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Electronic Filing and Service:

An Evolution of Practice



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Executive Summary

The goal of our justice system is to resolve disputes. When seeking justice the parties expect the resolution of their case to occur in a fair, just, timely and cost effective manner. The basic process for resolving disputes is for the court to apply the law to what it finds to be the facts of the case and render a decision. The presentation of evidence to establish the facts, the legal arguments and the applicable law is accomplished through the exchange of information. The information is usually contained in documents that are prepared by the parties, filed with the court and served on each other. For centuries, the primary media of exchange of documents has been paper. Elaborate practices have been established, and now become entrenched, to prepare, exchange, store and manage what has become a prodigious amount of paper.

Recent advancements in technology have made it possible to exchange this information electronically instead of relying on paper. There are significant advantages to doing so, and courts should be actively pursuing this new approach. The objective of this report is to describe the new options for the electronic exchange of court documents, point out the significant advantages associated with them and identify the best means of realizing them. What becomes apparent is that the electronic exchange of documents offers significant savings and benefits to courts and lawyers. While savings from the reduction in paper handling are substantial, the opportunities to enhance the quality of documents and speed their production are also significant. Participants in the justice system must overcome the inertia of traditional practices and discover the advantages of exchanging and using electronic documents.

The key benefits of electronic filing and electronic service of documents are of several types. The most immediate is a reduction in the handling of paper documents and case files. This results in less need for and better use of court, clerk and law firm resources. In addition, greater confidence in the completeness of the court's case file builds over time, as there are no lost or misplaced documents. Everything that should be in the case file is and is available instantaneously when needed. Being able to quickly call up electronic documents on a screen means more rapid access to documents by judges and court staff. Documents in electronic form can also be simultaneously accessed by several people, including attorneys and the public.

Having documents in electronic form offers several other advantages. Information can be found faster in electronic documents because of the ability to search for words and phrases and the option of including electronic tabs and indexing. It also permits cross-references within a document and hyperlinks to other documents and to legal databases, which can enhance the quality of the documents and the effectiveness of their legal advocacy. The ability to link documents opens up new opportunities to improve productivity in document preparation and review and enhance the quality of justice received by litigants. These benefits are simply not attainable with paper documents.

Achieving the maximum level of benefits from electronic exchange of documents requires a combination of features and functionality. The system to do this should include both electronic filing of documents with the court and electronic service of documents on all parties. Further benefits are possible if the electronic filing and service system is integrated with the court's case management system (CMS) and document management system (DMS) so that data is transferred without the need for re-keying of data by the court or clerk. A law firm with a CMS or DMS can realize additional benefits by integrating its systems with the electronic filing and service system.

There are several ways to exchange documents electronically, ranging from simple e-mail to sophisticated systems designed specifically to maximize the benefits of electronic filing and service. Few benefits can be realized from simply e-mailing documents. The more features and integration that are included in an electronic filing and electronic service system, the greater the benefits are to users. Experience suggests that developing a sophisticated electronic filing and service system with the features and support needed to achieve maximum benefit requires significant resources and time. Many courts are simply not able to acquire sufficient resources to develop a system and rely on third party vendors to build and support robust systems.

With all of the advantages of the electronic exchange of documents, it is appropriate to ask what the impediments are to the approach. There are obvious barriers such as the normal resistance to change and having to learn new ways to do work. Some resistance may be based on a fear of repeating past mistakes when implementing a new information technology project. Some resistance may also come from not having fully realized promised savings from previous technology projects. Adopting electronic filing and service also requires the up front commitment of resources, whereas the expected savings accumulate over time. Obtaining management support to overcome these concerns is made harder by the fact that the more obvious savings are to clerks and legal secretaries, not judges or attorneys. Judges and lawyers may need to use the system to fully appreciate the benefits but are reluctant to support implementation, having not yet experienced the benefits. None of these challenges is overwhelming, nor are there new technological barriers to overcome. With a commitment to improving processes and good project management, a jurisdiction can readily implement e-filing and e-service and experience the advantages and savings of this new business practice.

Implementing e-filing and e-service can take advantage of the experiences of a significant number of courts across the country which have already embraced electronic filing and service and realized significant benefits. To date, millions of documents in hundreds of thousands of cases have been filed and served electronically. There have been no reported "disasters." Many of these courts are actively expanding the use of electronic filing and service to more cases and more case types. These pioneer courts have worked through the problems, sorted out the better practices and can demonstrate savings and enhanced productivity. The efficacy and value of electronic filing and service to the court, to litigants and to the public has been amply demonstrated, and it is ready for general use by all courts.

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I. Introduction

What fuels the decision making process of the justice system is the exchange and consideration of information between parties and the court. Traditionally, information has been exchanged by using paper documents. Documents are filed with the court and served on all parties. It is now technologically feasible to exchange documents electronically instead of in paper form. There are significant advantages to the electronic exchange of documents. The process of electronically filing documents in a court setting is commonly referred to as electronic filing, or e-filing, and electronic service on parties as e-service. The objective of this report is to describe how this process works, identify what practices are more effective than others and identify the benefits and savings derived from the electronic exchange of court documents. The report focuses on state trial courts because of their common characteristics and the advantage of sharing experiences.

A. Background

In many sectors of our economy today businesses, organizations and governmental agencies are encouraging, even requiring, the exchange of information related to transactions to occur electronically. The auto industry conducts almost all of its purchasing of parts electronically. The federal government is actively promoting e-government.¹ Income tax returns can be filed electronically. The SEC recently adopted rules requiring electronic filing of some SEC forms. The judiciary has also been active in this area, with a number of state and federal courts across the country conducting pilot projects involving e-filing and e-service in individual cases or categories of cases.

Traditionally, courts have been paper based—information is in documents that are exchanged in paper form. Currently, most law offices produce court documents electronically and then print them out to file and serve them. Paper allows a certain technological independence between author and reader. It does not matter how the document is produced, whether with a word processing program, using document assembly software, or on a typewriter, or whether it is a form filled out by hand or using a typewriter. However it is produced, the end result is a paper document that is filed with the court and served on the other parties.

Handling all this paper—generating it, filing and serving it, and maintaining it in case files—involves a significant amount of staff time, in both the clerk's office and in law firms. Since court records are maintained in paper form, the major activity in the clerk of court office is the movement and storage of the paper case files. The volume of paper associated with court files is significant. Because of this, any new approach that reduces the burden of handling the paper must be very seriously pursued.

¹ E-Government Act of 2002, Public Law 107-347, 116 Stat. 2899.

At the same time as the shift to producing documents electronically has been occurring, there has been a reduction in the geographical isolation of courts and law firms. Improved transportation, improvements in communications abilities and the growth of businesses operating at more than one location means that litigants and their lawyers are not exclusively local. Attorneys and law firms now commonly practice in more than one court jurisdiction, especially in metropolitan areas. Consequently, when courts consider changes in the nature and quality of service they provide, they must consider the impact on lawyers who may practice in many courts. If they adopt new practices that are significantly different from those of other courts in which the lawyers appear, they are adding to the burden and cost of litigation for the clients of these lawyers.

The electronic exchange of documents is more than a new medium of exchange. It is a different way of doing business, one which can affect virtually every aspect of the handling of the court record. E-filing changes the way the court record is maintained, relieving the clerk of the burdens of handling so much paper. E-service not only changes the way documents are exchanged between parties but also provides new opportunities for preparing documents. Making the transition from paper to electronic documents requires changes in how people do their work and what types of support they will need to do an effective job. However, this is no longer a “bleeding edge” technology. A lot has been learned, and the use of e-filing and e-service is a mature practice.

B. Objectives and Scope

This report has two goals. The first is to provide a general description of what e-filing and e-service are about. The intent is to provide basic information to someone who is trying to understand this new way of doing business and how it might affect them or their work. It seeks to answer the frequently asked questions. It is not intended as a history of e-filing. The second goal is to identify and discuss the major components and alternative approaches of effective electronic filing and service practices. This serves to both provide an assessment of the current state of e-filing and e-service and to assist anyone who is contemplating implementation of e-filing and e-service in a jurisdiction. The report does not provide a detailed roadmap for how to plan and implement e-filing and e-service. Rather, it provides guideposts and benchmarks in the ongoing effort to take advantage of this new technology to improve the administration of justice.

The proper filing and service of documents is critical to the operation of the justice system. Given the variety of cases and courts, there is never only one way to do things. What practices are most effective, operationally and from a cost standpoint, for filing and serving documents depends on a variety of factors. Among the relevant factors are the types of cases heard, the volume of cases, the volume of documents in cases and the length of documents. The choice of practices is also affected by the types of litigants, the proportion of self-represented litigants, the number of lawyers and the concentration of lawyers by case type. All of these factors should be taken into consideration when determining whether, and how best, to introduce the electronic filing and service of documents. While not every court would benefit from one approach, some

approaches are better than others. Therefore, this report will identify how various factors influence the approach taken and what practices appear to be generally more effective than others in given circumstances.

Clearly, changing practices about how documents are filed and served by introducing electronic filing and service can produce savings and improve operations. However, it is not a magic pill that will suddenly cure existing problems or needs. It will not immediately reduce backlogs in document processing or solve file management problems in the clerk's office, but it certainly can alleviate them over time. The reduction in the cost of maintaining court records begins gradually but becomes significant fairly quickly. It will allow courts and clerks to cope with growing workloads without the addition of staff. It does not, by itself, answer some needs, such as providing help to self-represented litigants. However, when integrated with other solutions, it can enhance access to the courts for litigants and the public. E-filing and e-service, in conjunction with sound business practices and good management, will improve the quality of justice.

C. Basic Terminology

This report uses several basic terms as a shortcut for describing a concept or in order to encompass an activity that can be called by a number of different terms in different jurisdictions. Other terms are defined in the Glossary at the end of the report. The basic terms used here include:

E-filing — refers to the electronic filing of documents with the court.

E-service — refers to the electronic service of documents on parties to a court case.

Clerk — refers to the office of the clerk of court and the staff in the office, that is, the office that is responsible for maintaining the court case files that contain all of the documents filed in a court cases and the decisions of the court as recorded in court minutes or judgments.

CMS — refers to a Case Management System, an automated system for keeping track of a court's cases, the documents filed in cases and the hearings set in cases.

DMS — refers to a Document Management System, an electronic database containing documents in electronic form and structured to allow quick access to documents based on traits associated with the document, such as case number, filing date, filing party, type of document, etc.

D. Audience

This report is intended to serve several audiences. It is primarily intended for judges and court officials in jurisdictions that are considering the introduction or expansion of e-filing and e-service. It also is directed to the lawyers who practice in these jurisdictions. The report can also assist policy makers and those who fund courts who may be asked for funding to implement e-filing or e-service. By providing information about what e-filing and e-service involve, the benefits and what the key legal and operational issues are, it can help inform policy deliberations and funding decisions. It is also relevant to anyone who simply wants to know what e-filing and e-service are all about.

E. Structure of Report

This report is structured to move from the basics to more specific concerns. It begins with a description of what e-filing and e-service are all about. This is introduced by first describing the current paper-based practices for producing, filing and serving court documents. This provides a frame of reference for the subsequent description of typical e-filing and e-service practices and for identifying advantages and benefits. After explaining the basics of how e-filing and e-service typically work, there are discussions about the key issues that often arise in a shift to e-filing and e-service. These include such issues as the legal authority for e-filing, signatures, the format of electronic documents, filing fees and costs, required technology, etc. Recommendations and best practices are identified in the descriptions of the models and options. Having defined the basics, the report then considers e-filing and e-service from the perspective of each of the participants in the process – the judge, clerk, attorney, etc. Each section reviews the goals and benefits of e-filing and e-service to that class of users, the typical concerns expressed and options for relieving the concerns. Profiles of several existing e-filing and e-service jurisdictions are included as examples. A glossary of commonly used e-filing and e-service “terms of art” is provided, as are background references.

II. What Is Electronic Filing And Electronic Service?

This section of the report will describe the basic elements of e-filing and e-service in comparison to the traditional paper based methods of filing and service. The objective is to provide a basic understanding of what is involved and provide a context for the discussion of options and benefits.

A. The Existing Paper-Based Practices

In order to appreciate fully the impact of e-filing and e-service, it helps to understand the current practices and procedures in the paper world. The basic steps in producing, filing and serving a paper court document are as follows. A law firm or self-represented litigant prepares a document to be filed in a court case or served on other parties. The vast majority of the time the document is created in electronic form, either using a word processor or a document assembly program.² Some types of court documents are paper forms filled out by hand or using a typewriter.³ In some states the use of some forms is mandatory.⁴ When the document's author is satisfied that the document is ready for filing, if it is in electronic form, it is printed out. The paper document is then signed if a signature is required. The next steps are to file and serve the document.

If the document is to be part of the court record,⁵ it must be filed with the court and the appropriate filing fee paid. How the document is delivered to the court for filing is the choice of the party preparing the document. Someone⁶ can physically deliver the document to the clerk's office at the courthouse and pay the applicable filing fee. Alternatively, the document and filing fee can be delivered to the court using the postal service or a document delivery service. In some states parties are also allowed to file documents with the court by faxing the document. The cost of document delivery is a matter between the document's author and the delivery vendor, a transaction the court seldom regulates.

Payment methods for the filing fee are generally limited. Most clerks only accept cash, check, money order or, increasingly, credit cards as payment methods. A few clerks allow draw down accounts that they maintain for attorneys.

² A document assembly program provides choices for paragraphs or clauses that can be combined into a document for filing. Note that the concept of e-filing, as described in this report, does not include document assembly, although e-filing could be integrated into the 'back end' of a such a program to file a document once it has been assembled.

³ Examples of documents more likely to be filled out by hand include a civil case cover sheet in a civil case or an Income and Expense Declaration in a dissolution of marriage case. Court forms could also include forms a self-represented litigant purchased at an office supply store or downloaded from a web site.

⁴ For example, California's Judicial Council has authority to adopt forms whose use is mandatory (California Government Code, section 68511 and California Rules of Court, Rule 201.1).

⁵ Not every document prepared in a case must be filed with the court. For example, in many states, discovery requests, such as a request to produce documents, or a notice of a deposition, are not filed with the court. These documents must still be served on all parties in the cases.

⁶ Delivering the document to the court can be done by the party, someone from the law firm, or a messenger hired by the party of law firm.

The response of the clerk's office to the filing of a document is essentially ministerial in nature. The clerk's staff checks a document submitted for filing to see that:

- 1) The format (not content) of the document complies with applicable laws and rules,⁷
- 2) The case number and party names in the caption of the document match, to avoid documents being filed in the wrong case file,
- 3) There is a signature of the party or attorney, if required, and
- 4) The correct filing fee has been paid.

Note that the clerk checks for a signature where one is needed but does not authenticate the signature. If there is a question about the signature, it is left up to other parties to raise the issue. If the document fails to comply with any of the above requirements, it is returned to the party who submitted it for correction. Having the document returned can be very problematic, especially if there is a deadline for the filing of the document.

If the clerk accepts the document for filing, there are several additional steps the clerk must take. The clerk puts a "file stamp" on the front page of the document indicating the document has been officially filed with the court. The stamping is done mechanically, and there is often a signature or initial of the clerk staff accepting the document added to the stamp. The document is deemed filed on the date on which the clerk attaches the file stamp, regardless of when the document was mailed or delivered to the court. If a party wants to guarantee that a document is filed on or before a deadline, they can take the document to the court and wait at the filing window for immediate review. If the document is accepted, the filing date will be the day it is brought in.

