



January 25, 2016

Wisconsin Supreme Court
Attn: Clerk of the Supreme Court
110 East Main Street, Suite 215
PO Box 1688
Madison WI 53701-1688

Re: Rules Petition 14-03 Comment

Dear Honorable Justices:

On behalf of the Wisconsin Access to Justice Commission, I would like to express our general support, subject to the reservations set forth below, for the amended Petition 14-03 on electronic circuit court filings. E-filing has the potential to make the filing and maintenance of court records easier and more efficient. It can also make the court system more accessible to the public by reducing travel, delivery and service costs.

The Commission's mission is to develop and encourage means of expanding access to the civil justice for unrepresented low income Wisconsin residents. Consistent with that mission, our comments focus on aspects of Petition 14.03 that affect low income litigants who are either self-represented or represented by civil legal aid or pro bono counsel.

Our position on the amended petition is informed by the Principles and Best Practices for Access-Friendly Court Electronic Filing that were developed with support from the Legal Services Corporation, the Self-Represented Litigants Network and input from a range of stakeholders, including court administrators, legal aid programs, access to justice commissions and the National Center for State Courts. A copy of that best practices document is attached.

Any system for e-filing in Wisconsin should include an easy to use process for requesting a waiver of any e-filing and case filing fees based on the litigant's financial circumstances. The best practices for access-friendly e-filing address the issue of fee waivers beginning at page 11. Waiving the e-filing fee is not required in the amended petition although the transmittal letter for the amended petition says that "We expect that the director will waive the fee for indigent parties and for governmental units such as the district attorneys, public defender, child support agencies, Department of Justice, and county and municipal attorneys."

Finally, we support the comment filed by the Wisconsin State Public Defender related to an e-filing fee waiver for indigent defendants represented by the SPD or assigned counsel. We trust that the policy of waiving the e-filing fee for indigent defendants in criminal cases will be extended to indigent parties in civil cases whether they are represented by civil legal aid or pro bono counsel.



Thank you for considering our comment on amended Petition 14-03 and for all that you do to ensure equal access to justice for the people of Wisconsin.

Sincerely,

A handwritten signature in cursive script that reads "James A. Gramling, Jr.".

James A. Gramling, Jr.
President

Principles and Best Practices For Access-Friendly Court Electronic Filing

Electronic Filing and Access to Justice Best Practices Project

Reporter: Richard Zorza, richard@zorza.net

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Principles and Best Practices For Access-Friendly Court Electronic Filing

Electronic Filing and Access to Justice Best Practices Project

Introduction

Electronic filing of court documents is becoming a permanent part of the legal landscape. Electronic or e-filing will have a transformative effect on how the public and attorneys access courts and thus on access to justice for all.

These *Best Practices for Access-Friendly Court Electronic Filing* are intended to help ensure that e-filing nationally is deployed in a way that removes barriers to access to justice, and thus enhances justice itself.¹

The practices have been developed with input from a wide variety of state and national stakeholders, including State Court Administrators, legal aid advocates, and the National Center for State Courts.

The need to make such systems access-friendly is highlighted by the recent Supreme Court case of *Turner v. Rogers* (June 20, 2011), which makes clear that due process requires procedures that protect fairness and accuracy in self-represented cases dealing with constitutionally protected interests. While a procedure may meet constitutional requirements when there is a lawyer, the procedure is not necessarily sufficient when there is no lawyer.

The suggested Best Practices have been developed to be deployable with current technology and current professional structures. They may in certain cases require review and modification of state law, and where this is likely, particularly where archaic views of constitutional requirements impede efficient and appropriate solutions, that fact has

¹ The Best Practices have been developed by a consultant with funding from the Legal Services Corporation to the Central Minnesota Legal Services, and extensive input from an Advisory Group, working in close contact with the Self-Represented Litigation Network. The members of the Advisory Group are listed in Appendix One. It should be noted, however, that while this document represents detailed and extensive input from the Advisory Group, the views expressed in this document are not necessarily those of any individual members of the Advisory Group, of the organizations with which they are associated, of the members of the Self-Represented Litigation Network, of the Legal Services Corporation, or of Central Minnesota Legal Services. Special thanks to the Advisory Group, the Legal Services Corporation and Central Minnesota Legal Services, and the cooperating Minnesota Courts.

been noted. Where evolving technologies, or technologies already in existence but not yet widely deployed would assist in the resolution of problems, it has also been noted in the Commentary.

To the extent that jurisdictions use vendors or contractors to develop, deploy, or operate e-filing systems, these Best Practices are intended to cover the participation of those entities. In other words, the Best Practices focus on the experience of users and the practical outcomes delivered by the systems, regardless of how managed.

The suggested Best Practices are aspirational and do not have the force of law. Those who contributed to this document are acutely aware that adoption of these Best Practices may not always be immediately practicable, for reasons such as cost, technology deployment, prior contractual obligations, or financial structures. In such situations the Best Practices should be viewed as representing goals to which planning and future changes can be directed.

Many current e-filing implementations are local in nature and there has not yet been a national conversation by stakeholders on what is needed to make an e-filing system fully accessible for low and middle income litigants and those without lawyers. While a number of the same issues come up again and again in discussions of e-filing, there is as yet no consensus on how a fully access-friendly e-filing system should work. The document is intended to advance that discussion and to provide a tool for courts and their partners across the country as they move forward.

This document is based in part on responses to two comprehensive surveys, one distributed through the Conference of State Court Administrators, and one through the network of chairs of access to justice commissions. Responses describing over 50 projects in about 35 states were received in the court survey, and approximately 35 states responded to the access to justice commissions' survey.² Where there is no specific citation to the description of a project's practice or requirements that information has been obtained from a response to the Court Survey from an appropriate individual.³

Finally, a special additional note of credit should be given to the Conference of State Court Administrators for their 2005 White Paper *Position Paper on The Emergence of E-Everything*,⁴ which has had huge impact, and has been a major source for the values and approach behind this document.

² As of the end of 2012, thirteen projects were reported as being deployed in all of the jurisdiction (which might well have been only part of a state), fifteen in part of their jurisdiction, four being tested, six being developed, and twelve being planned.

³ Additional appropriate contact information is available upon request from the Reporter for this Project. Additions and corrections to project status reportg are welcomed.

⁴ Available online at <http://cosca.ncsc.dni.us/WhitePapers/E-EverythingPositionPaperApprovedDec05.pdf>.

I. Core Principles

The Best Practices in this document are intended to guide deployment of e-filing filing systems under the following core principles:

- Properly deployed, e- filing systems have the potential dramatically to improve access to justice.
- Such systems should be deployed with a view to the minimization of barriers to access to the justice system, and to the maximization of all aspects of access to the system.
- Access should be optimized for all, regardless of income, technological capacity, or linguistic or other personal capacity.
- Optimization of such access will improve the overall functioning, efficiency, fairness and accuracy of the legal system.
- Such optimization should be ongoing.

The remaining sections of the document apply these general principles to particular areas of deployment.

II. Electronic Identification and Verification During E-Filing

The Issue

Court rules and statutes traditionally require filing of the “original” pleading, with the actual signature of the party or attorney. When e-filing replaces in-person filing, the questions arise as to what, if anything, replaces the original signature as verifiable proof of the identity of the filer, and what if any processes should be used to capture and confirm the proof.

