, saving considerable time and expenses of their travel.

Parties can avoid the costs of lost time from work, transportation, parking, child care, and meals associated with a trip to the courthouse. There is existing evidence of those costs and their significance. They can also use the technology tools of their everyday life – smartphones, tablets, and laptop computers – to appear and testify in court. There is a further cost for persons with disabilities that is harder to quantify – the pain, discomfort, and frustration of having to travel to a court facility not designed to accommodate their needs. These costs are just as real for urban as for rural residents.

Attorneys can avoid the costs of travel, parking, and waiting in court for a hearing to take place. While many attorneys are able to bill clients for that time, their lives would be improved by being able to make more productive use of the time.

Witnesses can realize the same savings of time and expense experienced by parties and attorneys. Expert witnesses can benefit especially from remote appearances; by virtue of their unique qualifications, experts are unlikely to live near a courthouse at which they will be required to testify.

Law enforcement, correctional instituttions, hospitals and mental health facilities benefit enormously from the ability to have court appearances take place on their premises rather than at a remote courthouse. The costs of transportation and security for prison and jail inmates that can be avoided by the use of videoconferencing has led to the widespread use of videoconferencing for first appearances, arraignments, and other criminal hearings.

Appellate courts in California[1] and Missouri[2] allow judges, parties and attorneys to appear remotely for oral argument. In both instances the locations at which any participant can be present are limited to specified courthouses – presumably because they are equipped with particular videoconferencing equipment.

[1] Cal. 1st App. Dist. L.R. 13
[2] Mo. App. S.D. Spec. R. 1

But there are potential costs as well – most of which are considered potential because they have not been measured empirically. Remote appearances of witnesses may lessen the accuracy of judge and jury fact finding. Judges may without knowing they are doing it, favor or disfavor persons who appear remotely or those who do not. Not having all parties present in the courthouse may reduce the opportunities for early settlement of both civil and criminal matters – increasing the average time required to dispose of cases. Not having persons experience the courtroom environment, with impressive physical facilities and the robed judge seated above the parties, may reduce litigant respect for the judicial process and lessen the impact of court orders.

There is some evidence of negative effects. The most famous study was done in 2008 by Professor Shari Diamond. She and her colleagues gathered extensive data on bail outcomes both before and after the introduction of videoconference arraignments in Chicago. They documented an average increase in the amount of bail of $21,000 – a 51% increase. Persons who appeared personally in court after the introduction of videoconferencing did not experience such an increase. The URL for her study is http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc

In 2005, two public interest entities in Chicago studied removal hearings conducted by the US Immigration Court using videoconferencing and reported a number of negative consequences. The URL for that study is http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf

Neither of these studies appears to have dampened enthusiasm for the use of video proceedings in criminal cases outside Chicago itself. The US Justice Department's National Institute of Justice is currently conducting a three-phase study to produce empirical evidence from multiple sites on the fairness of video proceedings in criminal cases. The first phase report summarizes the literature on perceived problems and best practices to avoid them or their effects. The URL for the report is https://www.ncjrs.gov/pdffiles1/nij/grants/248903.pdf

Contrasting basic approaches

The traditional approach to both types of appearances begins with the premise that personal appearance in the courtroom is preferred and therefore that remote appearances are exceptional, requiring a showing of circumstances warranting the granting of such an exception. The burden of proof is on the party wishing to appear remotely. Deciding whether to allow

remote appearance is done through a traditional motion, service, answer, oral argument process. All costs of the remote appearance are the responsibility of the requesting (or first requesting) party.

Several states have now reversed this presumption, creating a neutral environment for deciding whether to allow a remote appearance – leaving judges with full discretion for deciding each situation on its relative merits. In these states, it is still presumed that the opposing party has a right to notice of the request to appear remotely and that the court needs to know in advance whether a party will be using the telephone appearance option.

Three states have reversed the presumption for non-evidentiary hearings. Florida[3], Hawai'i[4] and Oregon[5] have statewide rules requiring their courts to allow remote appearances for administrative and non-evidentiary hearings absent some compelling reason to the contrary – giving the party or attorney the discretion to decide whether to appear in court or by phone. In these states, the burden remains on the requesting party to obtain the consent of the other side or to prove to the court that the hardship on the witness warrants the allowance of testimony by telephone or video conference.

