

OSB / OJD TASK FORCE ON OREGON eCOURT IMPLEMENTATION

FIRST INTERIM REPORT

APRIL 2010

First Interim Report of the OSB / OJD Task Force on Oregon eCourt Implementation

This first interim report of the OSB / OJD Task Force on Oregon eCourt Implementation was developed in order to provide the Oregon Judicial Department and other interested parties with feedback and comments received from Oregon State Bar members on the Oregon eCourt Program and to the August 2009 draft of UTCR Chapter 22, proposed to address many practice rules for the operation of the Oregon eCourt program. In addition to providing background on the program and on the task force itself, it is hoped that this report will aid in system development, particularly regarding remote electronic access to electronic versions of court documents, as the program moves forward.

Oregon eCourt

The Oregon eCourt Program is a business transformation project that will fundamentally change the way that the Oregon Judicial Department conducts business and interacts with the public and stakeholders, all in support of fulfilling the eCourt vision: "Oregon eCourt will give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve the lives of children and families in crisis."

The Program seeks to 1) enable the courts to resolve disputes more quickly; 2) improve access to court functions for all customers; 3) improve data sharing throughout the public safety and criminal justice community; 4) streamline the business functions of the court system; 5) provide decision support for criminal, juvenile, and family judicial dispositions; 6) provide decision support for court management; 7) provide data to measure and manage performance; and 8) migrate toward a paper-on-demand solution. Meeting these objectives will enable the courts to make better decisions and improve safety and quality of life for Oregonians.

The Program seeks to replace existing technology program systems in the courts, by implementing new components to enhance court operations. The program will integrate changes to processes, service delivery methods, and facilities with new

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technology to improve both the court experience for Oregonians and the utility of court systems and data.

The Oregon eCourt Program has several major components. The first is a statewide Enterprise/Electronic Content Management (ECM), which is an electronic document repository that will eventually allow subscribers remote access to electronic versions of many court documents. Additionally, non-subscribers would be able to obtain basic scheduling information and certain payment information. The second major component is e-filing in the courts, which will allow electronic remote Web-based filing of court documents. The ongoing plan is to perfect the internal ECM and the e-filing solution for small claims and landlord-tenant cases in the pilot courts of Yamhill, Multnomah, Jackson, and Crook/Jefferson Counties, and to then implement the e-filing solution for general civil cases in the pilot courts, prior to statewide implementation for small claims, landlord-tenant, and civil cases. Eventually, the Program will also replace the department's current case management system, the Oregon Judicial Information Network (OJIN), with a new, Web-based case management system.

The Oregon eCourt Program schedule has undergone review and significant alteration in the last several months, in large part due to budget considerations. In early 2010, the Program's governing body adopted a "Recalibration Plan" that set out a series of Program goals for the remainder of the 2009–11 biennium. Among others goals, the plan identified the following: 1) complete the small claims/FED ECM rollout to the remaining pilot courts (Jackson, Crook/Jefferson) by June 2010; 2) continue and complete work on the general civil ECM and begin rollout to the pilot courts beginning fall 2010; 3) obtain a multiple solutions/integration vendor by fall 2010; 4) with that vendor, commence work on an e-filing solution; and 5) work toward rollout of the e-filing solution to the pilot courts by or near the end of June 2011. The Program anticipates that the pilot court ECM and e-filing solutions will be rolled out to non-pilot courts during the 2011–13 biennium and that further work will continue during that biennium on remaining case-type solutions (criminal, domestic relations, juvenile, probate, and tax), together with planning for a remote electronic access component of the statewide ECM.

OSB / OJD Task Force on Oregon eCourt Implementation

The Oregon State Bar Board of Governors, at the behest of then-President Rick Yugler, and in coordination with Chief Justice DeMuniz, created the OSB / OJD Task Force on Oregon eCourt Implementation in 2008. The task force was established to assist the Oregon Judicial Department's eCourt implementation by providing feedback from Oregon lawyers. After initial meetings in 2008, the task force resumed monthly meetings in August of 2009, after the adjournment of the 2009 legislative session.