General Principles

A. Limitation of Verification of Identity Requirements

E-filing systems should only include verification of identity requirements when actual experience has shown both the risk of false filings, and the risk of substantial harm from such false filings, and when other alternative means of preventing the harm are not available or appropriate.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

B. Limitation of Burdens from Verification of Identity Requirements

To the extent that any verification of identity requirements is placed on those using e-filing, such requirements should be structured to minimize burdens, barriers, and costs on the filer.

Practices to Put Principles into Effect

1. General Authorization of /s/ signing

The default rule should be that a litigant can e-file using “/s/” in a document, without further verification of identity in either the filing process or in the document e-filed.

2. Appropriateness of Notification of Possible Future Identity Request

In such a default situation, where that is the case, it is appropriate for a litigant to be informed that they may in the future be requested to provide information about identification.

3. Appropriateness of Litigants Providing Identification Information; Lack of Inferences

In such a default situation, litigants wishing to provide identification information should be allowed to do so, but inferences should not be permitted to be drawn against those who fail to do so.

4. Limitations upon Circumstances in Which Verification Requirements Are Appropriate – Means of Verification

When there is in a class of cases and/or situations, an actual risk of harm from filing by one other than the person asserted to be the filing person, it may be appropriate to require submission of information that is subject to verification. However, such a requirement is only appropriate for a class of cases if demonstrated by proven history both of actual falsity of identity and actual significant adverse impact directly caused by such falsity, and if there is a showing of the unavailability or inappropriateness of other means of preventing the harm. Such verification should be automated if possible. In situations in which additional verification is required, but such online data is not available, the requirement might also be met by submission of an affidavit or equivalent self-verifying and physically signed document asserting the identity of the person who electronically filed the case. As a general matter, many states have found that the assertion of facts under the “pains and penalties of perjury,” or other equivalent, appears to provide as much protection as a formal notarization process.

5. Limitation of Verification to Steps That Trigger Risk of Actual Harm

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

Such submission should only be required prior to a step in the case that triggers the risk of actual harm.

6. Broad Range of Identity Verification Available, Including Online Systems – Privacy Protection

As wide as possible a range of such identification should be available, and might include the scanning of an appropriate and broadly defined identification document, the submission of an appropriate identifier used in commerce or by the government, or the submission of a statement of assertion of identity. (In certain such cases, privacy protections for the identifier may be required.),

7. Agency to File on Behalf of Another

The system should be built to permit e-filing on formal behalf of another, but only when such an action is permitted and authorized by state law as a function of a relationship such as attorney-client, agent, or guardian.

8. Appropriateness of Verification from Online Systems

Verification would be appropriate by links to e-mail, Facebook, and other accounts, including from systems not developed as of the completion of this document.

9. Potential Use of Pre-Registration System Reducing Need for Verification

The need for verification may be reduced by implementing a pre-registration system in which each user receives an account to which each subsequent filing is linked.

10. Unexplored Potential of Still and Video Cameras for Verification

As yet unexplored, the almost universal inclusion of still and video camera capacity in computers and phones makes possible the development of e-filing software that would allow for a still photo to be taken of the user contemporaneous with the submission of filing. This would permit simple future verification.

Commentary

The proposed practices are intended as a substitute for attorney record keeping and credit card use (which cannot be assumed for low income self-represented litigants). The proposed verification processes are intended to be rarely required, imposed only when absolutely necessarily, and minimally burdensome.

These practices are intended to limit verification of identity requirements upon those rare situations in which there is a real risk of harm, such as cases of identity fraud, elderly abuse, or when a litigant is not handling the process himself/herself but is instead

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

relegating the work to another adult. Indeed, such risk may depend not only on the case type, but also on the pleading type within a particular case type, or the particular step that is being taken. For example, a jurisdiction might have found a history of abusive property liens, obtained by litigants who misrepresent their identity, and which cannot be prevented by means other than proof of identity of the person or entity seeking the lien. In such a situation, requiring proof of identity might well be justified, but only at the point that a lien was sought, not at the beginning of any case in which a lien *might* be sought. However, the court should develop steps to quickly retract any orders and record of action if the action is found to be fraudulent.

An example of an alternative means of preventing the harm might be the requirement of an actual hearing before the step is taken, as, for example, before the dissolution of a restraining order at the request of the asserted original petitioner.

Where state law requires notarization or other formalized assertion of accuracy to a third person, either the law should be changed, or a system will need to be set up at which such assertion can be made to a third person who can electronically record the assertion. It is not clear that such currently required assertions provide additional reliability that goes beyond self-attestation.

Thumb print identification is an accurate, deployed, but not fully accessible technology, which would solve proof problems, but might raise practical barriers to certain court-using communities.

The question has been raised as to whether it is appropriate to permit one with an e-filing account to use such an account to assist another with the filing of a case. Unless such filing is formally on behalf of another, as discussed in Practice 7, above, such an action is likely to lead to confusion, and should not be permitted. A person or organization seeking to assist a self represented litigant should help that person establish and then use that person's own account. This would remove many potential sources of confusion.

Notwithstanding the above, it may be appropriate to require actual signatures upon witness statements, or other "attached" documents.

Examples and Alternatives

The new Virginia law that allows for video supported notarization.
<http://www.commonwealth.virginia.gov/notary/enotary-faq.cfm>

As of late 2012 a total of 16 projects, including in Florida, Kansas, Oregon, Pennsylvania (most), Utah, Texas, Wisconsin and Iowa reported accepting or planning to accept online representation of identity.

Macomb County, Michigan reported requiring subsequent proof at court.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

Seven other states and projects reported requiring or planning to require the submission by the e-filer of a verifiable data element.

As the Federal Bankruptcy Courts implement e-filing, they are requiring submission of a photo id.⁵

III. Supplemental Fee/Waiver for E-filing and Associated Services

The Issue

Some recently deployed state court e-filing systems charge fees additional to the basic filing fee. These are sometimes imposed by a commercial vendor and sometimes by the court itself. Fees may be imposed for electronic filing, for credit card use, or for the use of front-end document assembly software which the user has employed to generate their document for filing. Obviously, such fees would impose an additional barrier to access for many of the self-represented (although the burden might in some cases be offset by the convenience savings of remote action).

While courts have traditionally provided systems that allow for fee waiver for those unable to pay, providing such waivers in the electronic filing context has been particularly problematic. This is partly because the systems, especially those set up to be funded by revenue, depend on fee income, and partly because of technical problems in establishing the procedures for judicial approval of fee waivers without disrupting the filing process.⁶

General Principles

A. No Additional Financial Burdens on Low-Income or Self-Represented Litigants

Any fee structure should place no additional net or perceived financial burden on low income and self-represented filers.

B. Goal of Avoiding Imposition of Additional Fees for E-Filing or Related Services

Ideally, there should be no extra fee for any services associated with electronic filing, such as for the electronic filing, the use of a credit card, or the use of a document assembly tool.

⁵ Electronic communication from Jim Waldron, Clerk, New Jersey Bankruptcy Court.

⁶ See also Section IV on *Payment Process if Due*.

C. Speedy Waivability of Unavoidable Fees

In the event that it is not possible to establish a system without such supplemental fees, all such fees should be waivable upon request in as rapid and minimally burdensome way as possible. This should be part of the same process as that for waiver of the underlying filing fee.

D. Minimization of Disincentive for Pro Bono Attorneys

Financial structures should minimize disincentives for pro bono attorneys.

Practices to Put Principles into Effect

1. Use of Court Rules to Eliminate or Ensure that Supplemental Fees can be Waived

Court rules should require that e-filing related supplemental filing costs either be included in the basic filing fee, or that they can be fully waived to the same extent, and under the same standards as other filing fees.