Alaska[6] and a number of individual courts[7] have implemented this presumption administratively or by rule – providing the option for remote appearance to all parties in eligible types of

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[3] Fla. R. Jud. Admin. 2.530 (c) (for civil hearings scheduled for fifteen minutes or less)

[4] Haw. R. Civ. P. Rule 16.1

[5] Ore. UTCR 5.050 2(b)

[6] Communication by the author with the Director of the Alaska Family Law Self Help Center

[7] CA Super Ct. Santa Clara County Local Rules Rule 12C; Ca. Super. Ct. Santa Cruz County, Local Rules, rule 3.1.02 (b); Ca. Super. Ct. Shasta County, Local Rules, rule 15.16 (A); Ca. Super. Ct. Shasta County, Local Rules, rule 5.13; Ca. Super. Ct. Sierra County, Local Rules, rule 1.1 (A)(d); Ca. Super Ct. Tulare County Local Rules Rule 108 b; 9th Jud. Cir. AO 2004-03-01 3.1 (videoconferencing by agreement of the parties; court approval not required); Montana statutes Section 25-31-710 (Justice's court); Texas Fort Bend Cty Dist. Ct. Local Rules Rules of Practice in the 400th District Court, Civil 5. Fort Bend Cty Dist. Ct. Fam. LR 3 section 3.3.

hearings by providing information for appearing remotely on the notice of hearing. In these jurisdictions, the court simply assumes that some parties will be appearing by phone – checking in persons on the phone at the same time as they check in the persons who are appearing in person.

All jurisdictions require prior notice of and judicial approval of the remote appearance of a party or witness for a hearing in which testimony will be taken.

California's rule[8] strongly encourages remote appearances – "To improve access and reduce litigation costs, courts should permit parties, to the extent feasible, to appear by telephone at appropriate conferences, hearings and proceedings in civil cases." However, it has created a strong monetary disincentive for the parties. Every remote appearance requires the payment of a fee of $86, absent the granting of a fee waiver in the case on a showing of indigency.[9] The fee is reduced to $66 for cases involving Title IV-D child support matters.[10] Twenty dollars of the fee is placed in the Trial Court Trust Fund – the source from which trial courts are funded. The remainder of the fee goes to a commercial vendor (CourtCall has a statewide contract in California) or to the court if it provides its own phone service or the party provides the conference call in a different manner. Interestingly, any judge may decide not to impose any remote appearance fee in her or his courtroom[11]. It is clear from some of the California trial court local rules that this is the practice in some courts – with some departments using the private vendor and others not.[12]

The disincentive is magnified by a provision that remote appearance fees cannot be claimed or taxed as costs against the losing party.[13] The Superior Court in Sacramento County has created a countervailing financial incentive; it warns attorneys that it will not allow the costs of attorney travel in computing attorney's fees (when they are allowable) if an attorney has failed to take advantage of the remote appearance option.[14]

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[8] CA ST CIVIL RULES Rule 3.670
[9] CA ST CIVIL RULES Rule 3.670 (k)
[10] CA ST CIVIL RULES Rule 3.670 (m)(2)
[11] CA ST CIVIL RULES Rule 3.670 (j)(2); Cal Govt Code Section 72010(c)(3)

[12] Ca. Super. Ct. San Luis Obispo County, Local Rules, rule 7.13 B1(a)
[13] Ca. Super. Ct. Siskiyou County, Local Rules, rule 4.03 C
[14] Ca. Super. Ct. Sacramento County, Local Rules, rule 2.04(C)

Several California courts by local rule provide a free alternative – either by allowing a party to propose a different form of conference call or by providing that, if a prior request has been made, courtroom staff will call the party at the time of the hearing.[15]

Case types and proceeding types in which remote appearances are allowed

Two states have enacted a single rule covering both telephonic and videoconference appearances. North Dakota[16] uses the term "contemporaneous transmission by reliable electronic means." The single rule covers criminal, civil and mental health cases and sets out four basic requirements:

> (B) A party wishing to use reliable electronic means must obtain prior approval from the court after providing notice to other parties.
> (C) Parties must coordinate approved reliable electronic means proceedings with the court to facilitate scheduling and ensure equipment compatibility.
> (D) Each site where reliable electronic means are used in a court proceeding must provide equipment or facilities for confidential attorney-client communication.
> (E) A method for electronic transmission of documents must be available at each site where reliable electronic means are used in a court proceeding for use in conjunction with the proceeding.