Most courts are required to maintain a list of all documents filed in a case, generally in what is referred to as a "register of actions" or "docket." Each new document is noted in the register either manually in a book or by data entry into a CMS that serves as an electronic register of actions. The register is maintained to keep track of what documents were filed and should be in the case file and for preparing the record on appeal.

There are additional steps if the document triggers a court hearing. The clerk must add the case to the appropriate calendar, either manually or by entering the date in the CMS. When the hearing date arrives, the clerk must pull the file and deliver it to the courtroom for use by the judge, court staff and litigants. After the hearing, the file must be returned to the shelf.

⁷ Format requirements deal with such things as the size of the paper, the font size, margins, proper caption, and use of proper and current form where it is required that a form be used.

Some clerks have instituted imaging programs whereby all documents filed are scanned and the image maintained in a DMS. Ironically, with imaging the clerk is converting back into electronic form a document that the party originally produced electronically and converted to paper for filing. Imaging is done either for the purpose of archiving or to provide simultaneous and faster access to documents. If the clerk is imaging documents, the newly filed document must be prepared for scanning. Preparation involves disassembling the document, checking for double sided pages or non-standard pages and removing tabs and any other items that would interfere with scanning. After the document is prepared, it is scanned and then must be reassembled before being put in the case file.

Finally, the clerk's staff must locate the case file, pull it from the shelf, place the new document in the case file and put the file back on shelf.

The file must also be pulled by the clerk whenever someone, whether it is an attorney, a party, a representative of the media or a member of the public, wants to see a document or obtain copies of documents in the file. After viewing the file or making copies, the clerk must return the file to the shelf.

All of these tasks take a significant amount of clerk's staff time. Although each step described may take only a little time, aggregated over thousands of documents, the cost is substantial.

In addition to filing the document with the court, a law firm or litigant must serve a copy of the document on all who are entitled to receive it.⁸ It is important to note that far more documents are served than are filed, by a factor of 6 to 1. This is attributable to both the fact that there are generally several parties served but only one court filing and because some documents that are served need not be filed with the court.

After a document is printed and signed and before it is filed with the court, it must be copied and arrangements made to serve all of the parties. In many states the document that initiates the case must be personally served⁹ on each defendant or respondent. Subsequent documents can be served either by personal service, by the postal service or a document delivery service, or, in some states, by fax. Each law firm or party in a case must maintain a service list of all the parties to be served, which includes the name of the person designated to receive service and the correct mailing address. Serving the document on all parties is the responsibility of the party who prepared a document. The choice of service method is up to the party serving the document. The method of service, including the cost, is a business transaction between the party and service vendor, seldom regulated by the court.¹⁰

⁸ Generally every party who has made an appearance in a case is entitled to a copy of every document filed with the court or exchanged among all parties, even if it does not involve the party.

⁹ Personal service generally can be by anyone, as long as they are not related to the party serving the document.

¹⁰ In some states, courts have a responsibility to license process servers who serve documents.

The method of service chosen can have legal impacts as well as cost aspects. Often service statutes provide for different time frames for service depending on the method of service selected. For example, a document must be served earlier if service is by U.S. mail than if it is personally serviced. Generally, prolonged time frames are required for slower delivery methods.

When a document is received by a law firm or a litigant, there are series of actions that must be taken. The mail or delivery package is opened and a determination is made as to who needs to see the document. The document is then routed to that person in order to prepare a response, if needed. If the firm has a DMS, the newly received document must be transferred into the DMS. Transferring the document may require data entry about the document, scanning of the document and linking the image to the case. Again, scanning converts a document originally prepared electronically, then printed out, back into electronic form. Finally, someone must find the law firm's case file, insert the document into the file and return it to the file storage system.

The existing practices for the production, filing and service of court documents reflect the evolution of technology and of business practices in the court, the clerk's offices, and in law firms. The evolution is from a completely paper-based practice. Most clerk and court activities continue to be paper based. A significant portion of the clerk's staff is devoted to maintaining and moving paper case files. When computers came into general use, the first evolutionary step taken by courts was the development of an automated CMS to keep track of cases, documents and hearings. Law firms began by using word processors to produce documents. It is important to note that the extent to which information technology is used to assist business practices is based on the incremental, piecemeal and independent exercise of discretion by each clerk's office, court and law firm. There was no grand plan coordinating or integrating the introduction of technology across all courts or law firms. As long as the exchange of documents between parties and the court occurs on paper, the entities on either side of the exchange are technologically "decoupled." Either side's choice of technology (software or hardware) does not bind or conflict with the choice of the other parties because the medium of exchange is paper.

B. The Electronic Filing and Service Alternative

With an electronic filing approach, the attorney or self-represented litigant prepares a document in the same manner as before.¹¹ The major change occurs once the document is created. If the document is produced in electronic form, it is filed or served electronically, instead of being printed out and physically delivered to the court or parties. The filing can occur from the same computer that was used to generate the document. The document can also be simultaneously

¹¹ As conceived here, e-filing does not include the creation of a document using a document assembly program or filling out an electronic version of a court form. See footnote 2.

served on all parties electronically,¹² again avoiding the need to print out the document and mail or deliver it to the parties.

Some aspects of existing practices will not change, although they may be done more efficiently. When it is received, the clerk must still review the document submitted for filing against existing filing requirements, namely, proper format, a match of the case number and party names in the caption, a signature of the party or attorney, if required, and payment of the correct filing fee. The clerk can check these items by viewing the document on a computer screen without printing out a copy of the document. Moreover, some of these tasks can be checked automatically by the e-filing system, avoiding the need for further clerk review. For example, the appropriate fee may be determined by the e-filing software using a fee table prepared by the clerk's office and automatically charged to the filing party. In addition, the filing of the document through a password protected e-filing system may be deemed to satisfy any signature requirement. Having some requirements addressed automatically reduces the likelihood of documents being rejected.

If the clerk is satisfied that the document meets the filing requirements, the clerk accepts the document for filing. This can be done by the simple click of an "accept" button in the e-filing window. This click can initiate a number of actions, none of which require any further action by a clerk, assuming the functionality is built into the e-filing system. For example, the e-filing system could:

- Enter data about the new document directly into the court's CMS register of actions. This information could include such data as the type of document, date filed, which party filed it and filing fee information needed for accounting purposes;
- File the document in the court's DMS with appropriate links to allow access to the document;
- Add a court date to the appropriate court's calendar if the document relates to a court event; and
- Alert a judge or court staff that the document has been filed and is ready for review and action.

Since the document is in electronic format and the e-filing system takes care of storing the document, the clerk no longer needs to:

- Pull the case file from the shelf, put the new document in the case file and put the file back on shelf;

¹² See Standard 1.2A Service of Filings on Opposing Parties in STANDARDS FOR ELECTRONIC FILING PROCESSES, TECHNICAL AND BUSINESS APPROACHES, hereinafter referred to as STANDARDS FOR ELECTRONIC FILING PROCESSES.

- Pull the file, deliver it to the courtroom and then return it to the shelf whenever there is a court hearing involving the case (although the court may want to print out a copy of the document to use in preparing for or conducting the hearing); or
- Pull the file from the shelf and then return the file to the shelf after it has been examined whenever someone wants to see the document or obtain copies. When someone wants to see or copy a document, it can be retrieved through any computer that has access to the e-filing system. If someone wants a hard copy of the document, it can even be printed out without the involvement of the clerk's staff.

Since an electronically filed document is sent to a computer, and no individual needs to be present to receive it, e-filing can occur at any time of the day or night.¹³ If this is allowed, it potentially extends the work day in law offices past the time the clerk's office closes.

The option of electronic service also changes the workflow in the law firm, both in serving documents and receiving them. Some e-filing systems include e-service whereby service is accomplished simultaneously with the filing of the document; one click triggers both actions. There is then no need to print copies, prepare and stuff envelopes for mailing or delivery to the parties, or arrange for a service to file and serve the documents. In addition, a single service list can be maintained as part of the e-service system, eliminating the need for each party to maintain a service list.

Electronic service also changes practices in the attorney's office regarding the receipt of documents. Instead of opening the mail or receiving deliveries, someone must check e-mail or an e-filing Web site for new documents. The electronic document must still be routed to the appropriate attorney or staff person to determine the need for a response. A process and mechanism must also be established for storing documents in the law firm's DMS, if they are kept locally as opposed to on the e-filing system's server.

Clearly, the introduction of e-filing and e-service can significantly reduce the work required to process new documents and maintain and move case files. The extent of relief depends on the nature of the e-filing and e-service system adopted and the extent of integration of the e-filing system with the court's or law firm's existing CMS and DMS.

¹³ See Standard 1.2D Availability of Electronic Filing Process in STANDARDS FOR ELECTRONIC FILING PROCESSES.

III. Electronic Filing And Service Options

The descriptions of the paper-based and electronic filing and service processes identify a number of points where there are process choices about how something is done or who performs the task. Moreover, some aspects of electronic filing link the parties in ways that require their agreement as to how things are to be done. This section of the report reviews the options and possible alternatives for several key aspects of a system. The topics discussed more fully below are as follows:

- E-filing and E-service Business Models – alternatives for electronic filing and electronic service practices;
- Service of Electronic Documents;
- Participation;
- Form and Format of Electronically Filed Documents;
- Timing of Filing and Service;
- Signatures;
- Filing Fee Determination and Payment Methods and Costs;
- Technology Requirements; and
- Legal Authority to Electronically File and Serve.

A. Electronic Filing And Electronic Service Models

There are several possible models for how court documents can be exchanged electronically. Within the context of this white paper, three basic models are discussed here, representing a spectrum of approaches. The first model is the simplest, using e-mail as the medium for exchange. With this approach, the authoring party files and serves a document by e-mailing it to the court and to other parties. Another model is for a court to develop an e-filing system for use in cases pending before that court. The third model involves a third party vendor developing a system for filing and serving documents between the court and participating law firms and self-represented litigants in a jurisdiction. The discussions note options each approach offers and provides comparisons based on ease of use, cost for development and operation, possible functionality and user training and support.

E-Mail Exchange

The simplest model is one where, when a party wants to file or serve a document electronically, the party sends an e-mail to the court and all parties with the document attached. Each party and the court must establish its own e-mail account through which it sends and receives documents. The court and each party involved must regularly monitor e-mail for new documents in their cases and respond as needed. Data entry into the CMS is still required for the new document. The court and each party must also develop for their own internal use a DMS for storing and retrieving electronic documents received via e-mail.

Utilizing this approach, the court and each party is responsible for its own operations, as it is now in the paper-based world. The approach requires the court and every party that chooses to accept documents electronically to establish an e-mail account and to notify each other of their address. Selection and costs of the e-mail vendor and DMS remains the responsibility of the court and each party. Training users on new practices would be the responsibility of the court and of each law firm. The training would involve use of e-mail, if not already available the proper protocols for filing and servicing documents and use of the court's or law firm's internal DMS, if any.

The approach places a burden on each participant and his e-mail provider for technical support and reliability regarding e-mail availability, security of delivery and proof of delivery. Most e-mail providers probably do not contemplate being used for delivery of court documents, in particular being involved in disputes about whether and when a document was sent by e-mail, or when and by whom it was received. Any breakdown of the Internet, internal networks or the e-mail provider would be the responsibility of each party. The volume of junk e-mail and imperfect filters would also interfere with the efficient use of e-mail for filing and serving documents. Finally, e-mail systems are highly susceptible to viruses and hackers, making reliability a major concern.

In order for this approach to work, there must be prior agreements between the court and the parties regarding the acceptance of documents delivered by e-mail, a means of paying filing fees, the acceptable format of electronic documents sent by e-mail, what constitutes good service, the timing of service, etc. An agreement on these issues would have to be orchestrated between the parties and the court in each case or be reflected in a set of court rules governing cases where documents are exchanged by e-mail. The rules could apply to all cases or only to those cases where all parties have agreed to e-filing and e-service. Attorneys practicing in more than one jurisdiction would have to learn the protocols unique to each court that permitted e-filing.

One particularly problematic aspect of this approach is the method by which filing fees would be paid. Each party opting to submit documents to the court electronically would have to establish some manner of paying filing fees. Options include establishing a deposit account with the clerk or providing a credit or debit card account number to the clerk with authority to charge filing fees to the account. The clerk would have to establish procedures for the payment of fees or establish relationships with financial institutions allowing credit or debit card payments. While this is feasible, it represents additional work for the clerk.

While the e-mail approach would eliminate the printing and handling of paper in cases, it amounts to little more than an alternate document delivery system to the mail or delivery services. It cannot effectively achieve many of the potential benefits of e-filing and e-service systems. The clerk would have to establish a system for payment of fees for documents sent by e-mail. The court or clerk would still have to perform data entry into its CMS for each document received by e-mail. To manage the electronic documents sent by e-mail, the clerk would need to develop or purchase a DMS and establish procedures for data entry into the system. The court and each party would still have to generate and maintain service lists for each case. The case file would not be available on-line unless the clerk made this possible using a DMS. Law firms that chose to manage documents electronically would also have to establish systems and data entry procedures for their CMS, DMS and fee accounting systems.

The e-mail approach can also create technology conflicts. All parties involved would need to use the same word processing software to produce documents or each must acquire software to read documents sent to them in other formats. Use of e-mail also risks unintentional sharing of viruses and a susceptibility to hackers. Finally, there can be problems with large documents. Some e-mail systems do not permit the exchange of documents over a certain size or require special arrangements to do so.

While this approach appears simple and straightforward, it involves multiple, separate systems which are not integrated (e-mail, case management, document management and fee payment) and disperses technical responsibilities and training among all involved parties. It also does not achieve any of the potential benefits of e-filing and e-service beyond elimination of the handling of paper documents and may actually add work for the clerk regarding fee collection.

Court Based E-filing Package

Another, more sophisticated, approach is for a court (at the local¹⁴ or state level¹⁵) to develop an e-filing system for use in cases filed in that court. When a party wants to file a document, the party would log on to the court's e-filing system and submit the document. In general, the process of submission also involves the party keying in information that describe the document being filed and information on the filer.¹⁶ This information is transferred into the court's CMS, thus avoiding data entry by the clerk. The party would also indicate how any filing fee is to be paid.

¹⁴ For example, the King County Superior Court in the State of Washington is in the process of developing an e-filing system as part of its Electronic Court Records Program. For a description of the project, see <http://www.metrokc.gov/kcsccecr/ecrsum.html>, "Plans for Electronic Filing in King County," by Paul Sherfey, Barbara Miner, and Catherine Krause, Washington State Bar News, September 2003 (available at <http://www.wsba.org/media/publications/barnews/2003/sept-03-sherfey.htm>) and "King County Superior Court – From Imaging to E-Filing," Sue Larson, E-FILING REPORT, vol. 2, no. 6, May 2002, pages 9-11.

¹⁵ For example, the New York State Unified Court System has established a pilot program referred to as "Filing by Electronic Means" for certain types of civil actions in three counties. The home page for the programs is located at: <http://fbem.courts.state.ny.us/ef/mainframe.html>. The federal courts have also initiated e-filing systems, see http://www.uscourts.gov/cmecf/cmecf_about.html.

¹⁶ See Standard 1.1F Data Accompanying Submitted Documents in STANDARDS FOR ELECTRONIC FILING PROCESSES.

The benefits and costs of a court-based system would depend on the features and functions built into the system by the court. A basic system would need to address the same protocol issues required by the e-mail-based system described above. Presumably, the system would also address the document storage and retrieval issues, at least for the court, by integrating the e-filing system with the court's CMS and DMS. It could also address the fee payment question by, for example, integrating and automating payment of fees by credit or debit cards, ACH accounts¹⁷ or attorney fee accounts.