2. Complexities should not Bar Availability to All

Courts should ensure e-filing is available to all, regardless of the complexities of putting in place systems that meet the requirements of (1) above.⁷

3. Avoidance of Delay or Burden for Those Requesting Waiver

As discussed below⁸ waiver processes under e-filing for all fees should be designed so that the filings of those requesting waiver are not delayed or burdened in any way.

4. Options to Minimize Financial Impacts of Waivers

Such approaches will be less financially problematic if either:

- a. E-filing related fees are bundled into the overall filing fee;
- b. E-filing fees are calculated in such a way that they sufficiently subsidize those who need a fee waiver;
- c. E-filing costs are subsidized by other charges relating to the usage of the data, such as access fees, which are structured to minimize the burden on litigants of limited means; or

⁷ See also, Part XI, *Opt-Out and Exemption Issues*.

⁸ Part III, *Fee Waiver Processing*.

- d. There are no additional e-filing fees at all.

5. Option to Exempt Some Priority Case Types from Supplemental Fees

Regardless of what fee structure is adopted, consideration should be given to removing from any fee structure certain kinds of policy priority cases, such as domestic violence cases.

6. Pro Bono Attorney Fee Minimization

Systems of fee exemption should be established for attorneys whose sole use is for pro bono cases.”

7. Inclusion of Waiver Policies/Requirements in Vendor Contracts

Contracts with vendors should require compliance with the above General Principles, and Practices. This is particularly necessary when the vendors are managing the actual file processing and fee processing systems.

Commentary

It appears that the political and financial aspects of ensuring availability of waiver for supplemental fees are more complex when vendors manage the process, or when the financial relationship between the court and the vendor has the effect of providing disincentives to permitting processing without payment.

Even in jurisdictions in which private vendors are not involved, the state budget structure, or the court’s budget plan may have a similar impact, with the state or court assuming significant revenue from e-filing, and thus a disincentive to the taking of any steps that reduce that income.

However, the savings from such systems are great. A time and motion study conducted by Orange County, California, for example, determined that every document filed electronically produces a “net savings” of \$2. That county handles nearly 1 million documents a year in its Civil Division, so mandated e-filing translates into a net savings of approximately \$2,000,000 in labor savings.⁹

Moreover, the costs of administering supplemental payment and waiver systems are often ignored when decisions regarding such fees are under consideration. Full inclusion of these costs in the business plan may make them far less appealing.

⁹ An article on return on investment for a full e-court is at:
<http://courttechbulletin.blogspot.com/2012/02/calculating-e-court-return-on.html>

When a court is considering deploying an e-filing system that might include those without lawyers, the RFP should request information on how the vendors propose to handle fee waivers and the other key issues related to the self-represented, as discussed in this document. Otherwise, once a vendor is retained, if these issues are not addressed in the RFP and in the final contract, the costs of any additional modifications needed to accommodate the self-represented will be perceived to be additional costs beyond the original scope. The risk is then that the system is either deployed without any changes needed to provide access for the self-represented, or that it is deployed as an attorney only system.

There is urgent need for additional research data to test these hypotheses about the impact of waiver systems.

Examples and Alternatives

As of late 2012, fourteen states and projects reported requiring (or planning to require) no supplemental e-filing fee, while twelve reported allowing for a waiver as part of the process, and five reported that they require or would require obtaining of waiver prior to completion of e-filing. Projects in Ohio, Alaska, Alabama Connecticut and Hawaii were among those with no additional e-filing fee.

Orange County, California, is directing the Electronic Filing Service Providers (EFSPs) to “figure out” how they will cover credit card merchant fee charges in such a way that the Court “nets” its entire fee (e.g., if the document filing fee is \$100, the EFSP has to pass to the Court \$100).¹⁰

IV. Fee Waiver Processing

The Issue

Some courts have faced problems in the relationship of the time to obtain a fee waiver to the actual filing. In current practice, some do not allow any filing – paper or electronic – without the fee being first paid or the waiver being actually approved by the judge, requiring a separate approval of fee waiver before the filing itself is made.

Moreover in some systems, court users that need to request a fee waiver have to file the case in person. Such systems do not allow e-filing when a waiver of any kind is required.

Regardless of whether there is an integrated fee or separate fees for e-filing and for the underlying filing itself, the structure of the waiver process in the e-filing context causes additional confusion and implementation delay, and is regarded as a significant barrier to access.

¹⁰ Information provided by Orange County staff during preparation of this document.

General Principles

A. No Submission Barriers for Those Requesting Waivers

The system should impose no additional submission barrier for that population of litigants that requests a waiver of fees, either for electronic filing or for the underlying filing.

B. Inclusion of All Filing Related Costs in Waiver Process

The waiver process must include, and must be the same for, all filing related costs.

C. Absence of Delay

The waiver process must be as instantaneous as possible, imposing no barrier or burden of delay.

D. To the extent that waivers may not be instantaneous, they should be granted “*nunc pro tunc*” making the time of filing of the pleading that of the waiver request.

Practices to Put Principles into Effect

1. Automatic Waiver for Recipients of Means Tested Benefits

Where not already in place, courts should establish systems for granting automatic waivers to recipients of a broad range of means tested state and federal public benefits programs. This would be easy to administer, and would cover a large portion of the waiver-eligible population. The submission of the identification number associated with the benefit could trigger the granting of the waiver, and could be subject to future audit if needed. Such systems could usually be established by court rule. Other areas of categorical eligibility, which might also be established by court rule, should be explored.

2. Automatic Waiver for Screened Clients for Certain Programs

One such categorical eligibility rule might be for automatic waiver for all those income screened by non-profit legal aid programs.

3. Provisional Acceptance of Filing, Subject to Waiver

E-filing systems should accept cases with waiver requests provisionally, subject to granting of the waiver or payment if the waiver is denied. Such a process could be handled completely electronically. The electronic record could note that the document has been lodged with the court pending review of the fee waiver.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

4. Online Submission of Financial Data and Algorithm

Most fee applications could be processed electronically, with the applicant providing financial information and an algorithm being applied to that data, even without categorical waiver. Required verification could be performed by automated checking, or at the first physical court appearance.

5. Electronic Referral to Discretionary Decision-Maker

Where judicial discretion is still required, either before or after preliminary filing, systems could be developed under which the matter would be referred electronically to the judge for online review. These systems could use texting and e-mail to obtain judicial approval.

6. Ongoing Review of Waiver Process and Standards

The fee waiver process and standards are particularly appropriate for ongoing review by an access to justice commission or equivalent body.

Commentary

As a general matter, most systems are more rigid than they need to be about allowing provisional filing prior to approval of the fee waiver. This appears to derive from concerns that it would be impossible to collect fees in those cases in which waivers are ultimately denied. Given the power of the court to deny relief until payments are received, this seems an overblown fear. The costs to the court of establishing new files should be significantly reduced by e-filing. In those states that require payment of filing fees for persons who are defending the action, burdens to the opposing party of defending a suit that may have gone by default can be considered in an award of attorney fees.

Increasingly, non-profit legal aid programs are performing income screening, and then providing limited services to litigants, without making them so-called “full service” clients, increasing the number of those for whom program eligibility could be used as means of determining entitlement to fee waiver.¹¹

Examples and Alternatives

In Iowa, the software includes a button that the user can click on when they want a waiver.¹²

¹¹ It should be noted that at least in the vast majority of states, waivers are not separately appropriated or funded, rather they result in a loss of filing fee income that may be offset with costs savings that result from e-filing.