Oregon's statute[17] uses the term "simultaneous electronic transmission" which it defines to mean "television, telephone or any other form of electronic communication transmission if the form of transmission allows" four capabilities:

> **(A)** The court and the person making the appearance to communicate with each other during the proceeding;
> **(B)** A defendant who is represented by counsel to consult privately with defense counsel during the proceeding;
> **(C)** The victim to participate in the proceeding to the same extent that the victim is entitled to participate when the person making the appearance is physically present in the court; and
> **(D)** The public to hear and, if the transmission includes a visual image, to see the appearance if the public has a right to hear and see the appearance when the person making the appearance is physically present in the court.

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[15] Ca. Super. Ct. Placer County, Local Rules, rule 30.17 D; Ca. Super. Ct. Riverside County, Local Rules, rule 5160 (for family law matters)

[16] ND Administrative Rule 52

[17] ORS § 131.045

A number of courts and jurisdictions have different rules governing remote appearances in different case types. All jurisdictions provide separate rules governing criminal proceedings. But there are often different rules in different civil case types. For instance, California has separate rules for remote appearances in Title IV-D child support cases.[18] The Superior Court in Mendocino, California identifies virtually the same procedures for five different categories of civil cases in the same rule. [19]

In criminal cases, courts typically authorize remote issuance of search or arrest warrants, and videoconferencing for initial appearance, arraignment, not guilty plea, non-evidentiary bail hearing, and case status conferences in misdemeanor and felony cases in which a party is in custody. Many allow the use of video conferencing for guilty plea and sentencing hearings with the defendant's consent. Alaska allows remote appearances for traffic and misdemeanor sentencing.[20] Alaska also authorizes video testimony at a preliminary hearing if the witness lives 50 miles from the courthouse or has to travel by air to reach the courthouse.[21] Alaska allow grand jury witnesses to appear telephonically so long as they ensure that no one is listening on the call on an extension within the witness's place of business.[22] Orange County, California allows an attorney to appear telephonically or by fax machine for a misdemeanor arraignment.[23]

Jurisdictions frequently provide rules addressing specific civil case types:

- Family cases. Several states have enacted the Uniform Interstate Family Support Act;[24] section 316 of that act requires courts in the state to allow out of state parties to appear and testify in such cases by telephone, audiovisual or "other electronic means." There are two other uniform laws with sections bearing on electronic appearances in family matters – the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act[25] and the Uniform Deployed Parents Custody and Visitation Act.[26] Many states and courts have their own unique remote appearance rules for family cases.[27]

[18] Cal. R. Ct. 5.324

[19] Ca. Super. Ct. Mendocino County, Local Rules, rule 11.1

[20] AK R RCRP Rule 38.2(b)

[21] AK R RCRP Rule 5.1 (e)(1)(A)

[22] AK R RCRP Rule 6 (3)(B)

[23] Ca. Super. Ct. Orange County, Local Rules, rule 856 F

[24] ARS 25-1256. Special rules of evidence and procedure

[25] NC statutes Section 35B-7

[26] NC statutes Section 50A-363

[27] Minn. Gen. R. Prac. 359.01

- Foreclosure cases. A number of jurisdictions have created special procedures for settlement of these cases. Florida is such a state. These rules often prohibit a party from appearing remotely at such a conference.[28] In the 20th Judicial District, however, the plaintiff's representative is granted the right to appear remotely because of the impact on judicial administration of requiring personal presence with so many pending cases.[29]
- Probate. Many rules allow the remote appearance of conservators and personal representatives in required but uncontested matters[30]
- Juvenile delinquency, dependency, and CHINS/PINS cases. A number of jurisdictions authorize remote appearances in these cases, sometimes disallowing it for a particular class of party.[31]
- Domestic violence protective orders. Following the example of individual courts in other states, New York has recently implemented a procedure allowing persons seeking protective orders to appear by Skype the ex parte issuance of a temporary order of protection.[32] Contested hearings require the personal appearance of the person seeking protection.
- Traffic cases. Florida's 15th Judicial District is conducting an experimental Saturday and video conference traffic hearing calendar.[33] The Superior Court for Fresno County, California has a pilot program for remote appearance for traffic hearings in two communities.[34]
- Driver's license revocation or restoration[35]
- Court-sponsored mediation and other ADR processes. Most rules state a preference for in person presence for ADR processes, but provide the judge with the discretion to allow parties to participate remotely when good cause is shown.[36] The San Mateo County, California Superior Court requires parties to redial into the commercial vendor service on a different line with a different PIN when a mediation has been ordered during a family law hearing so that the remotely participating party(ies) can schedule the