The extent of additional benefits realized from this approach depends upon how much functionality the court builds into its system. If the court decides to provide services beyond just e-filing to participating law firms and litigants, the most significant would be e-service and allowing access to e-filed documents to all parties. These options provide little, if any, benefit to the court, so there is no particular incentive for the court to add these features. Moreover, this would involve the court in service of parties that is, in the paper-based world, left to the exclusive control of law firms or litigants. The court would need to decide whether to take on the responsibility of providing training and technical support to those using the system, in particular the users in law firms and self-represented litigants. The court would also need to take on the responsibilities for communication protocols, system reliability and protection from abuse, fraud and hackers.

If the court's system does not provide specific benefits to law firms, or they are expected to provide their own internal training and support, there is little incentive for them to participate. This will slow implementation and delay the realization of benefits for the court. While the court could promote its system, this type of marketing activity is quite foreign to most court and clerk staff. While a court could provide training and support for law firms and other users, assembling the resources to develop and offer this sort of training and support is not a function typically supported by today's court or clerk's office.

The primary impediment to the development of a full-service system under this approach is financing the development and on-going operation of the system. This is particularly true regarding features that primarily benefit attorneys and the costs for training, on-going support, and maintenance that are essential to a successful e-filing and e-service system. Legislative funding bodies may be unwilling to provide public resources to develop and operate such a system. Developing the system may then necessitate a combination of public support and user fees.¹⁸ However funded, this approach places a new and on-going program in the court or clerk's budget. Adequately funding a system where much of the value is to users and not the court would be difficult in an era of limited public resources.

¹⁷ ACH accounts involve the direct transfer of funds from a bank account designated by the law firm to the court or clerk's bank account.

¹⁸ This is what occurred in the state of Colorado. See footnote 20.

The court developing its own exclusive system also raises issues of whether the court has become an agent of the parties, particularly regarding service. This may not be compatible with its neutral role in dispute resolution, including the appearance of neutrality. With this approach, the court takes on new obligations and possible liability for actions or inactions in the exchange of electronic documents between parties. Meeting this new obligation requires a very robust and reliable system for filing and service.

Finally, it is also important to note that this approach is quite court-centric. While it standardizes the protocols regarding cases filed in one court, it potentially complicates matters for lawyers that practice in more than one court. If each of several courts establishes its own e-filing system, attorneys must learn multiple systems and coordinate their training, internal technical support and fee payment practices with each court. This can be problematic for those firms practicing in multiple courts, a common occurrence in metropolitan areas. It is less of a problem if the court e-filing system is implemented statewide, as opposed to unique implementations in each court. Conversely, for case types where the set of attorneys is finite and local, for example in criminal cases¹⁹, or where the court is geographically isolated, as an example, in many rural courts, this may not be a problem.

Third Party E-file Vendor

A third approach is to choose a third party vendor to develop and operate an e-filing and e-service system. The vendor in this approach is often referred to as an Electronic Filing Service Provider (EFSP). The selection of an EFSP can be done by the court, at the local or state level.²⁰ Using this approach, a party ready to file or serve a document would connect to the EFSP's Web site and submit a document for filing and service. The party would also provide necessary information about the document and pay any filing fee. In a typical model, the EFSP would take care of filing the document with the court, if required, and serving the document on all parties. The EFSP's system would comply with all court protocols and rules regarding form and format, filing fees, etc. As with the court-based system, the benefits available depend on the functionality built into the system by the EFSP. For example, if the court and parties agree, the EFSP could be responsible for the storage and retrieval of all documents (providing an online case file), for maintaining the service list and for collecting filing fees. It could also transfer information to the court's or law firm's CMS or DMS.

¹⁹ An Electronic Filing pilot project was established in the Eleventh District of New Mexico in March 1999 in which all criminal and juvenile cases were filed and maintained electronically in San Juan County. The project was recently ended.

²⁰ For example, the Colorado state judiciary has implemented a statewide e-filing system using a vendor. For a summary of the project see <http://www.courts.state.co.us/iis/projects/efile/efilleprojsumm.pdf> and "Electronic Filing in Colorado: A Precursor to Imageless Electronic Document Management," by Bob Roper, in E-FILING REPORT, vol. 3, no. 9, p. 1 (October 2003)

As with the other approaches, the court and law firms must agree to the protocols, which are then built into the EFSP's system. Because the EFSP may have systems in several courts and have its own business needs, the protocols built into an EFSP's system may not always provide what the court specifies. The court and lawyers can either adjust to the EFSP's protocols, or there may be a need to add unique features and options to the EFSP's system to accommodate a specific jurisdiction's requirements.

With this approach, the responsibility, in particular the fiscal responsibility, for developing and maintaining the system and for supporting all customers is shifted to the EFSP. Training can be developed by the EFSP and provided to the court and clerk staff, the law firms and other users from a single, consistent source. The EFSP creates and maintains the necessary technological infrastructure, including security, reliability and backup, which all parties then use. Centralizing the infrastructure and support can reduce total costs and improve overall reliability and consistency.

Another significant advantage of this approach is that an EFSP can more effectively promote the adoption of e-filing and e-service. An EFSP can incorporate more functionality into the system earlier because of its ability to spread the costs of development over a potentially larger customer base (several courts and many law firms) and its ability to raise development capital. An EFSP can also provide training and support for the law firms and public users. More features and better training and support provide a greater incentive for law firms to begin exchanging documents electronically. All of this will increase the level of benefits realized, speed adoption, and shorten the time period within which the benefits are realized.

Using an EFSP raises the issue of the extent to which the EFSP becomes an agent of the party or the court for service of documents and payment of fees. The nature of the relationship and its attendant obligations will depend on the functionality of the system. The EFSP, court and lawyers can reach an agreement as to the EFSP's obligations, to whom they are owed and what limitations, if any, there are to liability for the EFSP's actions or inactions regarding the exchange of electronic documents between the court and parties. Having the EFSP accept this responsibility is another advantage of using a third party rather than the court developing its own system.

The EFSP model may avoid the court-centric aspect of a court-developed system. If a lawyer has a choice among EFSP's, it replicates the current status whereby the choice and cost of delivering documents are matters between the attorneys and the vendors. It also means the lawyer only needs to learn how to use one system. This is also true if the several courts in which a lawyer practices all use the same system. However, if a court uses one system exclusively, a lawyer may still have to learn multiple systems if another court in which the lawyer practices chooses a different EFSP.

If there are multiple EFSPs offering to e-file and e-serve documents, the problem of having to learn multiple systems becomes a burden on the court rather than the attorneys. It would require

multiple interfaces from the multiple EFSPs to the court's Case Management System (CMS) or Document Management Systems (DMS), particularly if the e-filing systems feed data to the court's CMS or DMS. It would also require the court to either maintain court documents on several EFSP's DMS, or to develop a DMS for court documents independent of the EFSPs. The latter approach would require an electronic interface for transferring documents from the EFSP to the court's DMS. This could be alleviated by a standard interface between e-filing systems and CMSs and DMSs used by courts.²¹

RECOMMENDED PRACTICE: In order to maximize benefits, a jurisdiction should choose a model that provides:

- E-service as well as e-filing;
- The capability to transfer data into the court's and lawyer's CMS and DMS;
- Adequate training for court and law firm users;
- On-going support and development;
- Minimal downtime and reliable backup;
- Adequate security against hackers and other forms of misuse or abuse; and
- An ability to grow, including scalability to accommodate more cases and case types.

RECOMMENDED PRACTICE: Before choosing an e-filing and e-service model, a jurisdiction should consider the needs and concerns of litigants and law firms, especially those who practice in multiple jurisdictions, as well as those of the court and clerk.

RECOMMENDED PRACTICE: A jurisdiction should choose an e-filing model that will be feasible and viable within the fiscal environment it serves.

B. Electronic Service On Parties

In contrast to the paper-based system, there are several policy alternatives regarding service of electronic documents. The choices arise from the fact that electronic service is essentially

²¹ This is the idea behind the development of XML standards for e-filing. XML is a means by which information is exchanged between different operating systems, applications, and databases that are otherwise unable to talk to each other. An XML standard would define all of the data needed for electronic filing transactions, and if all electronic filing systems used the standard, every lawyer and other court user could easily interact with every court permitting e-filing. See OASIS LEGAL XML MEMBER SECTION XML COURT DOCUMENT 1.1 CANDIDATE SPECIFICATION OASIS COMMITTEE DRAFT AND LEGAL XML COURT FILING WORK GROUP CANDIDATE SPECIFICATION 01, 2002-10-01.

instantaneous, is done through a third party (whether it is the court or an EFSP) and the document can be made immediately available in a central repository for simultaneous viewing by all. The policy alternatives relate to what is served, when a document is considered to be served, what constitutes proof of service and what the appropriate filing deadline is for electronically served documents.

What is Served?

Service in the paper world involves the delivery of a full copy of the document to each party to the case. This can be done by hand delivery, U.S. mail, a delivery service or, in some courts, by fax. With e-service, delivery is done electronically. There are at least four options as to how this can be done. The choice of options can be up to each party and can be unique to each case.

The option most similar to the existing practice is for service to be accomplished by the e-service system sending the full document to the party by e-mail. As with the prior option, the served party does not have to do anything to receive the document. Once received, the party can forward the document within its office and store the document in whatever DMS is being used.

A second option is for the full document to be automatically downloaded to the party's computer when the party connects to the e-service system. Again, with this option the party does not have to do anything to obtain the document and can immediately transfer the document into the DMS, as well as to the appropriate staff person in the court or law office.

A third option is for the party to receive notice by e-mail that a document has been filed and is available on the e-service system document repository. If a party wants a copy of the document, the party either clicks on a link to the document included in the e-mail or signs on to the e-service system to download the document. While this involves an extra step, it allows a party to decide whether it really wants a copy of the document. If the party initially chooses not to download a copy, it can still obtain the document from the e-service repository at a later date.

A fourth option is to provide no notice of the filing of a document to any party. Instead, each party must regularly monitor the e-service system to see if there are any new documents in the case. The system can be set up to indicate what new documents have been filed when the party signs on to the e-service system. This approach shifts to each party the burden of becoming aware of a new document. At the same time, it allows each party to decide when to check for new documents and whether or not to download the document.

The final decision depends on whether a party wants to automatically receive a document or have a choice as to when and whether to receive a document. If the document is sent automatically, the attorney must have internal systems and procedures to manage electronic documents. Each approach has different risks of transmitting viruses.

RECOMMENDED PRACTICE: An e-service function should be available that provides the maximum flexibility to lawyers regarding the manner of service, including discretion to decide whether and when to view or download a document being served.

Who is Served?

In the paper-based system, service of documents is the responsibility of the authoring party. This requires each party in a case to maintain a service list of the names and addresses of all the parties in each case and to arrange to serve a copy of a new document on each party. While each party must maintain its own service lists, it is the responsibility of a party that changes its address to notify the court and all other parties of the new address. In addition to serving all parties who have appeared, a party can provide copies of documents to anyone else, for example a client.

An e-service system can take over this function for all parties. The e-service system can maintain one service list for each case and automatically serve all parties on the list when a new document is filed. Notifying all parties of a change of address becomes unnecessary. Since each party is logging on to the e-service system or checking e-mail to receive new documents, there is no need to worry about a change of address. If e-mail is used to transmit documents, notice of change of e-mail address will be required but only to the e-service system, not every party.

Alternatively, e-service systems can allow selective service of a document. When a party is ready to serve a new document, the party can indicate which of the parties on the central service list are to receive the document, as opposed to everyone. Groups of parties could be established for service purposes, and other recipients can be added, for example, a client.

RECOMMENDED PRACTICE: An e-service system should permit all parties and the court to use one service list maintained by the EFSP or the court with each party being responsible only for the updating of its own service address.

When is Service Complete?

With paper documents, when service is complete depends upon the method chosen. For personal service or use of a delivery vendor, service is complete when the document is delivered to the party. If the document is mailed, it is considered served when placed in the mail. Use of the time of mailing, as opposed to the time of delivery, is based on the presumed reliability of the U.S. mail system. For e-service, the completion of service could be when it is delivered to the party being served. However, because of the virtually instantaneous delivery and availability of the document, and the independence and relative reliability of the e-service system, service could be deemed complete upon submission of the document to the e-service system. Application of this approach is complicated when there are non-participants that must be served by traditional means.

RECOMMENDED PRACTICE: Service by electronic means should be deemed complete upon submission of a document to the e-service system.

What Constitutes Proof of Service?

In the paper-based world, proof of service depends on the means of service. It is documented by an affidavit of mailing completed by the sending party, an affidavit of personal service or delivery service receipts. Proof of service of an electronic document can rely on the e-service system itself.²² The e-service system can automatically log when a party submitted a document for service and when it was opened. Courts or parties wanting to know whether and when service occurred could simply check the e-service system logs. A party could print a receipt for hard copy proof. Reliance on the system requires that the system be sufficiently independent of any party and sufficiently secure and reliable that the court and the parties are confident that the service occurred as logged.

RECOMMENDED PRACTICE: Paper documentation of proof of service should not be required in an e-service system where information regarding who was served and when service took place is readily available to the court or any party through the e-service system.

Filing Deadlines

Filing deadlines for paper documents vary with the method of service. For example, a document must be served earlier if service is by mail since mail is not delivered instantaneously or as predictably as personal service. Since electronic service occurs essentially instantaneously, the service period for e-service should reflect this. The service period should be the same as the time required by rule or statute for personal service. Sometimes a lawyer may perceive a tactical advantage in using one service method or another, generally to give the opposing party less time to respond. With e-service, because of the instantaneous delivery, any potential tactical advantage is minimized, creating a more fair and level playing field.

RECOMMENDED PRACTICE: Filing deadlines for e-filed documents should reflect the essentially immediate delivery of the document and neither penalize nor reward a party that uses e-filing or e-service.

C. Participation

E-filing and e-service are new methods for filing and serving documents. Thus, the question arises as to whether the use of this new method will be voluntary or mandatory, and if mandatory, in what situations will parties be required to use these new methods.

²² See Standard 1.2A Service of Filings on Opposing Parties in STANDARDS FOR ELECTRONIC FILING PROCESSES.

Documents

There are several options regarding which documents may or must be filed electronically. One approach is to require all documents filed in a particular case to be filed electronically. There might be limited exceptions for certain documents, for example, documents that are not available in electronic form, such as deeds, old insurance policies, or contracts, although these documents could be scanned and the images filed electronically.²³ Another common exception is the document that initiates a case—the original complaint or petition.²⁴ Since the parties have not yet appeared, they must be personally served with a paper copy of the document. Once they appear, however, all subsequent documents could be exchanged electronically. Even though a party must be served with a paper copy of the original complaint or petition, there is no reason the copy of the complaint or petition filed with the court could not be in electronic form. It should also be noted that sometimes the decision that the documents in a case will be filed electronically is not made until after the case has already been filed. In this situation, there may be several paper documents in the file already. Once the decision is made that all subsequent documents will be filed electronically, the paper documents should be scanned and the images added to the DMS to avoid problems associated with a mixed record.

Another option is to leave it up to each party whether to file a particular document in a case electronically. It is tempting to allow filing of paper copies of short documents such as a court form typically filled out by hand. However, allowing parties the choice would result in a mixed record in a case—some documents in electronic form and some on paper. The complications associated with using a mixed record—determining whether a particular document is in electronic form or in paper and maintaining a case file that does not contain every document filed—argues strongly against giving parties the choice whether to file electronically or on paper. Ultimately, either all documents should be electronic, or none. At a minimum, the simple court forms could be scanned and the image used instead of the paper form.