¹² Information provided by state during Best Practices Process.

Louisiana does not allow contingent filing even in paper cases. A recent study showed that while some litigants who are told they need to pay the fee do not do so, and have their cases dismissed, the number for whom this occurs is small.¹³

Orange County, California, allows for waiver as part of the e-filing process. The filer submits a Request to Waive Court Fees form to the court. The court reviews the application and approves or denies the request. The system will validate that no court fees are required from filers that have an approved fee waiver.

V. Payment Process If Due

The Issue

If and when a waiver request is denied, the problem of payment comes up. Moreover in some jurisdictions, notwithstanding the approach of these *Best Practices* some supplemental fees may not be waivable, and therefore payment will still be due. In such situations an appropriate payment process is needed.

Usually e-filing systems rely on credit or debit cards. However many of the self-represented do not have such cards (and with fee increases being imposed by many banks, the percentage of low and middle income people with such cards may go down). The problem therefore is how are those who must make payment can do so easily, speedily, efficiently, and at minimally burdensome cost.

General Principles

A. Ease of Process

The system should make it as easy as possible for people to make any ultimately required payments, regardless of their participation in the online economy.

B. No Disadvantage for Those Who Must Ultimately Pay

Litigants who have filed a fee waiver request should not suffer any disadvantage for making that request, if they are ultimately required to pay the fee, or part of the fee.

Practices to Put Principles Into Effect

1. Multiple Payment Systems Supported

The system should permit payment using any of a broad range of existing online payment systems, including, but not limited to:

¹³ Information provided by state during Best Practices Process.

- a. Credit and debit cards
- b. Pay pal and other online payment systems
- c. Electronic transfer from checking account
- d. Pay at the counter option selection

2. Use and Availability of Pre-Paid Cards

This should be supplemented by the making available for sale, at a wide variety of locations, a prepaid card for the exact value of the filing fee. This card would be available for purchase at courts, libraries, other government locations, as well as appropriate retail operations. Such cards could also be obtained by mail order from the court.

3. Availability of Personal Payment By Mail

To the extent that a filer was not able to use any of those systems, they should be able to make a provisional filing, with a payment due to be made in person (cash, check, or money order) or by mailing it to the court (check or money order).

Commentary

The above range of choices suggest that creating viable payment systems should not be a major barrier to accessible e-filing even for those without credit cards.

It should be noted that standard practice in the paper filing area is that when a waiver is denied and payment is required and made, the filing is deemed as of the time of the ultimate payment. However, it appears that few if any states require payment of a fee with an answer in such a way that timely filing of an ultimately denied waiver request would result in the answer being deemed non-timely.

Examples and Alternatives

Iowa allows for payment at the counter. If a fee waiver is refused, litigants are given five days to pay the fee. The state reports that, as yet there have been few problems.¹⁴

As of late 2012, twenty-nine projects and states report acceptance or planned acceptance of credit cards, seventeen cash in various forms, and only two Pay Pal, suggesting the need for continued expansion of forms of acceptable payment.

¹⁴ Information provided during Best Practices Process.

VI. Case Initiation and Service Of Process

The Issue

Completing proper initial service of process¹⁵ upon other parties is one of the biggest challenges for the self-represented. Moreover, depending on the governing state's processes, such litigant's failure to complete service properly is very costly for the court and the parties in terms of wasted hearings, dismissals, and frustration. The deployment of e-filing systems provides opportunities to improve the success rate of self-represented service of process and reduce the amount of time courts and others spend on educating and assisting such litigants with service of process.

Generally, in current systems pleadings for a new case must be personally served by either handing them to the defendant, leaving them in a certain required form at a known residence, receiving from the defendant a written acknowledgment of service, or providing proof of the impossibility of so doing. Often the defendant in an appropriate writing may waive these requirements.

The challenge is to find appropriate electronic alternatives to these burdensome processes, or failing that, to find ways to use electronic systems to speed and facilitate the processing and documentation of traditional processes for service.

General Principles

A. Need for Easy to Use and Access Service of Process Systems that Meet Courts' and Litigants' Needs

Courts need systems of easy service of process that takes full advantage of technology, works for those who are not regular participants in the online economy, and which meets courts' needs of security, reliability and accuracy and all parties need for full notice and due process.

B. Meeting Security, Reliability and Accuracy Needs

Security, reliability, and accuracy can be met by appropriately documented consent, including to electronic service, and by systems in which the court rather than the filer takes responsibility for the completion of service.

¹⁵ It should be noted that terminology concerning case initialization and ongoing communication varies jurisdiction by jurisdiction. In order to minimize confusion, the arguably redundant phrase "initial service of process" is used in this document to describe the process by which legal requirements for notification of initiation of a legal action to the defendant or defendants are fulfilled. The phrase "ongoing communication" is used to describe the filing and serving of subsequent papers or notifications.

C. Avoiding Archaic Understanding of Constitutional Requirements

While service of process must meet constitutional standards, there is no need for archaic expectations and understandings of those requirements to shape electronic processes, and modern expectations regarding technology and instantaneous information permit them to be radically reshaped.

D. Likely Limited Initial Scope of Modern Service of Process Systems

In their early phases, such systems are likely to be limited. As public acceptance grows, and as the technology is improved, the scope is likely to expand.

Practices to Put Principles Into Effect

1. Consent Removes Constitutional Problems

Where the responding party consents to electronic service of process, there is no constitutional problem, and such consent can be provided before or after the electronic service.

2. Practical Issues of Verification of Consent

There may be practical issues relating to verification of the identity of the consenting party, since the risk of falsity is real, and the consequences of falsity are great. Documentation of identification can be achieved as listed in I. 4, above. The data might be collected through a web interface.

3. Consent of Entities Registered With State

In the case of entities registered with the state to do business, prior consent can be obtained, recorded, or perhaps implied through the registration process, and the use of the registration number and e-mail or other consented-to service transport minimizes the risk of false consent. Potential defendants should be allowed to choose a variety of means of such electronic service. The more systems that are used in parallel, the lower the chance that no service is completed.

4. Technological Risks of Non-Delivery of Service

However, with any e-mail, text, or other electronic service system, notwithstanding prior consent, spam filters and other technology glitches make assuming actual delivery risky. This can be dealt with by requiring confirmation of receipt before service is deemed completed. A system might include penalties for one who refuses such confirmation of receipt when receipt has in fact been received. Obviously an absence of confirmation of receipt would require completion of service by traditional means.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

5. Online Recording of Acceptance of Service

When the responding party accepts paper or in person service of process, this can also be done through a web interface. Notification of the availability of this means of acceptance can be placed in the underlying documents that are served.

6. Online Recording of Frustrated Attempts at Service

When attempts are made to serve process in the traditional manner, but service is frustrated, such as by refusal to accept service, the fact of refusal can also be recorded on a web interface. Similarly, when alternative service (such as the form known as “nail and mail” in some jurisdictions) or equivalent is attempted, that can be recorded on a web interface

7. Integration of Photo Verification of Identify

Consideration should be given to building into the web interface verification of identity by use of the photo system described above in I.5. Similarly, photo proof or video proof of service attempts could be included. While fraud might be attempted, proof of fraud would be easier with such documentation.

8. Possible Increased Court Responsibility for Completion of Service of Process

A broader solution, reflecting certain Federal Court practice, would be for the court to take responsibility for serving, and obtaining proof of service of process (although it must be noted that this might raise cost issues). In many areas of practice and/or states, service costs are already being borne by the state through various forms of reimbursement of low income litigant costs.