[28] Florida 16th Jud. Cir. AO 2.072 Rules for Foreclosure Mediation a

[29] Florida 20th Jud. Cir. AO 1.12 13

[30] Ca. Super. Ct. Ventura County, Local Rules, rule 10.00; Ohio Warren Cty. Probate Div. LR 5

[31] Ohio Warren Cty. Juv. Div. LR 4; AK R CINA Rule 3

[32] From New York Unified Court Press Release

[33] Florida 15th Jud. Cir. AO 10.406

[34] Ca. Super. Ct. Fresno County, Local Rules, rule 3.6.3

[35] A.C.A. § 5-65-402 (B)(8)(A); C.R.S.A. § 42-1-218.5 (driver's license revocation hearings)

[36] Ca. Super. Ct. Contra Costa County, Local Rules, rule 5.7

mediation at the time of the initial court hearing (duplicating the requirement for in-court participants to proceed directly to a specific court office for this purpose).[37]

- Attorney discipline and client protection fund proceedings. Many courts allow persons to appear remotely in these proceedings (these rules were not included in the compendium).
- At least two states – Arkansas and North Carolina – authorize the county sheriff to serve subpoenas requiring a person to appear in court to testify by telephone.[38]

Recognition of the needs of persons in special categories

A number of states give a right of remote appearance to a person in the military in deployed status.[39] There are a number of court rules that allow remote appearance automatically for persons living in a different state or a certain distance from the courthouse – e.g., 50 miles, 60 miles, 100 miles, 150 miles. [40]

Virginia has special rules relating to the isolation of persons with communicable diseases.[41] These rules are for the protection of the courts and court personnel as well as for the convenience of the confined persons.

Processes for obtaining permission to appear remotely

The typical process calls for a party wishing to appear remotely or to have a witness appear remotely to file a request a certain number of days prior to the hearing. The number of days' advance notice varies from 1 to 30 days.[42] Some rules allow a party to make such a request by

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[37] Ca. Super. Ct. San Mateo County, Local Rules, rule 4.2 D(4)

[38] AR R RCP Rule 45 (c); NC Civil Rule 45(b)(1)

[39] Rules of Civil Procedure, Rule 99 (a)

[40] AK R RCRP Rule 6 u(1)(A) (50 miles for appearance before grand jury); Ca. Super. Ct. Sonoma County, Local Rules, rule 9.14 (60 miles for child custody); Ca. Super. Ct. Humboldt County, Local Rules, rule 8.26 (100 miles for Child Custody Recommending Counseling (CCRC) session; Ca. Super. Ct. Mendocino County, Local Rules, rule 6.4 (150 miles for mandatory settlement conference)

[41] Va. Sup. Ct. R. 7A:16; Va. Sup. Ct. R. 3:24; Va. Sup. Ct. R. 5:41

[42] Ca. Super. Ct. Sonoma County, Local Rules, rule 9.14 2 (one day's notice for appearance in child custody hearing); Arizona 17B A.R.S. Rules Probate Proc., Rule 11 (30 day's notice for appearance in probate matter)

including a phrase such as "Telephonic Appearance Requested" in the caption of a motion.[43] Many rules require this request to be served on all other parties in the case; in some instances the rules allow notice to be given by phone. The rules usually provide an opportunity for the filing of an objection.

The Washington Circuit Court for Asotin, Columbia, and Garfield Counties has the common sense rule that a contested motion about remote telephonic appearance will be heard telephonically.[44]

The courts that give the discretion to the party do not require notice to the court or to the other side of one party's decision to appear remotely, unless there are unusual technical requirements associated with the appearance.

Courts take different approaches to what the requesting party should presume if s/he has not received notice of the court's ruling on a remote appearance request. In the San Francisco Superior Court the parties are instructed to presume that an application to appeare remotely in a family law matter has been denied.[45] In Sonoma County, just north of San Francisco, the opposite is the case – a party should presume in the absence of notice that a remote appearance application has been granted in the same type of matter.[46]

Florida's 15th Judicial District has an experimental Saturday and video traffic hearing process; attorneys are assumed to be available to make regular court appearances, so they are not allowed to participate in the experimental process. [47]

Processes for obtaining permission to have a witness appear remotely

Jurisdictions set forth criteria for permitting remote testimony in very different ways. We set forth only three examples taken from the rules compendium.