RECOMMENDED PRACTICE: If a case or class of cases is designated as an e-filing case, all documents, including the case-initiating document, should be filed electronically.

Participating Parties

The development of e-filing and e-service projects has typically begun with one case or with a class

²³ For example, “A document that is required by law to be filed in non-electronic media may not be electronically filed.” Washington State Court Rules, General Rules, Rule 30.2(b) at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr30. The commentary to the rule contains examples of documents fitting this rule.

²⁴ This is the requirement of the Baltimore City Circuit Court in asbestos cases (see Paragraph 3i of the CASE MANAGEMENT ORDER FOR THE ELECTRONIC FILING OF PLEADINGS, PAPERS AND DOCUMENTS IN ASBESTOS PERSONAL INJURY CASES in the Circuit Court for Baltimore City, at http://www.baltocts.sailorsite.net/civil/efiling_cmo.doc).

of cases. The single case was often a large, complex case (for example, Fen Phen or silicone breast implants) or one involving a large number of parties (for example, a construction defect case). Examples of classes of cases designated for e-filing include asbestos,²⁵ probate,²⁶ or small claims.²⁷ Another class of cases where e-filing has been used is where there is a very high volume of cases filed, even if each case has few documents or only limited activity (for example, code violations,²⁸ tax liens, or parking and traffic citations). The common factor in these examples is a specific and finite group of attorneys or a specific set of litigants or public agencies that are frequent filers. These factors are such that the benefits of e-filing and e-service are more obvious, more pronounced or more quickly realized than in routine cases.

One option is to allow each party in a case to decide whether to file documents electronically or on paper, referred to as ‘permissive’ or ‘voluntary’ e-filing. While it is feasible to do this, it results in a mixed case record—some documents on paper and some electronic. A mixed record is more work for the clerk to maintain, and finding a document is more complicated than with either an all-paper or all-electronic record. Voluntary participation also complicates service of documents, as some parties are served electronically but others must be served a paper document. The court and parties must keep track of non-participants for service purposes, or the obligation to serve non-participants could be delegated to an EFSP if there is one.

Alternatively, participation in e-filing and e-service can be made mandatory. With mandatory participation, the court and parties begin to realize most of the benefits of electronic documents immediately, and the complications of a mixed record are avoided. If the court determines that it is too much of a burden for a party to file electronically (for example if the party is self-represented and indigent), the court can establish procedures whereby the party brings a document to the court on paper or on a disk and the court scans or uploads the document into the e-filing system.

Existing e-filing projects have followed different patterns regarding participation. One pattern is to start a pilot program that mandates participation by all parties. This is typically done in individual cases, particularly where many, if not all, of the parties request it. Often, upon seeing the benefits, the court seeks to expand the use of e-filing through voluntary participation, hoping to minimize objections. At some point, the complications associated with a mixed record become too burdensome, or a critical mass of participants is reached and causes the court to require

²⁵ The original e-filing project involving asbestosis cases was in the Delaware Superior Court using the CLAD system in January of 1991. Other courts providing for e-filing in asbestosis cases include the San Francisco (CA) Superior Court (Nov. 1998), Cuyahoga County (OH) Court of Common Pleas (Nov. 1998), State Court of Fulton County (GA, Oct. 1999), Fulton County (GA) Superior Court (June 2000) and the Washington DC Superior Court (May 2001) and Baltimore City (MD) Circuit Court (June 2001).

²⁶ The Denver Probate Court began mandatory e-filing in probate cases as of July 1, 2003; see ADMINISTRATIVE ORDER REGARDING MANDATED E-FILING OF PROBATE CASES at <http://www.courts.state.co.us/iis/projects/efile/denprobmandate.pdf>.

²⁷ The Philadelphia Municipal Court has a MC CLAIMS project for paperless small claims proceedings.

²⁸ The Philadelphia Municipal Court has implemented e-filing with several City agencies that file code enforcement cases.

mandatory participation. Another pattern is for the court to start an e-filing pilot with voluntary participation. The hope is that as attorneys see the advantages, more will begin participating. Again, at some point, in response to the volume of parties or documents or the complications of a mixed record, the court will make participation mandatory, at least in certain cases or for certain case types.²⁹

Note that it is not necessary that e-filing and e-service both be done in a case, or that all parties be required to do both. Parties could file electronically but use paper-based service methods or a combination of paper and electronic service. Some court-based e-filing systems initially only provide for e-filing, allowing attorneys to decide how they will serve documents. In order to realize maximum benefits for both the court and the attorneys, both e-filing and e-service should be mandatory.

RECOMMENDED PRACTICE: Maximum benefits are achieved from mandatory e-filing for all parties and all documents in a case or type of case. The court should adopt mandatory filing and service as quickly as it is feasible to do so in a case or class of cases.³⁰

D. Document Format And Date Of Filing

Over time, a set of rules and practices has evolved regarding the form and format of paper documents. These rules were developed to make it easier for the court and parties to determine what a document is about and to locate key information in the document (for example, the case number). When a document will exist in electronic form, the paper-based rules should be reexamined and a set of rules created for electronic documents that accomplish the same goals. One issue has to do with the layout of the document. The simplest approach regarding layout is for documents to continue to be produced with the same formatting requirements that exist for paper documents. No change would be required in the method of creating documents, and the printed version or screen image of an electronically filed document would look the same.

Document File Format

Another key issue has to do with the file format of the electronic document. Parties and the court use a variety of software to produce court documents. Most documents are produced using word processing software; others are produced using document assembly programs or an electronic form completion package. These programs do not always read each other's documents. Some do not even read documents produced by earlier versions of the same software. This is not a problem

²⁹ For example, the 58th District Court in Jefferson County, Beaumont, Texas now mandates participation in any case with more than 4 parties. See Standard 1.3C Judicial Discretion to Require Electronic Filing in Specific Cases in STANDARDS FOR ELECTRONIC FILING PROCESSES.

³⁰ See Standard 1.3A Universal Electronic Filing Processes in STANDARDS FOR ELECTRONIC FILING PROCESSES.

when the end result is a printed document. However, if documents are filed in electronic form, some accommodation needs to be made so that everyone is able to generate documents everyone else can read.

One approach is to require the format of all documents filed to conform to a standard. While any file format could be used, the most common format specified is the Adobe Acrobat PDF format. This standard is used primarily because the “reader” that allows someone to view a PDF document is available for free. However, a party wishing to file and serve documents electronically must purchase the Adobe program that creates PDF files from whatever program is used to create the original documents. Alternatively, the court could allow parties to file documents in any format and require the EFSP or the court’s e-file system to convert the documents to the standard format.

The choice of a standard has cost implications. An approach that requires the court and parties to purchase software to create or view documents adds to the cost of implementing e-filing and slows the implementation process in accordance with the learning curve for the new software. Requiring use of a particular format may also impose a proportionally greater burden on an indigent or self-represented litigant,³¹ which the court or EFSP could address by providing document conversion services.

One issue in the selection of a document file standard is the ease with which someone can modify a document that is in the standard file format. The integrity of the court record and the confidence of parties and the public in the e-filing system requires that an electronic document cannot be easily altered once filed.³² Another reason why the PDF format is often specified is that PDF documents are much harder to modify than a document in one of the common word processing software formats.

There are several circumstances that can complicate compliance with a particular file format standard. If a document is not available in electronic form, or it is a mixed document where part of the document is produced using a word processor and the balance of the document pieces are not available in electronic form, some accommodation must be made. The non-electronic document, or portions, could be scanned and the image used. However, the scanned image file may not be in the standard format or may require conversion to the standard format. Every time the document is converted to another format, there is the risk, real or perceived, that the content

³¹ See Standard 1.1L Addressing the Special Needs of Users in STANDARDS FOR ELECTRONIC FILING PROCESSES.

³² See Standard 1.1H Integrity of Transmitted and Filed Documents and Data in STANDARDS FOR ELECTRONIC FILING PROCESSES, and Proposed Standard 1.65(a)(iv) in STANDARDS RELATING TO COURT ORGANIZATION, American Bar Association, Judicial Division, proposed draft July 2003.

was changed in some way. The court could require a party filing such an image to bring into court the original of the document in response to a challenge to the document's authenticity or content.

RECOMMENDED PRACTICE: The jurisdiction should adopt a document format standard for which both the viewing software and document production software is readily available and inexpensive, if not free.³³

RECOMMENDED PRACTICE: The jurisdiction should adopt a document format standard that results in a document that is not easily altered and that permits easy detection of any changes made to a document.

Courtesy Copies

Some courts require parties to physically deliver courtesy copies of documents to the courtroom in which the matter is scheduled to be heard. Courtesy copies serve at least two purposes. When filed directly in the courtroom, the court can begin reviewing the documents immediately and need not wait for the original document to get into the case file and the file to make its way to the courtroom -- a process that can take several days. The second use is to provide the judge and court staff a copy of the document on which they can write notes for use at a hearing. With electronic filing, the first concern is eliminated; electronically filed documents are available in any courtroom as soon as they are accepted. The need for a copy can be solved by just printing out a paper copy from the electronic file as soon as it is filed. If the e-filing system is integrated with the court's DMS, judges and law clerks could take advantage of a DMS feature allowing them to electronically attach notes to documents without modifying the document itself, avoiding the need to print the document. The notes would be accessible only to the judge and designated court staff and not to the parties or the general public.

RECOMMENDED PRACTICE: The court should not require parties to deliver courtesy copies of documents that are filed electronically. Instead, the court should print copies on demand.

When is the Document Deemed Filed?

Another policy question regarding e-filing is when the document is deemed filed.³⁴ The significance of the filing date is that the legal deadlines for many court actions are based on the date a document is filed. In the paper world, the document is deemed filed when the clerk accepts the document and places a file stamp on it. When the document is carried into the court and filed at the clerk's counter, it is usually accepted and stamped the same day. If the document is mailed or delivered by courier, acceptance may or may not occur on the day it was received by the clerk, and often it is several days after it was mailed or given to a delivery service.

³³ See Standard 1.1D Document Format in STANDARDS FOR ELECTRONIC FILING PROCESSES.

³⁴ See Standard 1.2C Determining when a Document is Filed in STANDARDS FOR ELECTRONIC FILING PROCESSES.

E-filing could follow the same pattern. As described above, a robust e-filing system can eliminate some of the most common errors that result in rejection of the document (for example, no signature or improper fee). The electronic delivery of the document is virtually instantaneous, allowing immediate clerk review. Moreover, the submission of a document to an e-filing system can be verified by the e-filing system itself, and similar verification is not possible for a document placed in the mail or given to a delivery service. If the probability of a document being rejected is sufficiently reduced and the delivery is essentially instantaneous and verifiable, it is reasonable to consider the document filed at the time it is submitted to the e-filing system, rather than waiting for the clerk's review and acceptance. If, upon review, the clerk rejects the document and returns it to the author, it could then be considered unfiled as it relates to any deadline.

RECOMMENDED PRACTICE: If the e-filing system functionality minimizes the likelihood that the clerk will reject a document and the document is essentially immediately available to the clerk for review, then the date of filing should be the date the document is submitted to the e-filing system.

E. Signature Requirements

Many court documents must be signed by the party or the party's attorney. In the paper world, the document with the original signature is filed with the court. Part of the clerk's review of a document submitted for filing is to check for a signature. The check is cursory—only as to whether there is a signature. If it is not signed, the document is returned. If there is a signature, the clerk assumes the document was signed by the person whose signature appears. The clerk does not authenticate the signature, relying instead on the parties to challenge the veracity of the signature. Although there is the potential for someone to file a document with a forged signature, it is an extraordinarily rare occurrence.

With electronically filed documents, there is no piece of paper with a signature on it. Several options are available to comply with a signature requirement. One option is to require the parties to insert an image of the required signature into the document at the appropriate place. While this looks like a paper document would, it is relatively easy to obtain someone's signature, scan it and use it in documents. Another option is to rely on access protections built into the e-filing system as a substitute for a signature.³⁵ This is accomplished by requiring the user to enter a unique password issued to each user by the court or EFSP when first logging into the e-filing or e-service system. The signature line in the document itself either contains the notation "/s/" sometimes followed by the typed name of the person, an image of the person's signature or is

³⁵ This approach is followed by the District of Columbia Superior Court, the Circuit Court for Baltimore City, and the San Francisco Superior Court, among others.

blank. Note that the password access option produces a level of reliability greater than that in the paper world, as it is more difficult to get someone's password than to forge a signature image. A more sophisticated option is to require participants to use digital signature authentication provided through one of the commercially available services. While this provides even greater protection against abuse, it is more complicated to use and may interfere with existing practices for preparing and submitting documents within a law office. The choice of approach should weigh the need for verification³⁶ against the realistic risk of abuse. It remains to be seen whether expanded use of e-filing increases the potential for someone falsely filing electronic documents in a case.

Some jurisdictions require a party to print out a document that requires a signature of a party under penalty of perjury, have the party sign it, and either the attorney of record or the filing party must keep the signed original.³⁷ The signed version must be produced by the party if an opposing party requests to see it.

RECOMMENDED PRACTICE: A jurisdiction should adopt a signature requirement that is as reliable as the paper process but not so burdensome as to discourage use of e-filing and e-service.³⁸

F. Court Filing Fees And E-Filing And E-Service Costs

Court Filing Fees

The electronic delivery of a document requires a review of the way court filing fees are paid. There are two issues here—who determines the amount of the filing fee, and how the fee is paid. With a paper based system, payment of the filing fees is usually accomplished by the party including a check for the filing fee amount along with the paper document to be filed. The simultaneous delivery satisfies the requirement in many states that a document is not considered filed unless and until the associated filing fee is paid. The party filing a document makes the initial determination of the appropriate filing fee when deciding how much to write the check for. The final fee determination is made by the clerk reviewing the document. The document may be returned if the improper fee is tendered, or held until the balance of the fee due is paid.

³⁶ See Standard 1.1G Identity of the Sender in STANDARDS FOR ELECTRONIC FILING PROCESSES.

³⁷ For example, see Washington State Court Rules, General Rules, Rule 30.5 (b) and (c) at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&cgroup=ga&set=GR&ruleid=gagr30.

³⁸ See Functional Standard 3.6 Signatures and Authentication in STANDARDS FOR ELECTRONIC FILING PROCESSES.

With e-filing, the document is delivered immediately and electronically. Ideally, payment would occur immediately and electronically as well. Sending a check for the filing fee potentially delays the filing date and adds work for the clerk, who must match the check with an electronic filing made on a previous day. Fortunately, several options are available, many of which make the e-filing approach even more straightforward than the paper-based practice. The parties can make arrangements with the court or EFSP authorizing the filing fees to be charged to a credit or debit card or ACH account. Account charges can be made electronically and be automatically initiated by the e-filing system at the time the document is submitted for filing. Alternatively, the parties can deposit funds in an account with the court or EFSP from which filing fees are paid. However, accounting activities associated with this payment method probably involve work not present with existing practices, even if it is done mostly electronically. Another alternative is for the EFSP to advance the fee to the court, insuring the payment of the correct fee, and bill the attorneys periodically. With either approach, the e-filing system can provide the necessary receipt and accounting data to both the court and the parties and can do so electronically.