9. Possibility of Service by Publication Through Court Website

Consideration should be given to building a system in which, when either the case type, or the history of attempts triggers questions about the possible sufficiency of service by publication, such service would become the responsibility of the court, and would be performed through a central statewide court website. People are more likely to find things on Google than they are by reading the service by publication notices in the (usually unread) paper. This data should be structured in a format, such as XML, that allows it to be imported into other display and distribution systems.

10. Proof of Attempted Service to Include Electronic Attempts

In cases in which non-electronic service continues to be used, it should be a requirement that proof of attempted service would include attempts to serve by e-mail and any other electronic system by which the defendant is known to receive communications. This is like the requirements of certification of attempts to obtain the most current address – except that electronic records will exist.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

11. Recording Authority to File on Behalf of Another

An additional problem occurs with respect to the question whether a person filing on behalf of another in fact has the authority to file initial process. While this question also, occurs in paper service systems, it will be important to include in electronic systems mechanisms for assertion of the right to act for another.

Commentary

For attorneys and for the self-represented, a system that would permit filing and e-service in one step would be very convenient and might reduce or eliminate improper service.

Systems such as those described above would significantly reduce court costs, because service of process is a problem in such a high percentage of cases. An integrated e-filing and e-service system would significantly reduce workload and costs in the courts because clerks would handle far fewer files, mail substantially less deficiency notices and handle fewer remedial filings. Some of the greatest cost savings would be achieved by the parties, which could increase the change of prior consent.

Given the systems now in place to get free or low cost phones to the excluded, and given the high use of mobile technology in this population, many of the prior barriers to such electronic service and participation have been removed (or will be as the phones develop better display systems).

Examples and Alternatives

Iowa does not allow service of process electronically. However, the initial filing causes a recording of e-mail to permit answer and appearance to be filed electronically if they so wish.

New York¹⁶ and California¹⁷ permit electronic service with consent, and their rules and processes provide a useful model.

California reported working with the National Center for State Courts on a project to enable electronic service on consenting tribes in Indian Child Welfare Act Adoption cases.¹⁸

Alaska has researched 2 years of data for service by publication and found that at best, it may be successful about 1 percent of the time – so essentially it is not effective at notifying defendants of lawsuits (and is very expensive). That state's Civil Rules

¹⁶ New York e-filing rules are collected at <https://iapps.courts.state.ny.us/nyscef/RulesAndLegislation#Rules>.

¹⁷ California Code of Civil Procedure, Section 1010.6; California Rules of Court 2.251.

¹⁸ Personal communication from Bonnie Hough.

committee will be considering the creation of a court website for posting in these cases to satisfy the service requirement.¹⁹

VII. Ongoing Service and Communication

The Issue

Generally there is greater constitutional and legal flexibility as to requirements governing ongoing communication between the parties and the court following completion of service of process of the initiating case documents. .

However, there remain practical issues that must be addressed with respect to communications after that initial service of process. These include reliability, sufficiency of notice, and problems with accessing technology for certain groups.

General Principles

A. Ongoing Communication

Courts should build a system that provides for on-going, instructive communication with the self-represented litigant to assist that litigant through case completion, including filing of additional documents and updating on the status of the case.

B. Automated Approach

This process should be automated as much as possible, and be timely, reliable, accessible and compliant with privacy standards.

Practices to Put These Principles into Effect

1. Automatic Creation or Linking to Online Accounts Upon Case Initialization

As a general matter, initiation of a case should trigger either the establishment of online court accounts for all parties, or, when such accounts are already in place for a party, the linking of the case to the prior online account (provided that it is the correct account can be confirmed).

2. Electronic Verification of Accounts

Accounts should be sufficiently verified, such as by email confirmation of receipt from email addresses identified by the parties in communications.

¹⁹ Personal communication from Stacey Marz, December 2, 2012.

3. Notification of Activity Through Wide Variety of Communication Tools

Accounts should provide notification of activity through a full range of communication tools, including e-mail, text, phone, etc., while maintaining confidentiality.

4. Litigant Choice of Preferred Communication Methods

Accounts should allow for the users to select their preferred communication method(s). Litigants can choose voice telephonic notification or mail notice if they have no other technology.

5. Links to Information, Help, and Tools

The notifications and website should include automatic and customized links to tools and information that will assist the litigant in navigating the case.

6. Notifications to Include Reminders

Notifications should include information and reminders as to when next steps need to be completed.

7. Help to Include Navigation and Navigator Help

Help systems should include navigational assistants (ideally both tech and human) to help people figure out what they want, and how to get it. These systems should also be linked to triage gateways, as they are developed.

8. Rejection Communication and Correction

The system needs to be built so that if the clerk of the court rejects a filing, the court has an accessible plain language method of communicating the rejection and the ways to correct the filing.

Commentary

Integration of such ongoing communication/gateway systems with case management systems could lead to great savings, both in court “paper” processing, and in reduction of waste through hearings scheduled with litigants are not informed or prepared. It would also encourage litigant awareness of obligations and court dates. Such savings would benefit litigants as well as the court.

The system could be built to generate “snail” mail versions of documents uploaded or generated by those using the system. These would then be sent to all those who do not receive the information electronically. (The federal system generates a message to the

filer of the names and addresses of all parties that are not participating in the case electronically so that they can be served by mail.)

As much as possible, secure systems need to be built to protect the confidentiality and personal identifying information of the parties, including when requested by one of the parties to keep the information confidential from the other party (as when under a restraining order), when there are minors or mental health information in the pleadings or case record, when they are victims of crime, and when otherwise appropriate. Parties should understand the potential risks to their privacy of the information they share through mobile phones and electronic tablets and emerging mobile technologies before they are required to use those interfaces to keep up with their cases. They should understand the risks of using email to communicate with the court or other parties.

Examples and Alternatives

Several states or projects early in 2012 reported or planned use of the electronic filing system to maintain lists for e-service of subsequent documents. These include Iowa and Macomb County, Michigan..

Federal bankruptcy courts provide electronic notice of filings to all parties.²⁰

VIII. Comprehensibility and Usability

The Issue

A court system that serves all users, including those with little or no legal experience, limited education and limited English proficiency must be simple and easy to use.

Unfortunately, because the early e-filing systems have been designed for use by attorneys and their staff, those systems are often far from meeting this standard. The early e-filing systems can be hard to understand and use.

Attorneys are “frequent filers” and therefore learn how to use the system, no matter how complicated. This is not realistic for the self-represented.

General Principles

A. Comprehensibility and Usability for Real World Populations

Electronic filing systems, and the user sub-systems with which they work, should be understandable and useable by the real world self-represented population, including

²⁰ See, e.g., Arizona, http://www.azb.uscourts.gov/Documents/Debor_pro_se_Email_Registration.pdf.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

those with no legal knowledge, limited English, limited technological experience, physical or mental challenges, and/or lower educational and literacy levels.

B. Cross Platform Access

E-filing systems should work on all types of electronic equipment, including computers, tablets, smart phones, mobile devices, regardless of manufacturer.

Practices to Put the Principles Into Effect

1. Ground-Up Design for Access

All the elements of the systems, including and starting with the creation of the form e-filing submission, fee submission, fee waiver, document assembly, and document access, should be designed from the ground up for comprehensibility and usability. This might require the creation or modification of existing court self-represented web pages, designed specifically for the self-represented court users.

2. Elements of Accessible Design

These processes include the use of plain language, the use of access-friendly design principles, and comprehensive usability testing.