The Utah criteria are very simple:[48]

[43] CA St Civil Rules Rule 3.670 (h)(1)(A)
[44] Washington Asotin, Columbia, Garfield Super. Ct. LCR 7
[45] Ca. Super. Ct. San Francisco County, Local Rules, rule 11 D 4 a (iv)
[46] Ca. Super. Ct. Sonoma County, Local Rules, rule 9.6 E

[47] Florida 15th Jud. Cir. AO 10.406

Utah

Intent:

To authorize the use of conferencing from a different location in lieu of personal appearances in appropriate cases.

To establish the minimum requirements for remote appearance from a different location.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

(1) If the requirements of paragraph (3) are satisfied, the judge may conduct the hearing remotely.

(2) If the requirements of paragraph (3) are met, the court may, for good cause, permit a witness, a party, or counsel to participate in a hearing remotely.

(3) The remote appearance must enable:

(A) a party and the party's counsel to communicate confidentially;

(B) documents, photos and other things that are delivered in the courtroom to be delivered previously or simultaneously to the remote participants;

(C) interpretation for a person of limited English proficiency; and

(D) a verbatim record of the hearing.

The rules in Maryland[49] and Michigan[50] are much more detailed.

Maryland

(d) Contents of motion. The motion shall state the witness's name and, unless excused by the court:

(1) the address and telephone number of the witness;

(2) the subject matter of the witness's expected testimony;

(3) the reasons why testimony taken by telephone should be allowed, including any circumstances listed in section (e) of this Rule;

(4) the location from which the witness will testify;

(5) whether there will be any other individual present in the room with the witness while the witness is testifying and, if so, the reason for the individual's presence and the individual's name, if known; and

(6) whether transmission of the witness's testimony will be from a wired handset, a wireless handset connected to the landline, or a speaker phone.

(e) Good cause. A court may find that there is good cause to allow the testimony of a witness to be taken by telephone if:

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[48] Utah R. Judicial Admin Rule 4-106

[49] Md. Rule 2-513

[50] Michigan MCR 2.407

(1) the witness is otherwise unavailable to appear because of age, infirmity, or illness;
(2) personal appearance of the witness cannot be secured by subpoena or other reasonable means;
(3) a personal appearance would be an undue hardship to the witness; or
(4) there are any other circumstances that constitute good cause for allowing the testimony of the witness to be taken by telephone.
Committee note. -- This section applies to the witness's unavailability to appear personally in court, not to the witness's unavailability to testify.
(f) When testimony taken by telephone is prohibited. If a party objects, a court shall not allow the testimony of a witness to be taken by telephone unless the court finds that:
(1) the witness is not a party and will not be testifying as an expert;
(2) the testimony is not to be offered in a jury trial;
(3) the demeanor and credibility of the witness are not likely to be critical to the outcome of the proceeding;
(4) the issue or issues about which the witness is to testify are not likely to be so determinative of the outcome of the proceeding that the opportunity for face-to-face cross-examination is needed;
(5) a deposition taken under these Rules is not a fairer way to present the testimony;
(6) the exhibits or documents about which the witness is to testify are not so voluminous that testimony by telephone is impractical;
(7) adequate facilities for taking the testimony by telephone are available;
(8) failure of the witness to appear in person is not likely to cause substantial prejudice to a party; and
(9) no other circumstance requires the personal appearance of the witness.

Michigan

(C) Criteria for Videoconferencing. In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the court shall consider the following factors:
(1) The capabilities of the court's videoconferencing equipment.
(2) Whether any undue prejudice would result.
(3) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.
(4) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
(5) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.
(6) Whether a physical liberty or other fundamental interest is at stake in the proceeding.
(7) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

(8) Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom.
(9) Whether the use of videoconferencing technology diminishes or detracts from the dignity, solemnity, and formality of the proceeding and undermines the integrity, fairness, or effectiveness of the proceeding.
(10) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.
(11) Whether the parties or witness(es) have waived personal appearance or stipulated to videoconferencing.
(12) The proximity of the videoconferencing request date to the proposed appearance date.
(13) Any other factors that the court may determine to be relevant.