An alternate procedure needs to be established for situations where the credit or debit charge is rejected, just as one exists for returned checks. The EFSP could agree to advance the fees, shifting this problem to one between the party and the EFSP, thereby virtually eliminating the risk of a filing being rejected by the court for failure to pay the correct filing fee. Alternatively, the clerk and parties could agree that the clerk will still accept the filing, with the party making other arrangements for the payment of the fee once notified of the rejection of the charge.

Another procedure that may need modification has to do with requests for a fee waiver. A party seeking a waiver of a filing fee generally submits the request along with the document they propose to file. A judge reviews the request and determines whether the fee should be waived. If the fee is waived, the clerk files the document. If not, the clerk informs the party and waits for the filing fee to be paid. With electronic filing, the same procedure could be followed, using electronic documents instead of paper ones. When the clerk opens the document for review and sees the request, the document can be forwarded to a judge for review of the fee waiver request. After the judge decides, the clerk informs the party and either files the document or awaits the payment of the fee. Most states provide for a fee waiver request to be made when the party first appears, which is applicable to most subsequent filings by the party. In these instances, the e-filing system must be able to accommodate such on-going fee waivers and recognize its applicability each time the party submits a document for filing.

The second fee issue relates to determination of the proper fee. Generally, the party submitting the document makes the first determination of the proper fee. Usually, this determination is correct. Occasionally, the party may misunderstand the fee schedule, not realize there is a special or additional fee for a specific type of filing or be unaware of fee increases. The final

determination is made by the clerk when reviewing the filing. If the clerk determines the fee is insufficient, the clerk can either return the document to the party with an explanation of what is needed or hold the document, inform the party of the deficiency and wait for the balance of the fee to be paid. The practice varies across states as to whether a document is considered legally filed if the correct fee is not yet paid. In some states it is not considered filed until the correct fee is paid. In others, the document is filed but subject to ‘unfiling’ if the fee is not paid in a timely manner. An e-filing system that allows the clerk to specify the correct fee and charge an account at the time of acceptance will eliminate the problem of incorrect fees.

RECOMMENDED PRACTICE: The jurisdiction should select an e-filing model that provides for simultaneous electronic payment of filing fees and offers a choice of payment methods to the parties.³⁹

Cost of E-filing and E-service

In the paper-based world, each party is responsible for any costs associated with filing and serving papers, including printing and copying costs. There are costs even though they may not be readily apparent. For example, if law firm staff deliver documents to the court and prepare and mail documents being served, there is a cost, though it may be hidden in the office overhead. The costs are more explicit if a process server, messenger or document delivery service is hired. Depending on the arrangement, these costs may or may not be chargeable to the client.

When using an e-filing or e-service system, the party does not incur any costs for printing, copying and otherwise preparing a document for filing and service, or for the delivery of the document. There is a cost for the time to sign-on to the e-filing or e-service system and submit the document for filing or service. However, this should be considerably less than the time required to prepare and arrange to deliver a paper document. If there is a charge for the use of an e-filing or e-service system, the cost is more akin to the cost of a messenger or delivery service. Any cost comparison should compare the e-filing charge to the cost of printing, copying and preparing documents for filing and service, plus the cost of delivery or service. Reimbursement arrangements with clients could treat e-filing or e-service charges in the same manner as delivery charges.

If the party has a choice of EFSPs for e-filing and e-service, the cost is an issue between the party and the EFSP. However, if the court mandates participation using one particular EFSP, the court must recognize that it has established a monopoly position for that EFSP. Consequently, some method must be put in place through which the lawyers and the EFSP can agree on a price they consider reasonable in light of the EFSP’s investment, the costs of training and system maintenance and the incremental costs of filing or serving a document, as well as the savings to the party.

³⁹ See Standard 1.1I Electronic Acceptance of Payments in STANDARDS FOR ELECTRONIC FILING PROCESSES.

There may also be a need to address the amount, if any, of the e-filing or e-service charge for a litigant whose filing fees have been waived. Again, reference to the policy in the paper world provides guidance. Generally, a fee waiver applies only to court filing fees and not costs of serving papers. Since e-filing and e-service charges are more like expenses for serving papers, the waiver would appear not to apply. However, if the court mandates use of e-filing or e-service and there are no other options for filing or service, waiving the fee may be appropriate. If an EFSP is used, the decision about a waiver is less obvious, as the EFSP does incur actual costs regarding every document. A policy to waive charges in this situation may be incorporated into the calculation of the charge for paying parties, or it may be borne by the court.

If the e-filing or e-service system is one that is operated by the court, there is a policy decision as to whether any fee charged will only cover the court's costs of developing and operating the system⁴⁰ or if it can also be a revenue source for the court. The court may be under statutory limitations regarding the amount of fees the court can charge (for example, fees may not exceed actual costs). There are actual costs to develop and operate an e-filing or e-service system. At the same time the court should realize significant savings over time from not having to handle paper documents and avoiding data entry, assuming the e-filing system is integrated with and feeds data into the court's CMS. While quantifying these savings may be complicated, there certainly are savings from the avoided work. However, it is important to note that development costs and initial operating costs must be incurred before the savings can be realized.

The court itself creates documents, notices, orders and judgments in cases that must be served on parties. If the court uses e-service provided through an EFSP, the EFSP must also determine what, if any, costs the court will pay for using the system.

RECOMMENDED PRACTICE: The fee charged for e-filing and e-service of a document should be based on an agreement between the court, the lawyers and any EFSP involved. The fee should take into consideration the cost of developing and operating the system, including training and on-going customer and system support, the avoided costs of activities associated with filing and serving paper documents and other savings to the court and to the parties.

G. Technology Considerations

Change can be anxiety producing, and change involving the introduction of a new computer system can be even more stressful. E-filing and e-service systems involve just such a change. However, the activities of an e-filing and e-service system are not that different from many procedures already in use in courts and law firms. Computers are already used to produce documents and for case management and document management purposes. E-filing and e-service extend this use to the filing, service and viewing of electronic documents. Although it is another,

⁴⁰ See Standard 1.1J Surcharges for Electronic Filing in STANDARDS FOR ELECTRONIC FILING PROCESSES.

new system, the implementation of e-filing and e-service can, in fact, make other computer assisted tasks easier and more productive.

The relevant questions for a court or law firm considering or implementing e-filing or e-service are what hardware, software and technical support is needed for the systems. In part, the answer to this question depends upon what services are provided, the functionality available and the technical approach taken. The minimum information technology configuration needed in the court, clerk's office and law firms for e-filing and e-service includes the following components:

- **Software to produce and view electronic documents in the standard file format.** If the software already used to produce documents can produce them in the standard file format, no additional software would be needed. Otherwise, additional software would be needed to convert documents to the standard file format. If the word processor cannot 'read' the standard file format, software to read the document would be needed as well. The software will be needed on all computers that will regularly use the e-filing or e-service systems.
- **Hardware and software to create electronic versions of documents not available in electronic form.** Hardware would include a scanner to create an image of a paper document. The capacity of the scanner would depend on the anticipated volume of documents and pages that will need to be scanned. In addition to scanning capacity, there are questions of image resolution and the format of the image file.
- **Web browser or software to interface with the e-filing or e-service system.** The technical approach of the e-filing or e-service system would define the choice here. If the system uses a proprietary interface, each party would have to acquire this software and load it onto each computer accessing the system. If the system uses a web browser interface, the party could choose the browser.
- **Adequate disk space.** Sufficient disk space is required to receive and store large numbers of electronic documents. The amount of disk space needed would depend on the number and size of documents anticipated to be received, and the typical storage requirements of documents in the standard file format.
- **Ability to transmit documents electronically.** Each party and the court must have a connection to the Internet in order to transfer documents. The type of connection depends upon how many documents will be exchanged each day, the size of the document files, how fast the court or party wants to be able to transfer documents and how much they are willing to spend for the connection. The faster the connection, the less time spent waiting for documents to download, but faster access costs more. In addition

to connection speed, the Internet service provider selected by the court or a party must have the capacity to handle the number and length of documents likely to be transmitted. Some Internet providers have limits on the size of files that can be exchanged or the amount of temporary storage available on the Internet provider's servers.

- **Reliability of the system.** The computer system must have the capacity, security and redundancy to provide reliable service to the party or the court.
- **Back-up capacity.** Each party and the court must establish a back-up capacity that allows operation to continue even if the primary system crashes, whether from hardware or software failure or from hackers. If the court is providing the e-file or e-service system, it is particularly important that the court have a reliable plan and the capability to keep its system operating. If an EFSP is providing the service, the EFSP has that responsibility. If the EFSP is providing services to a large number of parties or courts, more extensive and more comprehensive backup and other system reliability components could be provided because the costs can be spread over a larger base of clients.
- **Training.** In addition to hardware and software, a comprehensive training program should be established for the court and all parties regarding the use of the e-file or e-service system. The training must not only serve the initial implementation of the system but also provide ongoing training for new staff and regarding updates or changes in the system.

RECOMMENDED PRACTICE: The e-filing and e-service method chosen by a jurisdiction should use an Internet-based, Web browser approach that minimizes the need for specialized, vendor-specific software, better accommodates whatever equipment and software a court or firm already has and reduces training requirements.⁴¹

H. What Can Go Wrong?

New processes, particularly those that utilize new technologies, often exhibit new problems not encountered in the systems being replaced. The magnitude of the problems may initially seem substantial, creating some anxiety amongst users. This is generally because people are less familiar with, and do not know how to deal with, the problems of the new systems. Over time the problems encountered in the new system also become familiar and solutions will be developed that minimize the impact of the problem. E-filing and e-service systems are no exception. Moreover, the experiences of a number of jurisdictions that have been using e-filing and e-service for some time strongly suggest the problems anticipated are quite rare, and the anxiety is unfounded.

⁴¹ See Standard 1.1C Technical Requirements in STANDARDS FOR ELECTRONIC FILING PROCESSES; and Proposed Standard 1.65(a)(iii) in STANDARDS RELATING TO COURT ORGANIZATION, American Bar Association, Judicial Division, proposed draft July 2003.

The types of problems that arise with e-filing and e-service systems most commonly relate to errors or delays in the transmission of a document. There are two kinds of errors, those associated with a document not filed that the sender thought was and those associated with failure of service of documents to those who were supposed to have received them. There are two possible sources for each type of error: “operator errors” (mistakes made by people using the system), or “system errors” (caused by a malfunction of the system). Either way, the error is generally not discovered until something does not happen that the court or a party expected to happen based on the filing or service of a document. Solutions must be developed which “protect” a party from the failure of filing or service where the error was not the party’s fault.

Appropriate solutions to these problems should be based upon recognition of the impact of the error. A document not filed can result in a filing deadline being missed. Documents not received can prejudice a party regarding a scheduled hearing. Rules and procedures can be adopted which allow the court to authorize retroactive filing of a document that a party thought was filed or postpone a hearing or provide for an extension of time to answer for a party that did not receive a document. One of the advantages of an e-filing or e-service system is that it can be designed to log attempts to file and serve documents, as well as successful transactions. This information can then be used to substantiate an allegation that filing or service was attempted but was not successful.

Minimizing the frequency of these types of errors depends on a number of factors, most within the control of the court, parties and any vendor. A more robust, more reliable and more redundant system will have fewer errors. Both the hardware systems and the e-filing and e-service software should have these qualities. Comprehensive training of court and clerk staff and law firm staff is equally important, as “operator error” is as costly as “system error.”

Problems with e-filing and e-service can also result from failures of the computers being used by the court, clerk or law firm staff, failures of the networks that tie the computers together within an office or failures of the communications networks that tie the court, law firms, and any EFSP together. Again, these problems can be minimized by the parties, court and vendor obtaining or building more reliable systems. No problem can be completely eliminated, but the few problems that are encountered can be addressed by rules and procedures that correct the impact caused by the problem.

There is another type of error that is not unique to e-filing systems. There may be an allegation that a document in the court’s repository is not the same document as that originally filed or as served on the other parties. As with the paper world, this can be resolved by comparing the document in the repository to that in the possession of the parties. It remains to be seen whether

there is any greater risk of alteration with electronically stored documents than with paper documents. Given the common practice of clerks allowing anyone to look at a file, generally in only a loosely supervised situation, it is likely that electronically maintained documents are more secure. This is especially true given that changing an electronic document requires a much greater degree of sophistication and more equipment than changing a document in paper form.

RECOMMENDED PRACTICE: A jurisdiction should select an e-filing and e-service model with enough reliability to minimize transmission errors and provide users with confidence that documents are filed and served as and when expected.

RECOMMENDED PRACTICE: A jurisdiction should adopt rules and procedures that relieve parties and the court from adverse impacts attributable to errors of the e-filing or e-service system.⁴²

I. Additional Benefits And Options

The existence of documents in electronic form provides new opportunities regarding the exchange of information and more effective business practices. The electronic file of a document contains the text, the substantive information being exchanged, along with formatting codes which the word processing software or document reader uses to convert the text into what is seen on the computer screen or on the printed page. What is new is the availability of the underlying information in electronic form. E-filing allows new practices based on the interpretation and manipulation of the information itself.

This difference becomes more apparent when considering court forms. Forms require a party to insert information in spaces after questions or to check relevant boxes. It is the information the party adds, not the text or layout of the form itself, that is of interest. Thus, the information, not the filled-out form, should be what the e-filing and e-service system is exchanging. Software can be used to display the data in its appropriate place on a form template when viewing it on a screen, or to create an image of the completed form to go into an image DMS. Having the information in electronic form allows the court and other parties to analyze the information, check it for consistency, and use it to prepare responses and orders.

⁴² See Standard 1.2E Remedy for Failure of Electronic Processes in STANDARDS FOR ELECTRONIC FILING PROCESSES; and Proposed Standard 1.65(b)(v) in STANDARDS RELATING TO COURT ORGANIZATION, American Bar Association, Judicial Division, proposed draft July 2003. See also Federal Rules of Civil Procedure, Rule 5(b)(3).

Looking at the typical free form text documents, they also contain pieces of information that the form and format rules specify to be present, and, usually, to be present in a particular place. Examples include the caption⁴³ and the name of the party filing the document. There are several ways to take advantage of this data in an electronic world. One is to have the e-filing system use the information to facilitate filing and service, avoiding data entry by a staff person. This data could also be transferred into the court's or law firm's CMS or DMS, again eliminating data entry by the clerk. Finally, the information can aid in the review and response to the document, including the preparation of responding documents and court orders.

One approach to accomplishing this is to electronically highlight the key pieces of data so that a computer can find the data and act on it without the need for data entry by the clerk or law office staff. This is the idea behind XML tagging.⁴⁴ 'Tags' are imbedded in the document pointing out critical pieces of data which the e-filing and other systems can then use. The tags are computer codes that do not appear on the printed version of the document.

Having information available in electronic form allows another type of potential benefit. The idea is to make the document 'live' by including cross-references and hyperlinks to:

- Exhibits and attachments in the document itself;
- Other, previously filed documents in the case;
- Frequently used documents stored in a central repository created for this case or a group of cases, including across jurisdictions, to eliminate repetitive filing of the documents as an attachment; and
- Legal research databases containing the text of laws or legal opinions.

Another option is to integrate e-filing and e-service into the 'back end' of document assembly programs, particularly as part of self-help programs, to provide a seamless process of document filing and service to self-represented litigants.

RECOMMENDED PRACTICE: A jurisdiction should adopt an e-filing and e-service model that can support cross-referencing and linking capabilities possible with electronic documents and case files.

⁴³ The caption includes the case number, main party names, document title and date of a hearing to which the document relates.