3. Legal Accessibility Requirements

ADA and Section 508 requirements and non-discrimination provisions under Title VI of the 1964 Civil Rights Act must be addressed.

4. Compatible With Multiple Generations of Technology

The systems should work with multiple generations of technology, not only the most recent, including at any point in time those technologies most in use by the self-represented population. For example, as of writing in 2012, mobile technology is the sole method of Internet access for many in the target group.

5. Confidentiality Protection Information and Tools

To the degree that attorneys know how to protect client confidentiality in certain cases, and the self-represented do not, the court's system should provide those options for non-expert litigants to protect their confidentiality. So before a litigant files in court, the court should provide information about secure filings, and how to keep certain filings, or certain data in the filings, from becoming public records, where possible. Options and tools to protect such data should be built into the system.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

6. Confidentiality Policies

Courts should have easy to find Personal Identification and Information (PII) policies that are easy to read and easy to understand for any potential e-filer or potential defendant that wants to proceed with the case in electronic format. The PII policy should inform parties as to what they should do if they suspect their PII has been wrongly released by the court and what steps they can take to protect their filings and communications with the courts.

Commentary

While the state of the art is continually improving, and while meeting accessibility standards takes work and attention, there is little “rocket science” here. Many sites, including in the access to justice world, routinely follow these requirements, and the tools are in place.

It should be remembered that most online systems, such as stores, airlines, and financial institutions, are used more frequently by the user and involve much less complexity and that most such users are under far less stress than litigants. Design of court systems must therefore be appropriate for occasional users. In particular, systems must allow for “trial and error” and learning during the process.

Examples and Alternatives

Attention is drawn to Section VIII, on Internet Access.

See also, the California Court document, approved by the State Judicial Council, *Advancing Access to Justice Through Technology: Guiding Principles for California Judicial Branch Initiatives*,²¹ and the *Washington State Access to Justice Technology Principles*, adopted by State Supreme Court Order.²²

IX. Pleadings and Data: Approach, Quality and Assembly

The Issue

Many, if not most, current e-filing systems assume that the litigant’s computer will generate a pdf from a word processing program for e-filing in an upload process. Obviously requiring the filer to draft the document is simply not going to work for the self-represented, who do not have the skill to draft legal documents from scratch.

²¹ <http://www.courts.ca.gov/documents/jc-20120831-itemA.pdf>.

²² http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=am&set=ATJ&ruleid=amatj02principles.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

Moreover, even if the filer is using an independent program to generate the pleading, such an independent approach makes it hard to import underlying data, is prone to data error, and fails to take full advantage of the fact that treating the document as the unit for processing has been rendered out of date by the creation of forms, and the structuring of data within computer systems.

Systems have to be built to: 1) collect the data that is to be presented to the court, 2) to structure it to meet court rules, e-filing requirements, and judicial needs, and, 3) to integrate it to produce formal documents to the extent that they remain needed.

General Principles

A. Gathering Information and Presenting to the Court

Systems should be built so that they help the user gather and present the case to the court.

B. Generation of Data for Import and Integration

Systems should generate data about the case and the pleading, so that it can easily be imported into case management, decision support, statistical, and research systems.

C. Presentation of Data for Decision-Makers

Systems should provide the information for decision-makers in ways that supports quality and cost effective decision-making. In the short term this will include the production of traditional “documents,” and in the long term may always include such elements.

D. Presentation of Data to the Opposing Party

The opposing party must be provided with all information submitted to the court in a format that is easily accessible in order to prepare a response.

Practices to Put the Principles Into Effect

1. Online Front End Document Assembly System to Gather Data

In all areas in which there is a significant volume of filings by the self-represented, there should be a front end online document assembly system which does the following:

- a. Helps the user make sure that they are using the right program.
- b. Collects data about the case that can be used to provide the envelope for e-filing and for population of the case management system.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

c. Collects data about the party's position in the case that would traditionally be written into the pleading.

d. Generates a pleading or equivalent to notify the opposing party of the other party's contentions.

2. Integration into Document and Decision Support Systems

The software should also do the following:

a. Prepare the data into the form needed for e-filing and service, in current terms as a pleading and/or a form.

b. Be able, when desired, to prepare that data into a structured form that can be loaded into the court's decision-support software for use in triage and for engagement by advocates and the judge at hearing.

3. Language Access Support

To assist in language access, the systems should be built so that users can, whenever possible, check boxes in their own language, and have the system produce the checked text in both the user's language and in English.

4. Data Quality and Consistency

These systems should have systems to ensure data quality and consistency.

5. Appropriate Consent for Research Procedures

Where data is potentially subject to research use, appropriate consent procedures should be followed.

6. Data Entry Standards to Support Intuitive Understanding

Detailed data entry standards should be drafted to ensure intuitive understanding of the system by the self-represented.

Commentary

There are a wide range of online document assembly systems. Such systems function like Turbo-Tax with questions and answers that lead to the creation of the document. There is no technical reason that these cannot be linked into e-filing systems. An example is Arizona's e-filing system developed by Intresys Turbo-Court. In the non-profit world, I-Can! and LawHelp Interactive are examples of document creation tools in use in many different states.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

Standardization of current paper forms would make the process of building such systems far more cost effective. Ideally, such standardization would allow for additional elements when to the extent appropriately required locally. As a general matter, local flexibility is easier to build in fully automated systems, provided the initial design is carefully crafted to support such flexibility.

Similarly, the development of national resources and models is making the cost of simplifying forms and automating data gathering much cheaper.

The real limit on the integration of online forms is that the court's case management system then has to have new data elements for storing the incoming data. This entails cost and delay every time a new smart form is created. The solution is to batch the process – identifying all the data elements that will be needed by family law cases, for instance, and having them created as part of the system design. Standardization of data elements across systems is obviously crucial.

The argument that such document assembly systems constitute the unauthorized practice of law is losing currency at least at the state level. When the tools are offered by the court, the simplest argument is that any “practice” is surely authorized by the court itself.

With respect to language access, it will not always be the case that complex situations can be captured with check boxes. In such circumstances, hybrid systems may offer the best solutions.

More research is needed in areas of data validation for the self-represented, and about the relationship between document assembly systems and court e-filing systems.

E-bench systems are now starting to be developed to present gathered information to the judge.

Examples and Alternatives

As of late 2012, several states and projects report deployed or planned use of document assembly front ends, with eleven reporting it for the e-filing only, and eight for both e-filing and the underlying document, and one for the underlying document only. Among those were Minnesota, New Hampshire, Pennsylvania, and Utah.

For e-bench systems See, e.g. <http://courtechbulletin.blogspot.com/2011/12/electronic-judicial-bench.html> and <http://courtechbulletin.blogspot.com/2012/09/the-last-mile-tyler-judge-edition-report.html>.

X. Access to Internet and Support

The Issue

No matter how accessible an e-filing site is, if litigants cannot get to the Internet, or if the Internet service is too slow to allow completion of the work in a reasonable period of time, the system is functionally inaccessible. E-filing systems need to develop ways that litigants can get easily online and obtain the help and services they need.

General Principles

A. Deployment in Conjunction with Access to Internet Systems

E-filing systems should be deployed in conjunction with access-to-Internet systems that minimize any barriers from access to appropriate technology or from litigants' ability to use that technology.

B. Need for Human and Tech Support Systems

Full access requires both physical access and human and tech support systems that are appropriate to the kinds of access needed for e-filing.

Practices to Put the Principles Into Effect

1. Online Access Points

At an absolute minimum, courts will need to set up online access points that are supported with broad access services actually used by target populations, including mobile technologies.