The task force was charged to work with the Oregon Judicial Department to:

- Assist in the implementation of the Oregon eCourt initiative over the next five years;
- Provide input and feedback from bar members on the implementation of Oregon eCourt;
- Develop a strategy to communicate with and educate bar members about Oregon eCourt programs;
- Provide periodic updates to the Board of Governors

The task force has assisted the court by providing feedback on business transitions, document conventions, and use of consistent nomenclature when referring to types of filings in the new eCourt system.

The task force has also provided guidance on the recently implemented UTCR 21, Filing and Service by Electronic Means, and the proposed UTCR 22, regarding electronic content management.

The task force solicited feedback from many bar groups whose members are likely to have access to the courts and involve the use of technology on the issues of maintaining confidentiality in documents filed electronically with the court and the practical and efficient use of technology in the courts.

Soliciting Feedback Regarding Online Document Access Issues

All members of the Task Force and court staff acknowledge that a tension exists between two important policy goals: the need to provide as much information to the public through eCourt as possible about cases within the court system, and the responsibility to maintain reasonable data security to safeguard sensitive information provided to the courts. An initial suggested balance of these goals is proposed in the draft UTCR 22, which has been drafted by and is under revision in various subgroups of the OJD Law and Policy Workgroup.

At the August 2009 meeting, the task force decided to pursue a two-tiered communication strategy.

1. **Solicit Feedback.** The task force targeted specific bar groups and provided information packets containing: a) memos by Lisa Norris-Lampe, Staff Attorney to the Chief Justice b) a draft of the proposed UTCR 22, and c) a memo from Chief Judge Brewer outlining the current status of eCourt. These documents were sent to the chairs of the Business Law, Business Litigation, Computer and Internet Law, Juvenile Law, Family Law, Estate Planning and Administration, and Criminal Law Sections, as well as chairs of the Procedure and Practice and Judicial Administration Committees, the Bar Press Broadcasters Council, and the Professional Liability Fund.

2. **Inform.** The task force informed the bar membership about eCourt status and progress at various stages of the project both in print and electronically through the Bulletin, the Capitol Insider, and the Bar News e-mail blast, and also posted information on the OSB Web site.

Framing the Questions

The task force asked these groups to help answer the questions of 1) how much information, which is now contained in public court filings available at the courthouse, should likewise be made available online; and 2) how to allow electronic access to these court records by the users in a practical and efficient manner.

In the first instance, the possibilities range from making the entire public case file available in an unredacted form, to permitting the public to see only basic docketing information, and making all other documents available only to authorized subscribers who have a relationship to the case. Other suggestions include making the entire case file available to all OSB members, but not to the public at large.

The draft UTCR chapter 22 is an initial attempt to balance the competing interests to protect personally identifiable information from inappropriate online dissemination. Among other provisions, UTCR 22 provides tools such as redaction and segregation to allow filers and the courts to protect information. The proposed UTCR intends to strike a balance between facilitating broad access to court documents and protecting personal information.

A working definition of "remote electronic access" to court documents is fundamental to understanding the feedback offered in this report. Although many particulars (such as cost) have yet to be determined, the general access model contemplated by the Program is similar to the federal court PACER model—that is, that most court documents would be available online, for purchase, to registered users through a subscription service of some sort. Documents stored in the statewide ECM would not, however, be retrievable through Google or another similar Web-based search engine. The Program has not yet determined the extent of the "search" parameters for the documents stored and retrievable through remote electronic access from the statewide ECM.

Bar Group Responses

Feedback from OSB members varies widely on the question of what information, documents, and case types should be precluded from display to at least some system users. Additionally, although different bar groups may understandably view the question from the perspective of their own practice area, there is a wide variety of opinion within any given OSB group.

That being said, members of bar groups that focus on a specific area of law (e.g., Estate Planning, Family Law, etc.) seem to frequently favor restricting access to information in court filed documents. Conversely, respondents from groups focused on procedural aspects of the system (e.g., Procedure and Practice, Judicial Administration) favored a system that allowed greater public access to court records.

However, this fact may say more about which individuals and practice groups participate in specific bar groups than about OSB members' attitudes toward eCourt generally. Additionally, this apparent trend could be due to the relatively small sample size of those who volunteered to provide input, and might not hold up if all OSB members were surveyed.