⁴⁴ See OASIS LEGAL XML MEMBER SECTION XML COURT DOCUMENT 1.1 CANDIDATE SPECIFICATION OASIS COMMITTEE DRAFT AND LEGAL XML COURT FILING WORK GROUP CANDIDATE SPECIFICATION 01, 2002-10-01 at: http://www.ncsconline.org/D_Tech/Standards/Standards.htm#ElectronicFilingProcesses.

IV. Legal Authority To Electronically File And Serve

E-filing and e-service involve a new method of exchanging documents and information in court cases. Typically, statutes and rules governing court procedures did not anticipate changes in technology that would allow electronic exchange of documents. Adjustments must therefore be made to authorize the use of e-filing and e-service of documents by lawyers and the court. Provisions must also be adjusted or added regarding filing deadlines, signatures, and electronic payment of filing fees. Given the many advantages of e-filing and e-service, it makes sense to adopt procedural statutes and rules that encourage, rather than limit or inhibit their use.

There are a number of ways to establish authority for e-filing and e-service. The differences relate to who provides the authority, the breadth of the authority, and the speed with which the authority can be established. The simplest approach is by the stipulation of all parties in a case. This can be implemented quickly, and can be tailored to the specifics of the case. However, it only applies to a particular case, and generally requires the consent of all parties or mechanisms to accommodate those not willing to participate. Another approach is for the judge to mandate use of e-filing and e-service in a case through a case management order.⁴⁵ Again, this can be implemented fairly quickly and can be tailored to the needs of the case. However, if there is no general statutory or court rule authorizing e-filing and e-service in a case, and such authority is required, this approach may also require the consent of the parties. A local court rule is another possible source of authority. Adoption of local rules can take longer, usually requiring a comment period and the approval of at least a majority of the judges of the court. There may also be a delay in implementation from the fact that new rules can take effect only once or twice a year. Finally, statewide procedural statutes or court rules can be amended to authorize e-filing and e-service. This is generally the slowest approach but the broadest in terms of scope of authority and flexibility. There is a risk of political compromises made during the adoption of the rule that may limit the scope of authority or reduce incentives regarding the use of e-filing or e-service.⁴⁶ The choice of approach depends on the needs of the case and the extent of cooperation among the parties.

⁴⁵ See Standard 1.3C Judicial Discretion to Require Electronic Filing in Specific Cases in STANDARDS FOR ELECTRONIC FILING PROCESSES

⁴⁶ When California first adopted new statutes allowing e-filing and e-service, a provision was included stating that electronic filings after the time the court physically closed are deemed filed the next day (California Code of Civil Procedure, section 1010.6(a)(3)).

The minimum authority required to operate an effective e-filing and e-service program would include the following elements:

- Authority for the parties to file documents electronically,⁴⁷ preferably with authority to the court to make participation mandatory;
- Authority for the parties to serve documents electronically,⁴⁸ preferably with authority to make e-service mandatory, with provisions for non-participants;
- The document filed is considered the original and official record of the court;⁴⁹
- Specification of when a document that is filed electronically is considered filed⁵⁰ and when it is deemed served,⁵¹ including the ability to file after the clerk's office closes where review and acceptance does not occur until the next business day;
- The appropriate response period for documents served electronically;⁵²
- The form and format of electronic documents⁵³ and what to do with documents where the original is not available in electronic form;
- How a signature requirement can be met;⁵⁴
- Methods for payment of filing fees for documents filed electronically⁵⁵ and
- Remedies for errors in use or transmission.⁵⁶

⁴⁷ See section 1-104 of A GUIDE TO MODEL RULES FOR ELECTRONIC FILING AND SERVICE, by Travis Olson, Marsha Edwards and Hon. Arthur M. Monty Ahalt, ret., LexisNexis, 2003, hereinafter referred to as GUIDE TO MODEL RULES.

⁴⁸ GUIDE TO MODEL RULES, section 2-107(1) for parties and 1-104(3) for the court. See also Standard 1.2A in STANDARDS FOR ELECTRONIC FILING PROCESSES.

⁴⁹ See GUIDE TO MODEL RULES, section 1-107 and Standard 1.1A in STANDARDS FOR ELECTRONIC FILING.

⁵⁰ GUIDE TO MODEL RULES, section 2-102.

⁵¹ GUIDE TO MODEL RULES, section 2-107(2).

⁵² GUIDE TO MODEL RULES, section 2-107(3). See also Standard 1.2A in STANDARDS FOR ELECTRONIC FILING PROCESSES.

⁵³ GUIDE TO MODEL RULES, section 2-103. See also Standard 1.1D in STANDARDS FOR ELECTRONIC FILING PROCESSES.

⁵⁴ GUIDE TO MODEL RULES, section 2-106.

⁵⁵ GUIDE TO MODEL RULES, section 2-105.

⁵⁶ GUIDE TO MODEL RULES, sections 2-102 and 2-108.

In addition, the rules could include provisions addressing the following issues:

- What provisions apply regarding public access to court documents in electronic form;⁵⁷
- The procedure for filing documents that the party wants kept under seal, including provisions about whether the document should be filed initially on paper and whether it is publicly accessible pending the sealing decision made and
- The use of repositories or other methods of document reference to avoid redundant submissions.

Based on the general authority to use e-filing and e-service in cases, a judge may issue a case management order governing electronic document practices in a particular case, group of cases or case type. Examples of provisions in addition to those listed above that might be included in such an order might include:

- Whether all documents must be e-filed, including the original pleading⁵⁸ or only subsequent documents, and what documents may not be filed electronically;⁵⁹ and
- Procedures for non-participants and indigent or self-represented litigants.⁶⁰

⁵⁷ See Steketee, Martha Wade and Alan Carlson, DEVELOPING CCJ/COSCA GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS, National Center for State Courts and The Justice Management Institute, October, 2002, at www.courtaccess.org/modelpolicy/.

⁵⁸ See footnote 24 regarding Baltimore's rule requiring paper filing of the original pleading.

⁵⁹ GUIDE TO MODEL RULES, section ALT. 1-104.

⁶⁰ See Standard 1.3B in STANDARDS FOR ELECTRONIC FILING PROCESSES.

V. What's In It For Me? The User's Perspective

Previous sections of this report have provided an overview of e-filing and e-service and the key issues regarding design options and its operation. This section of the report changes perspectives from a global overview to that of each of the participants. The discussion looks at the objectives, benefits, and concerns regarding e-filing and e-service for each of the potential users—the participants in the justice system. The goal is to allow the reader to focus on what they may experience when they begin using e-filing or e-service. The reader can also see what the impacts are on other users to get a better sense of their opportunities and concerns. Questions addressed in the discussions include:

- Why consider electronic filing? How would e-filing or e-service meet specific goals and objectives? What problems can it help solve?
- What are the potential benefits? What savings are possible? Will it allow work simplification or re-engineering of practices and procedures? Can it be used to achieve a higher quality or level of service?
- What is going to be different? Sometimes the nature of the problem changes, but there are still problems.
- What can we learn from jurisdictions that have already implemented electronic filing?
- What can be done with e-filing and e-service that cannot be done with paper?

The user groups identified below include the clerk, who is responsible for the court record, the judicial officers, the lawyers, litigants, particularly self-represented litigants, and the public.

The discussion here assumes a court-based or third party vendor system, as only these approaches are capable of providing many of the benefits that make the change to e-filing and e-service worth the effort.

A. Clerk of Court

Summary

The major benefits to the clerk come from a substantial reduction in the handling of paper documents and a reduction in data entry associated with newly filed documents. There are also savings from quicker and improved access to court records. The benefits are primarily realized from the implementation of e-filing and to a lesser extent from implementing e-service. The savings are achieved in small increments -- a little time saved or work avoided for each document. However, given the significant volume of documents and files handled in a typical court, the cumulative effect is substantial.

It is important to note that e-filing is more than a new technology to speed the work; it is a new way of doing business. Accepting an electronic document as opposed to a paper document can change almost all aspects of the keeping of the record. It is also important, when considering a transition, to keep in mind the larger context in which the electronic exchange of documents is occurring. The choice of approaches not only determines the potential benefits to the clerk and the court, it also affects the level of participation by the bar. Selecting an approach that provides significant benefits to the lawyers and gives them incentives to participate will increase both the magnitude of benefits realized by the clerk and the pace of adoption.

Clerk of Court Objectives Supported

When considering new practices such as e-filing or e-service, the clerk's objectives relate primarily to the core responsibility to maintain the court record. There are several aspects to this objective. The clerk seeks to maintain an accurate and complete record and to do so at the least public cost. At the same time, by making the court record readily accessible to the public, the clerk contributes to the transparency and accountability of the judiciary. E-filing and e-service can further these objectives in a number of ways.

Benefits

The following benefits can be realized by the clerk with a basic e-filing system:

- Substantially less clerk staff resources are required for document intake. Staff spend substantially less time reviewing and accepting documents with e-filing than with conventional paper filing.⁶¹
- Fewer documents need to be returned by the clerk's office to attorneys because of errors such as lack of a signature. Less staff time will be spent answering litigant questions regarding documents with problems.
- There will be a more standardized and more consistent⁶² collection of filing fees. Fewer documents will need to be returned for lack of, or insufficient, filing fees because the fees are determined by the e-filing system, subject to review by the clerk, and automatically charged to a credit or debit card or other account. Less staff time is spent answering litigant questions about fees.
- Virtually no clerk staff time is required for data entry into the court's CMS if the e-filing system, either because of data entry by the party submitting the document or use of XML tagging, transfers the data directly into the court's CMS.
- No staff time is spent locating and placing new paper documents in the case file. Savings are immediate with respect to new documents and cumulative as more electronic documents are accepted.
- Less staff time will be spent pulling files for hearings or the public and re-shelving them. Savings are immediate with respect to new documents and cumulative as more electronic documents are accepted.
- Several people can be looking at an electronic document at the same time, whereas only one person at a time can look at documents in a paper file.
- There is substantial reduction over time in the volume of paper case files that need to be maintained.
- There are no lost or misplaced documents or files. No staff time is spent trying to locate or replicate lost documents or files. A back-up feature in the e-filing system means there is always a copy of the document; it cannot be lost.

⁶¹ The clerks in Circuit Court for the Baltimore City can review and accept a new electronic filing in less than a minute.

⁶² After implementing e-filing, the Circuit Court for Baltimore City found it had not always been collecting the full answer fee in all cases.

- There is less anxiety that the case file does not contain all the documents filed by the parties. Once the document is received and accepted, there is very little risk of it not being linked to the correct case or that it will be filed in the wrong case file.
- It is easier to find a document in a large, multi-volume case file because of the indexing of documents in the e-filing system or the court's DMS.
- Fewer case files are out of the file room in judges' chambers or in law clerk or reporter's offices, etc.
- There is less risk to the integrity of the case file. All documents in a file are available without people having the ability to remove a document. Nor can documents be written on or altered. People can print out their own copies of a document on which to make notes without compromising the integrity of the original record.
- There are fewer calls to the clerk's office regarding the status of filings or court dates as law firm staff, parties, litigants, the media and the public can check the court's or EFSP's e-filing site for the information.
- E-filed documents are available virtually immediately after acceptance. There is no waiting for the document to be placed into the file. This is particularly useful for high visibility cases where several people, most significantly the public and the media, may want immediate access.
- There is improved public access to court documents, via terminals or over the Internet. There is never a problem that a file is unavailable because it is in court or lost, and no staff resources are needed to retrieve and reshelv the case file. Fewer inquiries to the clerk for records to the extent people can access them on the EFSP's system.
- There are other potential benefits to be realized with e-filing systems that cannot be achieved with paper-based filing. Some may require functionality beyond that of a basic e-filing system. Additional benefits include the following:
- E-service can be used by the court to serve court orders and judgments, avoiding the need to maintain service lists and the costs and time associated with making and serving copies.
- Clerks can "cut and paste" language from documents filed by the parties to create orders after hearing and judgments. This reduces the time to prepare court orders and reduces the risk of error from the re-typing of language from documents.

- If essentially the same document (for example a court order) needs to be filed in multiple cases, the e-filing system can be designed to allow a clerk to prepare a master document that is then filed in multiple cases, with the caption automatically changed for each case.
- Electronic work flow can be incorporated into the e-filing system whereby the system automatically routes a newly filed document to a person who needs to review it and make recommendations to a judge in preparation for a hearing or decision. Examples include calendar clerks, law clerks and probate examiners. Clerks will not have to figure out to whom a newly filed document needs to be routed once the protocols have been determined and programmed into the system.
- The electronic nature of the document allows gathering of information useful for management purposes. The information, once analyzed, can be used for budget planning and defense. For example, it can show growth in document filings and pages per document, notwithstanding flat or falling case filings. The information can also be used for evaluation of the e-filing system itself.

Concerns

Implementation and use of e-filing involves changes, in business practices, in work habits, and in the “look and feel” of one’s work. Some changes will occur during the transition process, others will occur in the way work is done after the transition has been made. Based on experiences in jurisdictions that have already implemented e-filing and e-service, here are some of the concerns the clerk and court staff may encounter when making the transition. Change always creates anxiety and some discomfort, but none of the concerns discussed here are insurmountable. Generally, there are several ways to minimize any impacts of the changes.

- There is no original paper document. The original version of documents exists only in electronic form. Paper copies can always be printed on demand for those preferring to read a hard copy. It is also easier to maintain back-up copies of electronic documents.
- The clerk must have control of the document. The clerk and court must decide whether they want a copy of every document to be in the clerk’s DMS, or is it sufficient for the document to be available only through the EFSP, which is presumably always accessible to the clerk, the court and the public.⁶³ The clerk’s need to have the document can be addressed by establishing a practice whereby an electronic copy of each e-filed document is transferred to the court’s DMS. The document transferred becomes the official court record in the case.

⁶³ See Standard 1.1K Court Control over Court Documents in STANDARDS FOR ELECTRONIC FILING PROCESSES.

- The existence of multiple copies of the electronic document. If an EFSP is used to provide e-filing services, there may be multiple copies of the electronic document. The EFSP will have a copy in its server, the clerk will have one in its DMS (if it does not rely on the EFSP's copy), and each party served may keep a copy. This is not altogether different from the paper world where every party receives a paper copy of each document. Only the version in the clerk's file is considered the official court record. Similarly, the electronic document in the clerk's DMS can be defined as the official court record.
- Viewing documents on a computer screen is not the same as looking at the paper version. Again, printing a copy of a document is simple. Moreover, most people become accustomed to reading documents on a screen, particularly short documents.
- Need for training programs for clerk and court staff who will use of the e-filing or e-service systems. This is important both initially and as turnover in the office occurs. Training will have to be developed, but the processes are not complicated, and if an EFSP is used, the vendor may be directed to assist with the training.
- Misidentification of the nature of a document, both for purposes of determining the correct filing fee and for correctly describing it in the case management system. This is best addressed by properly trained and competent clerks doing the document review.
- Proper handling of the document. It is important to document the business rules and protocols to be embedded in the e-filing system to facilitate the clerk's review, the payment of filing fees and the proper routing of newly filed documents. The rules and protocols must also be updated as laws and business practices change. Initially identifying the rules and protocols will take some effort, but maintaining them is less burdensome. Again, an EFSP can assist with this process, especially in the beginning.
- Working with a mixed record – some paper and some electronic documents. This may occur within cases as well as across cases. This can create added work, and is a strong incentive to mandate e-filing in a case, or encourage use of e-filing generally.
- Helping users having trouble filing or viewing an electronic document. There will be a need for a 'help desk' and other aids for such users, especially a self-represented litigant. If there is an EFSP involved, this type of support can be delegated to the EFSP.
- Selection of a date for a hearing in a case in a manner that is consistent with the requirements of the judges, yet convenient to the parties. Existing practices could be maintained whereby a party must contact the court to select a hearing date compatible with the court's calendar. One feature that could be included in an e-filing system would be one that assists parties in selecting hearing dates using business rules developed by the court.