2. Physical Access Locations

Similarly, courts themselves will need to establish physical locations at which access can be provided, and sufficient support is available to ensure that such access is real and meaningful. This includes actual human support, printing services, etc.

3. Community Collaborations

Courts will usually find it extremely helpful for access to collaborate with community-based locations such as libraries, community and senior centers, legal aid programs, and other public service agency offices. Agreements will be needed to provide on-site support services, possibly from staff or volunteers.

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4. Support for Persons with Limited English Proficiency

There should be a particular focus on the identification of places that are appropriate for those with limited English proficiency. Support systems must be appropriate.

5. Tech-Based Support Systems

Consideration should be given to providing tech-based support systems, such as LiveChat, co-browsing, phone hotlines, and how to videos.

Commentary

The extent to which full access depends on the practices described above cannot be overstated.

It should be noted how much support services such as Live Chat (in which the user can type questions and an operator can respond) are becoming standard in online stores. In some systems the operator and user can even co-browse, and work off the same screen over the Internet.

Examples and Alternatives

Iowa recommends the use of libraries by the self-represented and also provides ADA and non-ADA public terminals.

The Pennsylvania Appellate Court System includes a very detailed self-help user manual.

The Pennsylvania Philadelphia County Court System includes on site interviewers to help the self-represented with their filings.

In Orange County, California, Legal Aid serves as an Electronic Filing Service Provider, utilizing the I-CAN document assembly system.

In Utah, Legal Aid uses the system to perform filings for the court. Utah also operates a self-help service. The e-filing system provides links to the self-help center and the state law library for both on-line chat and phone listings.

XI. System Interoperability and Communication

The Issue

The great benefits of e-filing, for litigants as well as courts, will ultimately come from true interoperability with the case management and database systems of courts, governmental, social service and other agencies.

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The tools that help the self-represented, such as triage and caseflow systems that make sure that the self-represented get the help they need, or are told when they have failed to perform a necessary task, depend on such well-integrated data systems.²³

Basic Principles

A. Optimization of Potential of Interoperability

Systems should be built to optimize the capacity for full interoperability with existing and future systems at a wide range of institutions and agencies, inside and outside courts and other government agencies.

B. Short and Long Term Perspectives

Systems should be built with both short and long term interoperability perspectives.

Practices To Put the Principles into Effect

1. Standards

E-filing systems should be compliant with OASIS' LegalXML ECF 4.01 or later, an XML standard that is itself compliant with NIEM, a cross-government XML standard.²⁴

2. Vendor Incentives

States in their bidding process should build in incentives for full compliance by vendors with standards.

Commentary

Use of standards will make development of common software across states much cheaper, as well as facilitate the integration into other software platforms.

As handheld devices gain ground among the next generation of litigants, any system build has to be built with tablets, notebooks, and cell phones in mind.

²³ Such integration must be fully consistent with privacy and consent standards. See also Part XII, *Relationship to Public Access to Court Record*.

²⁴ As of late 2012, version 4.01 has been approved as a “committee draft”. Now that it has received “statements of use,” it is expected that version 4.01 will proceed through the OASIS process for adoption as an OASIS standard. More importantly, the Judicial Technology Committee has approved 4.01.

Currently, incentives for the vendors are against interoperability, since standards remove barriers to entry.

Courts must be ready to support multiple e-filing providers, including government e-filing.

Issues of privacy and consent in such integration are beyond the scope of this document. It must be noted, however, as with public access issues, that the more data that is saved, and the more it can be shared with other agencies, the more careful attention must be paid to protection of privacy rights. It is important that a shift away from privacy does not occur unintentionally as a result of these efforts.

Examples and Alternatives

Iowa required NIEM standards in its RFP and some parts of the system are using Legal XML, which is a subset of NIEM.

XII. Opt-Out, Exemption and Discrete Task Representation Issues

The Issue

Some e-filing systems are dealing with the problems of the self-represented by simply allowing (or even requiring) the self-represented to opt-out of e-filing.

Restricting self-represented litigants from being able to e-file is not enough, since it imposes burdens on the self-represented that are not imposed on those with attorneys.

The opt out solution while important to protect the access rights of those who face technology barriers during the transition period may create other long term problems, because it may remove incentives for system designers to ensure usability and accessibility. However, the benefits of e-filing would appear to be great enough to provide incentive for the courts to work to simplify their systems to encourage all parties to e-file.

Longer-term solutions to the problems of those for whom even access-friendly systems are not sufficient, are needed.

There may be related problems when discrete task representation is permitted, and there is potential for confusion as to whether and for what e-filing is permitted or required in these cases. This could be resolved by requiring e-filing if the attorney is “of-record” and not requiring it if the litigant is filing their pleadings in their own name.

Basic Principles

A. Blanket Restrictions Strongly Disfavored

The blanket restriction of all the self-represented from e-filing should be strongly discouraged since it unfairly discriminates against those without lawyers.

B. Opt-Out Disincentives Innovation

The benefits for all of e-filing are so great that systems must not avoid engaging the real difficulties of deploying systems that are access-friendly by simply allowing for opt-out.

C. Opt-Out Will Remain Needed for a Time

Until it can be guaranteed that the e-filing system is fully accessible for all, opt-out should remain available to filers.

D. E-filing Rules Should Add No Disincentive or Confusion to Discrete Task Practice

Care should be taken to ensure that litigants who are working with attorneys in discrete task representation situations are not inconvenienced or burdened by the interplay with e-filing rules.

Practices to Put the Principles into Effect

1. Planning for the Self-Represented as a Core Constituency

E-filing projects should, from day one, plan for and include the self-represented as a core constituency.

2. Need for Early Self-Represented Pilot

Any project plan for e-filing should include an early self-represented pilot.

3. Mandatory E-Filing for the Self-Represented Must Await Full Accessibility Sign-Off

While moving to mandatory e-filing for the represented on a speedy basis is appropriate, moving to mandatory e-filing for the self-represented should await a sign-off process that ensures full accessibility for all.

4. Sign Off – With Criteria – Must be Designed Early

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Such a sign off process, with detailed criteria and multi-group participation, should be designed early in the overall process, so design and implementation can proceed with the criteria in mind.

5. Accommodations for First Amendment Concerns and Those Unable To Use Systems in Place

Any generally mandatory system must include an opportunity for opt-out exceptions for a variety of reasons.

6. In Discrete Task Representation Situations, E-filing Rules Should Reflect the Task Rules of the Jurisdiction.

As a general matter, e-filing rules in discrete task matters should depend on who is doing the filing for that portion of the case.

Commentary

Perhaps the strongest argument to develop a system that will regularly review its policies about opt-out provisions is the risk that they get extended again and again. A model based on expert users (attorneys) will become ossified, and any modification to accommodate some of these recommendations will be viewed as additional costs by vendors, courts, and legislatures. It would be best to internalize the costs of serving those without lawyers from the onset of an e-filing project, so that once the court is ready to tackle e-filing for those without lawyers, there is a budget and some good understanding of savings, as well as a plan for assistance, training and support for those who will not be regular users of the system.

One way to providing sufficient accessibility to permit the end of opt-out, is to ensure alternative support services. There are a couple of funding models that could potentially work such as government tax credit (benefit to the government would be more than the credit in overall system cost). In those systems, a court might use the savings gained from e-filing with self-represented litigants to fund support staff at self-help centers, legal aid, and the clerk's office to provide assistance with e-filing.