Standards for telephonic and video appearance

Several states provide that their Administrative Office of the Courts will promulgate standards for the use of videoconferencing.[51]

There are two quite recent excellent technical reports on best practices for the use of videoconferencing for the appearance of parties and witnesses and the presentation of testimony. The first was developed by InfoComm – a trade group for technology vendors – with the help of an international group of experts. *AV/IT Infrastructure Guidelines for Courts* The URL is http://www.infocomm.org/cps/rde/xchg/infocomm/hs.xsl/38165.htm

The second is a report for the Administrative Conference of the United States focused on best practices in administrative hearings. *Best Practices for Using Video Teleconferencing for Hearings and Related Proceedings* The URL is https://www.acus.gov/sites/default/files/documents/Final_Best%2520Practices%2520Video%2520Hearings_11-03-14.pdf

A recent article on testimony by videoconferencing in Canada can be found at this URL. http://www.slaw.ca/2015/09/08/when-are-witnesses-allowed-to-testify-via-videoconference/

[51] Fla. R Jud Adm 2.530; Michigan MCR 2.407 F; Wash. GR 19;

A number of courts post on their websites the technical requirements for videoconferencing. An example from Florida's 9th Judicial District appears in the compendium. [52]

Technical requirements for telephonic appearances are set forth in many of the court rules and guidelines. They generally prohibit the use of cell phones[53] (although at least one court allows their use but warns users that they are responsible to ensuring a strong cell signal).[54] They prohibit the use of speaker phones, pay phones, and "voice over IP" computer-based telephone services.[55] Some require that parties "mute" themselves unless they are talking to prevent disruptive background noise.[56] They prohibit the use of the "hold" function.

Many courts explicitly pay attention to the right of the public to access court proceedings – requiring that videoconferencing be displayed in a manner that allows public viewing. Most vendor-provided and other forms of telephonic appearance include the broadcast of the voices of the telephonic participants so that they are heard in open court.[57] The California Court of Appeals requires that videoconferencing be available to the public at any of the courthouses where counsel or an appellate judge is participating. [58]

Courtroom procedures

The procedure for long calendars is the same whether a court uses a commercial vendor or not. All parties who are appearing by telephone "sign in" with the operator before the hearing begins (following the same process used in the courtroom itself for persons coming to court). All of the telephone participants remain connected and hear what is transpiring in the courtroom and the voices of other parties appearing by phone. When their case is called, they confirm their presence and then repeat their name each time they speak. In hearings that are conducted in chambers – such as a case management conference in a major civil case – the telephonic conference takes the same form as the in-person conference; only the parties to that case are on the phone.

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[52] INFO FROM WEBLINK 9th Cir Video Conference Hearings Probate & Complex Civil Litigation Courts

[53] Ill. 10th Judicial Cir Admin Order 14-07 C 3; 17C ARS Super. Ct. Local Prac. Rules, Yuma County, Rule 2(C); but see Baker Cir. SLR 3.051

[54] CA Super Ct Calaveras County Local Rules Rule 3.8 (D) (2); Ill. 18th Judicial Cir Memorandum Appearance Procedure 4

[55] E.D. Mo. L.B.R. 9070

[56] Ca. Super. Ct. Lassen County, Local Rules, rule 6 (c) (3)

[57] AK R Civ P 99 (c); ORS § 131.045 D; Washington Island Dist. Ct. LCrRLJ 10

[58] Cal. R Ct. 8.885 (b)(2)(C)

Judges in some courts do an initial sorting and prioritizing of cases on a long calendar – informing parties and attorneys in cases that are expected to take more time that they will be heard at the end of the calendar. This allows them to leave the courtroom and attend to other business until later in the morning or afternoon. Some courts use this same process for telephonic participants – informing them that their case will be heard at a later time in the morning or afternoon and giving them a specific time to call back on the conference call line. Courts that do not use such a process often include in their local rules that a remotely appearing parties must remain on the conference call line for the entire calendar – or until their case has been called and heard.

There is a disagreement among the courts concerning the preference to be given to cases on a long calendar when there are remote appearances. Some courts provide that cases will be taken in the order they appear on the calendar without reference to remote or in person appearance. In Missouri, the US District Court gives preference to cases in which a party has appeared in person.[59] In many California courts, the preference is given to cases with a telephonically appearing party.[60] In one California court, a trial judge must agree to that procedure in order to be able to use CourtCall in her or his courtroom.[61] It is possible that the interests of the commercial telephone services vendor are recognized in giving preference to remotely appearing parties.