- Reconciliation of filing fees collected through the e-filing system with the clerk's fee accounting system. Experiences of other courts and EFSPs can be very helpful here.
- The possible need for additional technology – workstations, scanning stations, printers, back-up capability, etc. Section III.G. above discusses Technology considerations.
- The potential need to create an interface to integrate the e-filing system with the court's CMS and DMS. This will require either software development by the court's IT support staff, the assistance of the CMS or DMS vendor, the assistance of the EFSP, or all of the above.
- Enforcement of applicable public access and privacy requirements when the EFSP has a copy of all documents filed with the court. The court can require the EFSP to comply with applicable public access and privacy rules.
- Planning the transition, in particular, where to start (case types, parties, documents excepted, etc.). Experiences of other courts and EFSPs can be very helpful here.
- Deciding on the starting point for implementation. Whether to start as of a given day and go forward only, or go back and scan documents previously filed in certain cases, or only scan those documents required for a hearing. Experiences of other courts and EFSPs can be very helpful here.
- Resisting the temptation to think that e-filing will, by itself, be the 'magic pill' that will suddenly solve problems such as lost documents or case files, filing backlogs, inadequate space or equipment, or poor record management practices.

*Court of Appeal Clerk*⁶⁴

If a case with an electronic record is appealed, the clerk of the court of appeal must make some changes to accept an electronic record. Generally, the appellate clerk receives the trial court clerk's entire original record, referred to as the clerk's transcript, and the parties receive copies of the record. If some or all of the original documents are in electronic form, the appellate court must make several decisions.

- The appellate court must first decide whether to accept a CD or other media that contains the electronic documents forming the clerk's transcript, or to require the trial court to produce a paper record.

⁶⁴ For further discussion of the potential impacts of e-filing on appellate courts, see Richard B. Hoffman and Barry Mahoney, "Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices and Procedures Can Work to Reduce Delay?" 35(2) INDIANA LAW REVIEW 467, at 493-94 (2002).

- In some cases there will be a mixed records (some electronic and some paper documents) and there may be physical exhibits. The clerk needs to make sure justices and law clerks are aware of all of the parts of the record.
- Related to this is how the clerk certifies the record when it is electronic, although this may be more an issue of form than substance.
- The appellate clerk must decide how to provide access to the record, both internally for judges and law clerks, and for the public. The appellate court clerk could install public access terminals or make the e-file EFSP's database available.
- The trial transcript presents a different issue. Generally, the transcript is produced by court reporters or transcribers and may or may not be available in electronic form. In some courts, the transcript will consist of audio or video tapes. Whatever the format, the appellate clerk will have to integrate the various forms of the record so that it can be readily accessed and used by the justices and their staff.

B. Judges

Summary

The impact of e-filing and e-service on the work of judges is varied. Some issues directly affect their work in hearing and deciding cases. Others are more indirect, affecting the operations of the judicial branch for which the judges are responsible. To the extent judges are responsible for the court record, the impacts on the clerk's office impact the judges as well.

Objectives Supported

The role of judges is to resolve disputes and to define the status, rights and duties of the parties in cases. They are expected to act in a just, timely and cost-effective manner. To make their decisions, judges consider the law and evidence. To a large extent, the law and evidence are presented to them in documents. E-filing and e-service can further these objectives in a number of ways. It can enable faster access to documents and minimize delays caused by lost or misplaced documents. More significantly, it can improve the quality of documents through such features as hyperlinks, cross-referencing and the improved ability to find information in documents. This allows judges to make more informed decisions and to do so more quickly and at less cost.

Benefits

The following benefits can be realized by judges with a basic e-filing system:

- There are no lost or misplaced documents or files and there is less anxiety that the case file does not contain all the documents filed by the parties.
- E-filed documents are available virtually immediately after acceptance. There is no need to wait for them to be logged into the CMS, placed in the case file and delivered to the courtroom.
- There are no stacks of case files in the judge's chambers.
- It is easier to find a document in a large, multi-volume case file because of the indexing of documents in the e-filing system or the court's DMS.
- Electronic documents are available 24 hours a day, 7 days a week. The judge does not need to wait for the clerk's office to open to get a file or document.

There are other potential benefits to be realized from an e-filing system that cannot be realized with paper-based filing practices. Some may require functionality beyond that of a basic e-filing system. Additional benefits include the following:

- A judge can immediately review a document that requests prompt judicial action and to issue an order electronically in response to the filing.⁶⁵
- A judge can review a request and issue an order without being physically present in the courthouse.
- Electronic documents can contain cross-references allowing the judge to jump from the body of the document to relevant pages in appendices and exhibits attached to the document. A court could require such linking as a way of making attorneys be more prudent as to what is attached to a document, or at least indicate more specifically what portions of the attachments the attorney considered most relevant.
- Electronic documents can contain hyperlinks to legal databases containing the full text of the case, statute or rule, etc., cited in the document. This would allow the judge to jump from the body of the document to the legal authority cited and back again without having to stop and refer to hard copies of law books or to open other software programs (for example to access a legal research database).

⁶⁵ A good example would be the ability of a victim of domestic violence to electronically complete the documents requesting a protective or stay away order and e-file them to the court. The judge could review the documents, issue the appropriate orders, and the clerk could e-serve the orders back to the victim and to relevant law enforcement agencies.

- Electronic documents, particularly exhibits and transcripts, can be rapidly searched electronically to find terms, names, references, case cites, etc.
- Judges can “cut and paste” language from electronic documents filed by the parties to draft orders after hearings, decisions and judgments in cases, reducing the preparation time.
- Electronic “post-it” notes can be attached to a document and shared between the judge and a law clerk. These notes are not available to the parties or the public. The notes can be kept linked to the document (for example, for the judge to refer to when the parties appear again at another hearing).
- Electronic work flow can be integrated with the e-filing system whereby the system automatically routes a newly filed document to a judge or the judge’s staff for review and action, if any. This could be particularly useful in cases assigned to one judge for all purposes.

Concerns

Implementation and use of e-filing involves changes, in business practices, in work habits and in the “look and feel” of one’s work. Some changes will occur during the transition process, others will be reflected in the way work is done after the transition has been made. Based on experiences in jurisdictions that have already implemented e-filing and e-service, here are some of the concerns the judge may express when making the transition. Change always creates anxiety and some discomfort, but none of the concerns discussed here are insurmountable. Generally, there are several ways to minimize any impacts of the changes.

- The most immediate concern is making the transition from using paper case files and reading paper documents to using an electronic case file and viewing documents on a computer screen. It can be more tiring and difficult to read a document one screen at a time, particularly a long document that is in electronic form. The simple answer is to print out the document. Conversely, for some documents, particularly short documents, it may be easier to focus on the essential contents on a computer screen.
- There will be some unease surrounding the need to learn how to use an e-filing system and associated CMS and DMS systems. This highlights the importance of training and on-going support of users.

- It may seem easier to find a document in a paper case file because of familiarity with files, the use of colored forms, the likely location of a document in a file, the thickness of a document, etc. Many of these cues can be duplicated in the way the documents appear on the CMS register or in the DMS. Moreover, lists of electronic documents in an e-filing or DMS system can be sorted by those who filed the document, by document type, as well as by date of filing, which may make it easier to find a document in an electronic file.
- The ease with which electronic documents can be assembled creates the potential for attorneys or self-represented litigants to create and file even longer documents. Attorneys may err on the side of including an attachment or exhibit because of the relative ease of including it electronically. This can be addressed by requiring the attorneys to cross reference to specific pages or sections of any attachments.

C. Attorneys and Law Firms

Summary

The major benefits to attorneys and law firms are of several types: a) a reduction in the handling of paper, b) more certainty about when documents were filed and received, c) a more readily accessible record, and d) new opportunities regarding analysis and preparation of electronic documents. Maximum benefits are realized from implementation of both e-filing and e-service. Savings and benefits resulting from the elimination of the handling of paper documents are primarily felt by the support staff in a law office. First, the handling of paper documents is eliminated. Second, there can be a reduction in data entry associated with newly filed documents if the e-filing and e-service system is integrated with the law firm's CMS or DMS. Note that the savings are achieved in increments; a small amount of time is saved or work avoided for each document. However, with the significant volume of documents and files handled by a typical law firm the cumulative effect is substantial. The impact of e-filing and e-service on the work of attorneys is of a different kind. It provides greater control and certainty about the filing and service of documents and faster access to case documents and information. It also enables faster preparation of documents, faster response to documents served by opposing parties and higher quality in the documents submitted.

Attorney Objectives Supported

In our adversary-based system, the role of lawyers is to advocate for a just, equitable and fair result for their clients. They are expected to do so in a timely and cost effective manner. Lawyers advocate for their client by gathering and presenting information to each other, the court, and their clients, generally in the form of documents. E-filing and e-service can improve advocacy in a number of ways. At the simplest level, it results in quicker and less expensive filing and service of documents. Having the case file on-line also permits better tracking of case activity. More significantly, it can shorten the preparation time and improve the quality of documents through the use of hyperlinks and cross-referencing and through the enhanced ability to find information in documents.

Benefits

The following benefits can be realized by attorneys with a basic e-filing and e-service system:

- Less staff time and resources are spent e-filing and e-serving documents than is spent for conventional paper filing and service.
- There are lower costs for e-filing and e-service, as compared to copying and preparing documents for service and using messengers, mail or other delivery methods.
- There are fewer documents returned by the clerk's office for errors such as the wrong fee, a missing signature, etc.
- There is less need to call the clerk's office regarding the status of filings, proof of service, or court dates in cases. Attorneys or their staff can check the e-filing system for the information.
- Electronic service of documents is easier, more reliable and more secure than service by any of the traditional methods. Because of the significant number of documents that are served on other parties but not filed with the court, the benefits of e-service are greater to attorneys than to the court.
- E-filed documents are available virtually immediately after submission. There is no wait for them to be processed by the clerk's office and placed into the file. Nor is there a wait for the document to be delivered by the mail or a delivery service.
- Attorneys have greater control over the timing of filings and there is more certainty about when filing and service of documents occurs. It is also easier to document when service occurred and there is less opportunity to manipulate service to a party's advantage.

- Electronic documents, including proof of filing and service, are available 24 hours a day, seven days a week. There is no need to wait for the clerk's office to open to obtain a copy of a document or check the status of filing or service.
- Lawyers have the ability to review a document in a case remotely or without being physically present where the actual document or case file is located.
- There may be more time to prepare a document if the service time is reduced because of the immediacy of e-filing and e-service or if the e-filing and e-service system is available 24 hours a day, seven days a week, not just during normal court business hours.
- There are no lost documents or files in the clerk's office that might necessitate a request to postpone a hearing or might delay a court's decision.
- Having all documents that have been served (even if not filed with the court) available in an online case file, whether maintained by the court or EFSP, provides a more complete record of what was served and when.

There are other potential benefits to be realized from e-filing systems that are not available with paper documents. Some may require functionality beyond that of a basic e-filing or e-service system. Additional benefits include the following:

- Case and document related data can be fed into the law firm's CMS or DMS from the e-filing or e-service system, thereby avoiding the need for data entry by law firm staff.
- There is the option of filing multiple documents in a case with one e-filing transaction.
- There is the option of filing the same document in multiple cases with one e-filing transaction.
- Electronic documents can contain cross-references allowing the reader to jump from the body of the document to relevant pages in appendices and exhibits attached to the document. This makes it easier for the judge or opposing counsel to follow an attorney's argument because the jump is directly to a particular page, paragraph, or statement in the attachment and the reader does not need to thumb through the document looking for it.
- Electronic documents can contain hyperlinks to legal databases containing the full text of the case, statute or rule, etc., cited in the document. When preparing documents, this would allow the attorney to point the court or opposing counsel directly to what the attorney considers the relevant law. When reviewing a document prepared by the counsel, it would allow the judge or attorney to jump from the body of the document to the legal authority cited and back again without having to refer to hard copies of law books or to open other software programs, such as a legal research database.

- Electronic documents, particularly exhibits and transcripts, can be rapidly searched electronically to find terms, names, references to attachments, case cites, etc., which can assist the attorney in more quickly drafting a more persuasive argument.
- Attorneys can “cut and paste” language from other documents to draft new documents, proposed orders or responses to opposing counsel. This can significantly reduce the time to prepare documents.
- There is the ability to create an "electronic repository" of commonly cited documents referred to in a case or group of cases. Parties could then reference or provide hyperlinks to a document in the repository when drafting motions and other papers filed with the court, thus avoiding the need to repeatedly attach copies of the referenced document. The repository could be used across jurisdictions, as well as across cases.
- A DMS component integrated with an e-filing system can have a feature that allows electronic “post-it” notes to be shared between an attorney and a law clerk that are not ‘publicly’ available.
- Electronic workflow can be added to the e-filing system to automatically route a newly filed document to the appropriate attorney, paralegal or secretary in a law office for review and response, if any.

Concerns

Implementation and use of e-filing and e-service involves changes, in business practices, in work habits and in the “look and feel” of one’s work. Some changes will occur during the transition process, others will occur in the way work is done after the transition has been made. Based on experiences in jurisdictions that have already implemented e-filing and e-service, here are some of the concerns attorneys and law firms may encounter when making the transition. Change always creates anxiety and some discomfort, but none of the concerns discussed here are insurmountable. Generally, there are several ways to minimize any impacts of the changes.

- Making the transition from using paper case files and reading paper documents to using an electronic case file and viewing documents on a computer screen. It can be more tiring and difficult to read a document, particularly a long document that is in electronic form, one screen at a time. The simple answer is to print out these documents. Conversely, for some documents, particularly short documents, it can be easier to focus on the essential contents on a computer screen.
- Learning how to use and training support staff to use, an e-filing or e-service system, and any CMS or DMS integrated with the e-filing or e-service system. This highlights the importance of training and on-going support for users.

- The need to change certain business practices and procedures in the law firm, for example:
 - Internal operating practices regarding the preparation of documents so that they are ready to be served electronically at the end of the preparation and review process instead of being ready to go to the “copy center” for copying and serving;
 - Timing issues of when documents are prepared, particularly if e-filing is allowed during hours the courthouse is physically closed;
 - Relationships with process servers and delivery/messenger services who currently serve the attorney’s documents;
 - Business practices for routing documents served electronically similar to those practices for routing documents arriving by US mail, deliveries or faxes; and
 - Practices for notifying or providing copies of electronically served documents to clients.
- The need for additional technology such as workstations, scanning stations, printers, back-up capability, etc. Section III.G. above discusses Technology considerations.
- The need to create an interface between the e-filing system and the law firm’s CMS or DMS.
- An attorney that practices in more than one jurisdiction may have to learn more than one e-filing or e-service system if each jurisdiction develops its own system or requires use of different EFSPs.
- The need to learn how to protect the privacy or confidentiality of a particular document or information in the document in an e-filing environment.
- The potential of opposing counsel taking advantage of e-filing and e-service deadlines, for example, by setting a hearing at the last possible moment or in a manner that reduces the response time available to other parties.
- Non-participation by parties who are indigent or self-represented, thereby complicating service of documents and creating a mixed record.
- The concern as to whether judges really read all of the documents submitted and that the risk is greater when the documents are electronic, based on the perception that it is harder to read and digest them.