Federal System

Several lawyers suggested that Oregon eCourt should be implemented like the federal system, in which any document that is filed electronically immediately becomes available online. If a party wishes for an entire document to be unavailable online, it must file the document on paper and under seal.

However, in federal court, filers are still required to redact certain protected information (Social Security numbers, financial account numbers, etc.), and then the redacted version of the filing is available both online and at the courthouse. Also, on occasion, some documents filed in federal court are made available in the courthouse but not online, usually on a case-by-case basis.

Lawyers who are familiar with the federal system generally find it easy to work with and assume that any state system would follow similar principles. One commentator said:

I had assumed that all information filed electronically would be publicly available. In federal court, my understanding is that the only information not publicly available on the PACER system is information filed conventionally and under seal. Wouldn't state court follow the same course—anything e-filed is publicly accessible? Confidential information—like protected personal information under UTCR 2.100 or documents subject to a protective order—must be filed conventionally and under seal if a party doesn't want that information to be publicly available.

OJD should consider how to address practitioners' resistance to a state eCourt system that may provide substantially less immediate access to content.

Family and criminal practitioners may have a different view of this, but as a civil commercial lawyer, I think having an electronic system comparable to what the federal courts use for filing and accessing pleadings would have a substantial benefit. It would increase efficiency for litigants, reduce congestion in the clerk's office and free up the time of court personnel.

Even OSB members who do not work within the federal system often assume that the default rule would be that everything now publicly available would be available online.

The task force recognizes, however, that federal court practice differs somewhat from state court practice in at least three important respects. First, state court practice involves a different variety of case types that, by their nature, involve different types of personal information, such as sensitive personal facts, other than account numbers, in juvenile, domestic relations, and probate cases. Second, a significant number of state court litigants are self-represented. Third, state courts are subject to the “open courts” provisions of the Oregon Constitution, supporting a broad access policy regarding court documents (and disfavoring pervasive sealing of court documents). Those factors support development of a state court system that acknowledges the context of state court practice.

Defining Protected Information

Two threshold questions must be addressed before determining what methods are practical to limit case information displayed online, and to allow effective access to users. First, what information should be protected; and second, to whom should protected information still be available?

The proposed UTCR chapter 22 defines “protected information” for the purpose of limiting viewing via remote electronic access. This definition differs from other similar terms set out in trial court rules or statutory provisions, such as “protected personal information,” UTCR 2.100, 2.110; “confidential personal information,” UTCR 2.130; and public records exempt from disclosure, ORS 192.502.

Some respondents were surprised that more types of information might be excluded from display than in other online systems. This will require significant education of the legal community and others if the proposed UTCR 22, or something similar to it, is adopted.

Objections to this broader definition of “protected information” fall into three categories. The first concerns workload. Specifically, some lawyers object because (presumably) the more information is protected, the greater the workload on the

Specific Issues:

UTCR 22.050(2)

The proposed language would largely prohibit the inclusion of residential addresses in filings.

How should certificates of service be handled when they contain a residential address?

How do we address filings in which a residential address is the subject of the filing itself (e.g., foreclosures, FEDs)?

UTCR 22.050(3)

The proposed language would prohibit disclosure of the names of minors who are not “voluntarily a party to or subject of” the filing.

What minors fall into this category?

Do we require segregated pages when minors are the victims of a crime?

individual attorney to redact or segregate that information in the course of preparing court filings. The more information in that category, the longer it will take to prepare redacted or segregated filings, and the greater the likelihood for error.

The Bar Press Broadcasters Council raises a second concern—a philosophical objection that, as a matter of principle, information should not be limited more than required by Oregon’s public records laws. One stated purpose of the Oregon eCourt Program is to provide greater public access to Oregon’s courts. Any information that is unnecessarily excluded from online availability frustrates the broad policy goals of Oregon eCourt. A commentator from the Computer Law Section echoed this sentiment:

The Federal PACER system requires the filer to certify, via a checkbox, that sensitive information has been protected. But Oregon’s culture of open courts points toward a policy of minimal redaction—will the eCourt filer also have to certify that “no more than must be” has been protected?