Several courts require the presence of a notary public at the remote site where a witness is located – to identify the witness and to administer the oath in person.[62]

The role of court reporters remains unchanged in remote appearance hearings. S/he takes down the testimony as if the remotely appearing persons were present in the courtroom. A number of court rules expressly prohibit the recording of a telephonic hearing, presumably to protect the court reporter's exclusive property rights in a transcript.[63]

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[59] E.D. Mo. L.B.R. 9070

[60] Ca. Super. Ct. Napa County, Local Rules, rule 2.8 A 1

[61] Ca. Super. Ct. San Luis Obispo County, Local Rules, rule 7.13 B 1 (a)

[62] Fla. R. Jud. Admin. 2.530 (d)(3); Texas Blanco Cty Dist. Ct. Procedures 33rd Judicial District Rule Re: Courtcall Telephonic Appearances

[63] Ill. 18th Judicial Cir Memorandum Appearance Procedure 5

Technology options

The appendix prepared by Open Access Law Firm analyzes the telephone options available to courts. Mr. Morris and Mr. Whaley were asked to determine the availability of a model for telephonic appearances in a courtroom with a long calendar that would have the parties waiting in queue for their case to be called, but not having access to other proceedings in the court. From a review of the operation of current commercial vendor products, that model is not one that is currently in use, or sought. To the contrary, having all telephonic participants present in the courtroom for the full calendar – just as the persons physically present in the courtroom are – is seen as an advantage.

Free conference telephoning vendors – FreeConference.com and FreeConferenceCall.com – now provide any user the option of having a dedicated telephone number with its own PIN for use 24/7. No prior arrangement needs to be made with the vendor to reserve space for a specific number of participants (up to a very large maximum capacity). This service is free to the user. It does offer the option of digital recording for a fee. Similar service is available through some commercial business telephone applications. This free service appears to duplicate completely the telephone technology provided by commercial court telephone services vendors. It does not duplicate the service performed by these vendors of registering in advance the names of the parties and cases in which they plan to appear. But for courts willing to give the party the unfettered discretion to decide whether to appear telephonically or in person, such services are not necessary. The court can simply provide the call in number and PIN on all notices of hearing for which telephonic appearance is appropriate and dial in to the same number, using the same PIN, from a speakerphone in the courtroom to facilitate remote access at no cost to the court or the user.

The appendix describes an open source application developed by Open Access Law Firm using Twilio that it is willing to discuss with and adapt to the needs of courts seeking a customized, low cost teleconferencing solution.

The experience of one California court with videoconferencing technology is documented in the Resource Guide identified in the introduction. The courts in three northern California counties abandoned the use of Polycom equipment which requires a dedicated T1 phone line, and moved to an Internet-based videoconference solution. They initially used Skype but found that Zoom.us provided a higher quality resolution at a reasonable cost of $10 per month.[64] A court

[64] http://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf, at page 32

in Texas authorizes the use of Skype, FaceTime or similar technology.[65] West Virginia rules require that any videoconferencing application "provide a live signal transmission that is secure from unauthorized acquisition."[66]

[65] Texas Montgomery Cty Local Rule 14 Experts
[66] W. Va. Trial Court Rules R. 14.01 (d)(2)

Tab 4

Rule 3-115. Committee on resources for self-represented parties.

Intent: To establish a committee to study and make policy recommendations to the Judicial Council concerning the needs of self-represented parties.

Applicability: This rule shall apply to the judiciary.

Statement of the Rule:

(1) The committee shall study the needs of self-represented parties within the Utah State Courts, and propose policy recommendations concerning those needs to the Judicial Council.

(2) Duties of the committee. The committee shall:

(2)(A) provide leadership to identify the needs of self-represented parties and to secure and coordinate resources to meet those needs;

(2)(B) assess available services and forms for self-represented parties and gaps in those services and forms;

(2)(C) ensure that court programs for self-represented litigants are integrated into statewide and community planning for legal services to low-income and middle-income individuals;

(2)(D) recommend measures to the Judicial Council, the State Bar and other appropriate institutions for improving how the legal system serves self-represented parties; and

(2)(E) develop an action plan for the management of cases involving self-represented parties.