D. Litigants

Summary

The benefits to litigants are of two kinds. First, there are the direct benefits from the improved quality of attorney preparation and reduced costs of legal services. There are also benefits from the better support for, reduced cost and improved quality of judicial review.

Objectives Supported

A litigant comes to court to resolve a dispute or obtain clarification of their status, rights or duties relative to other parties in the case. They expect resolution of their case to occur in a just, timely, fair, and cost effective manner. E-filing and e-service contribute to these goals by improving the quality of legal representation and judicial review, and by reducing the costs of resolving disputes.

Benefits

The benefits experienced by litigants come in smaller increments since most are not regular participants in the judicial system and because individual cases often do not involve large numbers of documents. Nonetheless, litigants benefit from reduced costs and the potential for improved quality of representation and review as follows:

- Lower costs for filing and serving documents;
- Lower costs for document preparation and improved quality of attorney representation;⁶⁶
- Lower public costs and more efficient operations in the judicial system;⁶⁷ and
- Better support for and improved quality of judicial review.⁶⁸

Concerns

- Discomfort from the lack of paper documents reflecting what has happened in court cases. This can be relieved over time as litigants see how easy it is to obtain paper copies of court documents when needed.
- Perceived disadvantage if their attorney is not using e-filing and e-service.
- Providing for litigants who are entitled to fee waivers; and

⁶⁶ See section V.C. above.

⁶⁷ See section V.A. above.

⁶⁸ See section V.B. above.

- Provisions, if any, to be made for indigent litigants regarding the charges for using the e-filing or e-service system.

E. Self-Represented Litigants

Summary

Litigants who chose to represent themselves in court proceedings, whether by indigency or choice, find themselves in two roles—attorney and litigant. As such, the benefits and concerns described above for these two classes of participants also apply to self-represented litigants. There are additional concerns arising from the fact that they are generally not regular participants in the judicial system and some, but not all, have limited experience with judicial procedures and practices and fewer resources for participating. Accommodations can readily be made to minimize any inability to take advantage of these services.

Objectives Supported

A litigant comes to court to resolve a dispute or obtain clarification of their status, rights or duties relative to other parties in the case. They expect resolution of their case to occur in a just, timely and cost effective manner. Self-represented litigants also seek to represent themselves without being penalized for choosing to do so. E-filing and e-service can support these goals by reducing the cost of filing and service and by improving the quality of judicial review.

Benefits

The benefits experienced by self-represented litigants come in smaller increments since most are not regular participants in the judicial system and because individual cases often do not involve large numbers of documents. Nonetheless, the following benefits can be realized:

- Lower costs for filing and serving documents;
- Easier to access court documents from anywhere using an e-filing system as opposed to traveling to the courthouse to review or obtain copies of documents;
- Lower public costs and more efficient operations in the judicial system;⁶⁹ and
- Better support for and improved quality of judicial review.⁷⁰

⁶⁹ See section V.A. above.

⁷⁰ See section V.B. above.

Concerns

- Lack of access to a computer: a) to generate electronic documents; b) to file or serve documents electronically; or c) to receive electronically filed documents. A court can minimize this impediment by establishing a process whereby someone who does not have the equipment to file or serve electronically can either bring in a disk with the document on it, and use a public access terminal to file and serve the document, or bring in a paper document, which the court will scan and e-file and e-serve.
- Lack of access to legal-document assembly programs or electronic forms that can be used to prepare legal documents. While this type of functionality is not typically part of e-filing or e-service systems, e-filing and e-service can be integrated into the “back end” of such programs. This concern is best addressed by self-help centers or other forms of assistance to self-represented litigants rather than expecting these services to be part of an e-filing system.
- The need to learn how to use the e-filing or e-service system, as opposed to learning how to file and serve paper documents. Training and on-going support are important in addressing the needs of self-represented litigants, recognizing they are generally one time users. The simpler the e-filing or e-service systems are to use the better.
- Accessible methods for paying or waiving court filing fees. Provisions should be made to allow a person bringing in a document for filing to pay by cash or check rather than through the e-filing system.
- Providing for litigants who are entitled to fee waivers, recognizing not every self-represented litigant is indigent. The court and any EFSP must also decide what, if any, provisions will be made for indigent litigants regarding the charges for using the e-filing or e-service system.

F. The Public

Summary

The greatest benefits of e-filing to the general public come from more immediate and expanded access to court documents. In addition to making public records more accessible, it also makes it easier to hold courts accountable for their actions. There are also indirect benefits from a less costly and more efficiently operated justice system.

Objectives Supported

The expectation of the public is that the judicial system provides a neutral forum for the just, timely and fair resolution of disputes. There is also an expectation that this be done in a cost effective manner and that the processes and procedures do not inhibit access to justice. Greater public access to the working and decisions of the judiciary educates the public about the limits of acceptable behavior and also provides greater transparency and greater accountability for the judicial branch of government. E-filing and e-service contributes to these goals both by making the processes less costly and more efficient and by improving the quality of attorney preparation and judicial review.

Benefits

- Several people can be looking at an electronic document at the same time, even while the court is working on the case.
- E-filed documents can be available virtually immediately after acceptance. There is no wait for them to be processed by the clerk's office and entered into the case file.
- There are no lost documents or case files in the clerk's office.
- There are fewer case files out of the file room in judges' chambers, law clerk, reporters' offices, etc. In the paper world, case file and documents may be unavailable during hearings and trials. This is especially relevant in high profile cases.
- Electronic documents are available 24 hours a day, seven days a week. There is no need to wait for the clerk's office to open in order to review or obtain a copy of a document.
- It is easier to access electronic documents through a court or EFSP site than to travel to the courthouse.

Concerns

- The cost, if any, to access or to make a copy of an electronic document in an e-filing system.
- The public cost of a court developing an e-filing or e-service system, as opposed to using an EFSP. If an EFSP is used, the cost to the court of the court's use of the services.

VI. E-Filing Jurisdiction Profiles

A large number of jurisdictions have initiated e-filing and e-service programs, and the scope of this white paper limits the ability to profile all of them. Instead, a representative sampling of programs is described below. The intent is to show a variety of programs in terms of the jurisdiction involved (one court, regional or statewide), types of cases included, characteristics of the program and range of features.

Circuit Court for Baltimore City, Baltimore, Maryland

Jurisdiction of Court: General jurisdiction state trial court

Type of cases initially part of project: All asbestos cases from the entire state of Maryland, which were consolidated into the Baltimore City Circuit Court

Case types added later: None yet

Mandatory/Optional: Mandatory

Date E-Filing began operation: June 2001

Characteristics of program:

- E-filing and e-service
- Partnered with LexisNexis File & Serve as the EFSP
- Password requirement of EFSP system satisfies signature requirement

Other Significant Aspects of the program:

- Initial pleading must be filed in paper form
- E-file and e-service system is same as that used for similar cases in Washington D.C. Superior Court. Thus, attorneys practicing in both courts need only learn one system
- Clerk's office reports that the document intake process was reduced from 11 steps taking 3-5 days with paper filing, to 2 steps involving generally less than a minute
- System has features that allow users to file one document in multiple cases simultaneously

Colorado Judicial Branch Electronic Case Filing Project

Jurisdiction of Court: Program available to and serves all District Courts in the State of Colorado (general jurisdiction trial court)

Type of cases initially part of project: Available in all civil, domestic, probate and water cases in District Court

Case types added later: Plan to expand to limited jurisdiction courts

Mandatory/Optional: Generally voluntary, except for Broomfield District Court (e-filing mandatory for all domestic, probate and civil cases filed after January 1, 2002), Denver Probate Court (e-filing mandatory in July 2003), Boulder District Court and some courtrooms in Arapahoe and El Paso counties.

Date E-Filing began operation: July 2000; fully implemented statewide in February 2001

Basic characteristics of program:

- E-filing and e-service
- Partnered with LexisNexis® File & Serve as the EFSP
- Signature requirement satisfied by password requirement of e-file system
- E-filing system integrated with statewide case management system ICON
- System is word processor neutral; document is converted to PDF by the EFSP
- Documents e-filed up until 11:59 PM are deemed filed that day
- As of September 9, 2002, more than 100,000 documents have been filed, and there are approximately 3,000 electronic filings per week

Other Significant Aspects of Program:

- E-filing and e-service can only be done by licensed attorneys
- Integration of e-filing with I-CAN kiosks for self-represented litigants, implemented under a grant beginning in the fall of 2003

Superior Court of the District of Columbia, Washington, D.C.

Jurisdiction of Court: Unified trial court serving the District of Columbia

Type of cases initially part of project: Complex litigation cases (“Civil I” cases, which include most of the court’s asbestos and tobacco litigation).

Case types added later: None yet

Mandatory/Optional: E-filing and e-service are mandatory in designated cases

Date E-Filing began operation: May 1, 2001

Characteristics of program:

- Partnered with LexisNexis File & Serve as the EFSP
- Password requirement of EFSP system satisfies signature requirement and document filed electronically must contain facsimile or typographical signature
- EFSP pays filing fees and bills lawyers directly for the amount of fees paid
- Documents e-filed up until 11:59 PM are deemed filed that day
- Initial pleadings are filed electronically but must be served in paper form
- Parties must keep a signed original of every document filed in their office
- Documents proposed to be filed under sealed must be filed in paper form, not electronically; the motion to file document under seal must be filed and served electronically
- Public Access terminal located in the Civil Clerk’s Office at the courthouse

Other Significant Aspects of Program:

- E-file and e-service system is same as that used for similar cases in Baltimore City Circuit Court such that attorneys practicing in both courts need only learn one system
- Clerk’s office reports that the document intake process was reduced from 11 steps taking 3-5 days with paper filing to 2 steps involving only a few minutes
- Over 675,000 pages have been e-filed and e-served in the first two years

King County Superior Court, Seattle, Washington

Jurisdiction of Court: General jurisdiction state trial court

Type of cases to be included: Initially a pilot project involving volunteer law firms and civil cases. Planned expansion to all case types and to include self-represented litigants.

Mandatory/Optional: Initially voluntary

Date E-Filing began operation: Expect to begin pilot project operations in summer of 2004 and expand to all users by the fall of 2004

Characteristics of program:

- Court centric—court developing its own system with the assistance of Sierra Systems, the court's imaging vendor
- Initially e-filing only; e-service would be added later
- Initially the e-filing will be integrated with the document imaging system, but not with the court's case management system. Intend to use XML tagging in an "electronic envelope" to feed data to the document management system
- The initial system will not include electronic payment of filing fees
- There will be no fee to the filer, as the court is paying for the development of the system
- Signature requirement satisfied by password requirement of e-file system
- Document electronically filed after the court closes will be deemed filed the next business day
- Documents must be in PDF format

Significant Aspects of Program:

- Court already has an extensive imaging system, including most documents filed since 2000. Consequently judges and court staff are familiar with viewing documents on a screen
- Project oversight provided by E-Filing Steering Committee with representatives of the Court, bar associations, county information technology staff, Clerk's office, Supreme Court Clerk, and state Administrative Office of the Courts
- Program will develop XML based forms for use by court clerks, self-represented litigants and certain executive branch agencies

Philadelphia Municipal Court, Philadelphia, Pennsylvania

Jurisdiction of Court: Limited jurisdiction state trial court.

Type of cases initially part of project: Small claims cases as part of the Municipal Court CLAIMS project (Civil Litigation Automated Internet Municipal Court System).

Case types added later: Cases filed by several City agencies, including the court's largest filer, the License and Inspections bureau. By October, 2003, 12 of 19 City agencies who regularly file court cases were initiating cases electronically.

Date E-Filing began operation: First case filed electronically in April, 2000. The first City agency began electronic case initiation in September 2001, and several others, including the License and Inspections bureau, began initiating cases electronically in September 2002. In December, 2002, the first pro se small claims case was initiated electronically through the system.

Characteristics of program:

- Partnered with Verilaw Technologies, Inc. as the EFSP
- E-filing is integrated with the court's web-based CMS
- E-filing authorizing rule permits documents to be in PDF, WORD, or WordPerfect format. The e-filing system converts the documents to PDF format
- E-filing by City agencies is initiated by a transfer of data, not a document, directly from the agencies information technology system to the court's CMS

Other Significant Aspects of Program:

- Some court forms can be completed by the parties using web-based data entry screens. The data is transferred through the e-filing system, which then creates a PDF version of the form with the transmitted data in it
- Attorneys can select a hearing date for their case as well as file documents through the system

VII. Glossary/Definitions

ACH — see Automated Clearing House

Automated Clearing House (ACH) — Method of electronically transferring funds from the attorney's or EFSP's bank account to the court's or clerk's bank account to pay the filing fee for accepted documents.

Case Management System (CMS) — An electronic database maintained by the court or clerk to keep track of information used to manage a court's caseload. The information includes such things as case numbers and party names, attorneys for parties and their addresses, titles of all documents filed in each case, and all scheduled events in each case.

CMS — see Case Management System

DMS — see Document Management System

Document Management System (DMS) — An electronic database whose contents are documents in electronic form and whose structure allows quick access to documents based on traits associated with the document such as case number, filing date, filing party, type of document, etc.

Docket — The list or index of proceedings in a case, which may include court events and documents filed in a case. See also Register of Actions.

Document assembly program — Document assembly, at the most basic level, is the creation of new documents from the combination of existing information and new information. The existing information can be an existing document, elements (for example, paragraphs) that can be combined to form a new document or a template or form into which new information is incorporated. The process generally involves a person responding to a series of dialogs and prompts, often from within a familiar word processing program, and the system assembles a draft document. Alternatively, the user picks forms, clauses and other document components as needed from libraries of alternatives to create a document.

E-filing (Electronic Filing) — The electronic transmission of documents to the court for the purposes of filing.

EFSP — see Electronic Filing Service Provider

Electronic Filing Service Provider (EFSP) — The court or the vendor who provides a system for e-filing and/or e-service of court documents via the Internet. The service may be accessed through a web site or in person at the courthouse using a Public Access Terminal.

E-service (Electronic Service) — The electronic transmission of documents to a party, attorney or representative under these rules. Electronic service does not include service of process or summons to gain jurisdiction over persons or property.

Mixed record — A circumstance where some of the documents in a case file exist in paper form and others exist only in electronic form. The physical case file would be incomplete since it does not include copies of the electronic documents.

PAT — see Public Access Terminal

PDF — see Portable Document Format

Portable Document Format (PDF) — The Portable Document Format is an electronic document file format created by software available from Adobe Systems, Inc. The PDF format is often specified as the standard format for all documents e-filed.

Public Access Terminal (PAT) — A computer terminal provided by the court or clerk for use by anyone to e-file documents or view publicly accessible electronic court records. The public access terminal is generally located in the Clerk's office at the courthouse and is available during normal business hours.

Register of action — The list or index of all papers and documents actually filed in a case. It may also contain other pertinent information for filed documents and for the case such as hearings or other events scheduled in a case. See also Docket.

TIFF — Tagged Image File Format is a widely used raster graphics file format. It is the file format generally used to store images of scanned documents.

XML — EXtensible Markup Language is a computer programming language designed to communicate both data and the meaning of the data. XML accomplishes this by using structured information that contains both content (such as words or numbers) and an indication of what role the content plays, or its meaning. XML identifies information through data “tags” that define both the nature of a data element and the format of the data within that element. The tags are included in the text just before the data elements, which they define.

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