A related concern is the question of who is ultimately responsible for ensuring that information is redacted “correctly.” This issue has been raised by several commentators, including the PLF and a member of the Computer Law Section:

Without touching on the current limitations of natural language processing or context-sensitive algorithms, it seems obvious that human judgment will be necessary to protect sensitive information. Accuracy and efficiency demand that the human in question be knowledgeable about the particular case. This suggests that the attorney filing the electronic document be given this duty (the PLF’s objections to the proposed UTCRs notwithstanding).

Limiting Online Access to Information by System User Type

As envisioned, the ECM will be a subscriber based system, similar to the federal PACER system, which allows only system subscribers access to records.

The specifics of the subscriber system are still being developed. Options include 1) Charging system users a periodic fee (weekly, monthly, etc.) for unlimited use, or 2) making account creation free, but charging user accounts for actual use of the system. This later option could charge users based on the time they are logged in,

Specific Issues:

UTCRC 22.100

The proposed language would create several subscription levels:

A free public view would permit viewing the next scheduled event in a case.

A public subscription view would allow access to the entire case file in most case types, except those parts that are segregated, redacted (either online or otherwise), or sealed.

An “Authorized Users View” available only to OSB members would display more documents than the public subscription.

A party/lawyer-of-record view that would permit access to the entire file, but only for cases in which the subscriber has a requisite relationship to the case

Questions:

Should any other categories exist?

Should OSB members have a level of access that is ever different than a member of the public?

Should non-subscribed public viewers be able to view a limited number of case files (as with PACER)?

the number of searches they run, or the number of documents they view. These issues are still under consideration by various eCourt working groups.

Regardless of the subscription method ultimately chosen, the basic architecture of the ECM will incorporate the idea of multiple levels of access based on user type. The current design contemplates four levels of access.

One “user view” would be a free public view, perhaps available without the need to create a user name. This view would allow the system user to view the next scheduled event in an active court docket, and would allow access to certain payment information, but would not allow access to individual court documents.

A second user view would be a “public subscription view” which would allow access to most documents within individual case files, except those parts that are segregated or redacted (either for online purposes or otherwise) or are sealed. It should be noted that non-redacted documents as well as segregated documents that are otherwise publicly available would still be available at the courthouse.

A third proposed user view would be an “authorized user view”. This view might be available exclusively to subscribers who are Oregon State Bar members. As officers of the court, these users would have access to additional material not available within the public subscription view. For example, there might be specific case types (Domestic Relations, Probate, Tax) in which certain types of documents would not be available online to a public subscriber, but would be available to an OSB subscriber.

Many OSB members have indicated that this third view is extremely important. One of the major values of ECM to lawyers is the ability to get information out of court files without the need to have someone run down to the courthouse. Without this ability, the value of ECM is reduced for many lawyers.

Finally a fourth proposed view has been referred to as a party/lawyer-of-record view. This view would allow access to virtually the entire case file, including some document types generally unavailable even to other OSB members. However, this view of a case file would be available only to a subscriber that the system identifies as a lawyer of record on a case, or another user who has specifically been given access by the court.

Many determinations about where to draw the lines between these four user views have not yet been made. Some of the issues and concerns are described in the next section.

Limiting Online Access to Information by Document and Case Type

Respondents differed as to who should have access to protected information, as defined in proposed UTCR chapter 22. Some practitioners want only those who are parties to a case to have access to the complete case file. (This would be a necessity in certain types of cases.) Others, including the Professional Liability Fund, advocate that all OSB members should have access to anything that is accessible physically through the court clerk.

Many bar members expressed concerns about making clients' "personal" information available over the Internet. Although these practitioners may see some value to migrating to an eCourt model, they also think eCourt could negatively impact their clients.

An example of such harm was expressed by the Estate Planning section. In probate cases, the court obtains extensive financial information including bank account information and the location and value of assets. Obviously, this information could fall into the wrong hands. Practitioners suggest that documents such as lists of assets be redacted so that this information is not available online. Some respondents also pointed out that, even if information is redacted, users could still find information regarding the size of the estate based on the filing fee.

Another concern with making this information public is that, in addition to concerns about identity theft, it could also be used for advertising. Some practitioners thought that their clients would be "slammed" with solicitations once probate information is easily available online. Additionally, a lawyer member of the Bar Press Broadcasters Council noted that access to probate case information could subject an estate to theft (e.g., thefts from unoccupied homes).

Although much sensitive information is now publicly available at the courthouse, many OSB members seem to think (correctly or incorrectly) that the need to go to the court to request the information deters both commercial users and persons who intend to use court file information to commit crimes.

The difficulty here is that technology allows significant amounts of data to be automatically extracted from online data sources, whereas the same information—while publicly available—is largely useless for commercial purposes when restricted to a paper file. Respondents expressed their belief that when eCourt is up and running statewide, data that is publicly available will likely be used for commercial purposes. The following comments from the Computer Law Section summarize this concern:

*Information on the Internet is collected by automated processes serving both legitimate and illegitimate purposes. Illegitimate purposes include outright criminal efforts, of course, but also commercial efforts that intentionally or unintentionally disregard sites' "do not access" requests. As new technologies are deployed to restrict machine access, new counter-measures to circumvent that technology keep pace. **Early in the 21st Century, we must assume that information available anonymously will be collected.***

Anonymous access, then, should be limited to information that cannot, by its nature, be sensitive. Conversely, access to possibly sensitive information should require authentication.

Authenticated access is the rule in PACER, and in the King County, Washington electronic filing system. By requiring an account to access potentially sensitive information, the potential to exclude machine collection is increased. Does it violate the spirit of open courts? No—if a citizen wished to view the non-sealed portions of the case file anonymously, they could do so at the courthouse, just as today.

If the existing data feeds from OJIN to other government and commercial systems are replicated by eCourt, then those "back channels" of access should be precisely controlled; it's no use to restrict access through eCourt's web site if every eCourt data element can be accessed through some other provider.

Additional Concerns with Redaction

Several respondents who favored restricting information also worried about the technical difficulty of doing so. One Juvenile Law practitioner commented:

The big issue with Juvenile is all of the confidentiality surrounding who has access to what records. It will not be a matter of just allowing all attorneys, or all CASAs or all of some other type of person, juvenile records are restricted to parties to the case, so each file will need to be restricted to only a few people having access. It will be a programming nightmare, especially when things will need to change due to attorney withdrawals and/or change in CASA or other person. That seems to be the major issue with juvenile records.

Others respondents expressed concern that the redaction required to make the system work in most cases would hamper individual lawyers (as well as their staff).

All of us are familiar with "redacted" documents we see in the US govt all the time; but they are the most unproductive causing the creator to do the document twice. The reaction and resistance of early users will be this double work.

A related concern has been raised by the Professional Liability Fund. The PLF is concerned that proposed UTCR Chapter 22 could be construed or interpreted to create civil liability based on an inadvertent disclosure of protected information. The PLF proposes the deletion of the language in draft UTCR 22.010(2) that specifies that the person filing the document is primarily responsible for avoiding disclosure of protected information. Additionally, the PLF proposes the inclusion of a provision clarifying that UTCR Chapter 22 is not intended to create civil liability based on the inadvertent failure to segregate or redact protected information or to label a document as a confidential document.

It appears from initial responses that, if redaction of filings is required, the courts may have to deal with a significant amount of resistance before users are able to adjust their business practices and become comfortable with the new system.

Other respondents expressed the concern that, if significant redaction is *not* required, we may see attorneys requesting—and judges allowing—documents to be filed under seal, contrary to current practice. Because this would make the document unavailable to the public both online and at the courthouse, this could actually result in *less* public access than the current system.

Finally, the task force acknowledges that training issues will accompany requirements for redaction and/or segregation of protected information in court documents. In addition to training lawyers on any new system to be implemented, significant training efforts must be directed toward self-represented litigants and potential litigants.

Public Access and Media Concerns

The counterargument to disclosing less information to protect parties to filings is that disclosing more information protects the public’s right to know what is going on in its court system.

Several respondents stated that limiting what material was placed online (except material that is currently not available to the public) was inappropriate considering Oregon’s history of maintaining an open government. One of the groups expressing this concern was the Bar Press Broadcasters Council.

A thorny issue raised by the Council is: what information should be subject to redaction?

Different sections of statute use the term “personal information” differently, and exactly how this term is ultimately defined may considerably affect the Council’s position.

In particular, the media would object to the redaction of dates of birth, which they note are often very liberally posted in other places on the Internet. This information is important, because the date of birth is often the best way to verify that two uses of the same name refer to the same person.

Related issues raised by the Council include concern that, if material is redacted, the user must have some way to quickly determine that redacted material exists. This would put the user on notice that they need to go to the courthouse to seek the material in person.

Specific Issues:

UTCR 22.040

Unlike in the federal system, which makes filings available online immediately, the proposed language would limit when a filed document becomes available online.

The purpose of this proposal is to address the reality that filed documents will not always be properly redacted or segregated, and therefore opposing parties need time to review the filing to protect their clients’ personal information.

Does this rule appropriately balance the public interest with the privacy rights of parties?

Are there any other ways to address this concern that wouldn’t limit the press’s ability to access court information?

The Council is also wary about any suggestions that there be a delay between when a document is filed with the court and when the material is available online. Because timely dissemination of information is key to the public's right to know, striking this balance will be important.

On the other hand, other groups—including the Computer Law Section—expressed explicit support for the delay, which they believe will be unavoidable given the logistics of requiring attorneys to redact documents, and the anticipated disagreements between parties over what information should be the subject of redaction.

The Council raised an open-ended question regarding fees charged to use the system. It had perhaps been hoped by some that a significant subscription fee would discourage use of the system by those with nefarious objectives. After discussion, the Council determined that they do not believe this to be the case, because anyone using the system for commercial purposes (as well as well-funded criminal purposes) would find any subscription fee a small price to pay for the benefit of the information.

Finally, the Council reiterated the concern expressed by others that making more information available online may inadvertently encourage lawyers to file an ever-greater number of documents under seal, simply as a way to keep client records offline.

Next Steps

As the task force has collected feedback on proposed UTCR chapter 22 and prepared this interim report, the OJD Law and Policy Work Group has continued to review and revise the draft UTCR. Additionally, the Law and Policy Work Group has created several small groups for the purpose of evaluating remote electronic access needs and issues in different case types.

The next steps for the Law and Policy Work Group include: 1) considering the task force's feedback on the draft UTCR chapter 22 and incorporating further revisions; 2) preparing a comprehensive report that includes an updated version of draft UTCR chapter 22 and also the "substantive law" group recommendations, as approved by Law and Policy, regarding access to documents and information in particular case types; and 3) distributing that comprehensive report to stakeholders, including the bar, for further input. After collecting input on that report, the Law and Policy Work Group will consider any final revisions and then begin to move its report through the OJD eCourt governance structure for consideration and approval.

The OSB / OJD Task Force on Oregon eCourt Implementation will need to continue to gauge the responses of OSB members to the Oregon eCourt Project as members learn more about it. To the extent possible, this task force should continue to provide

guidance to the OJD as members bring to light additional questions and concerns about the Oregon eCourt Project.

Recommendations and Conclusions

There appears to be broad support from Oregon State Bar members for the Oregon eCourt project. At the same time, many members have strong views about how the project should be implemented based on their own experiences with the court system. On balance, the task force recognizes the need for a carefully crafted compromise that addresses the concerns raised in this report.

The task force recommends that the Oregon State Bar Board of Governors specifically endorse the proposal for future development of the eCourt system that heightened access to the ECM be available to OSB members. This is an acknowledgment of two specific facts. The first is that in order to do their jobs efficiently, and in order to represent their clients to their best ability, lawyers need to access court records more quickly than most members of the public. The second is that as officers of the court, lawyers have an ethical obligation to ensure that sensitive records are handled appropriately, and they can reasonably be entrusted with greater access to sensitive information that would otherwise be available. For these two reasons it is appropriate for the system to be designed and implemented to entrust OSB members with the maximum level of access that is reasonably possible.

One of the keys to making the system work will be making sure that the rules and expectations of system users are clearly defined. This, in turn, will help ensure that the system provides a useful and understandable product for all users. It is our hope that this report will begin to shed some light on how best to accomplish that goal.