In the long term, mandatory e-filing for all may only work when courts provide assisted e-filing at the courthouse. In other words, there is sufficient individual help that anyone can make use of the system.

Examples and Alternatives

Nineteen projects or states are reporting that e-filing is or will be available to the self-represented, but is not required. Nine are reporting that it is mandatory for all filers, and sixteen that it is available only to attorneys. Twelve report that no decision has been made.

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In Iowa self-represented litigants are required to e-file – on the theory that this will provide better access to justice by keeping the filing system available 24 x7. However, there is an exemption for those unable to use the system.

In terms of maintaining a variety of ways to access the system, it is of relevance that the Standard for Legal Non Profits developed by the American Bar Association's Standing Committee on Legal Aid and Indigent Defense, requires that legal aid groups allow multiple ways to request legal services.

XIII. Relationship to Public Access to the Electronic Court Record

The Issue

As a general matter, as courts go fully “paperless,” the system is moving to one in which there is broad access, by the public and litigants (and counsel), as well as data aggregators, to the electronic court file. This raises questions of policy regarding privacy, feasibility risk and cost about extending this to the papers filed by the self-represented.

These issues are central to access to justice since fear of violation of rights of privacy may deter full participation in the justice system. Such deterrence, and indeed the consequences of such deterrence, are potentially far greater for those already suffering exclusion from the system.

Basic Principles

A. Goal of Access to Whole System

Any integrated system should take full advantage of the potential that electronic filing and a “paperless” file provide for making it easier for the self-represented to access the system in all senses of the word.

B. Right to Access Own Cases For Free

Litigants have a basic right to access their own cases for free.

C. Balancing of Privacy and Rights of Access

Privacy and rights of public access must be appropriately balanced.

D. No Unintentional Shift on Balance of Privacy and Access

The balance between privacy and rights of public access should not unintentionally be shifted by the increase in electronic storage of court information that is an inevitable consequence of moving to e-filing.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

Practices to Put the Principles into Effect

1. Review of Potential Shift in Privacy/Access Balance

Deployment of e-filing systems should be accompanied by review by those responsible for balancing interests of privacy and accessibility to ensure that the balance is not adversely impacted by the deployment.

2. Potential for Need for Design Changes in Both Systems

Maintaining this balance may require design changes in both systems. For example, to the extent that there is broad public access to files, the underlying e-filing and document assembly systems must be built to help litigants make sure that information that they need to keep confidential, such as social security numbers and health information, is so treated.

3. Capacity to Exclude Certain Information From Assembled Documents

This includes building the system so that certain information is not included in the assembled document, or other accessible element. Document assembly front ends have the potential for much greater control over data than traditional pdf e-filing.

4. Linkages to Sealing Mechanisms

Such capacity also includes linking to, and triggering, appropriate easy to use sealing mechanisms.

5. Need for Court Authority to Maintain Confidentiality of Registration Information.

An additional need is to ensure that courts have the authority to maintain the confidentiality of information gathered in the e-filing registration process itself.

6. Fee Waiver and Payment Systems for Access Systems

The self-represented need easy fee waiver and payment processes for online access to court files, just as they do for e-filing itself.

7. User Accessibility in Public Access Systems

Similarly, public access systems must be designed with user accessibility in mind, just as they must for the e-filing system.

Commentary

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Fee systems for public access provide the great benefit of revenue, but care must be taken to provide sufficient access to the self-represented.

Given that the self-represented may have difficulty maintaining full copies of all the papers in their case, online access may be particularly beneficial and important. Similarly, online access to underlying documents will make e-mail and text event reminder triggering systems more valuable.

Full discussion of the appropriate balance between privacy and public access is beyond the scope of this document. It must be recognized however, that deployment of electronic filing systems dramatically expands the range of data stored electronically, and as such tends to shift the balance in the direction of access, *regardless of the intent of the design of the systems*. This is in large part because barriers of practical obscurity disappear. In particular, the integration of records from courts with those from other sources increases the risks of identity theft or other harms from the loss of privacy.

The situation is not helped by the fact that much of the potential revenue comes from data aggregators, who play a major role in the removal of practical obscurity.

Additional risks to privacy occur if private vendor partners are not under effective regulation with respect to the data they receive as part of the e-filing process.

Examples and Alternatives

Iowa restricts access to filers and parties to the case or attorneys online. Public access to the electronic file is on a public terminal in the courthouse of the county where the case was initiated.

XIV. Training

The Issue

Training programs for court staff and the staff of partnering organizations are critical for any technology deployment. Maintaining the accessibility of e-filing will require training appropriate to the particular challenges of such deployments.

Basic Principles

A. Importance of Embedded Training Programs

E-filing deployment must be accompanied by embedded training programs that include sufficient focus and materials on access issues so that staff members perform their jobs with appropriate attention to access issues.

Note: Descriptions of e-filing rules and processes are for policy and planning purposes only. Litigants should obtain current information direct from the appropriate court.

Practices to Put the Principles into Effect

1. Training on Importance of Access and Role of Staff

Such training needs material on the importance of access to the courts by self-represented litigants, low income persons, persons with limited English proficiency and others who may face challenges with e-filing and the role of staff in ensuring access.

2. Training To Include Specific Tasks Needed

Such training needs description of the specific things that staff needs to do to ensure such access.

3. Training to Focus on Needs of Those Inexperienced in Computers, or who Face other Barriers

Such training needs a focus on the special needs of those with little or no computer experience, those with limited English proficiency or literacy issues, and those who face other barriers

4. Training For Those Supporting Access From Non-Court Locations

Such training will also be needed for those persons who are helping litigants e-file or review court records from from non-court locations.

5. Online Training Tools

Online training tools will be particularly appropriate, given that they can easily demonstrate what filers have to do, and what staff therefore have to do to help them. For low-literacy communities, videos, animations, cartoons, and recordings will be an important supplement to heavy text based approaches. Courts and their vendors should not assume that the public at large is familiar with Frequently Asked Questions (FAQs) or able to read through multiple pages of text, in plain language or not.

Commentary

Customer service training is already generally regarded as critical to court functioning. This component merely adds a new element to an existing function.

Examples and Alternatives

Iowa is providing ongoing systems of hands on training to filers. It is also providing online documentation.

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XV. Management and Governance

The Issue

While the overall management and governance of the e-filing initiative is beyond the scope of this document, certain management practices are worth identifying as facilitative of establishing and maintaining access-friendly e-filing.

Basic Principles

A. The e-filing management process and structure should be designed to ensure sufficient attention to access issues throughout the process.

Practices to Put the Principles into Effect

1. Placement of Managerial Responsibility at Sufficiency High Level

Responsibility for access issues should be placed high in the management structure of the e-filing initiative.

2. Viewed as Operational Project, Not Technology Project

The e-filing project should be seen as an overall operational project, not just a technology project.

3. Role of Access Staff In Management of Process

Staff concerned with issues relating to access for the self-represented must be a major part of the management process.

4. Principles Document As Guide

Establishment of a “Principles” document, related to, but shorter than, a Best Practices document, might be helpful in ensuring such a focus by the governing entity.

5. Maintaining Governance Within Government Structure

The overall governance of the project should be kept within the governmental structure; vendors should not make fundamental policy decisions about access, costs, etc, although certain details may be delegated subject to review.

6. Role of Contracts in Ensuring Court Control

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To the extent that vendors are used, while the process should remain flexible, contracts should be carefully drawn to ensure that decisions that impact access are made by a process controlled by the court.

7. Ongoing Systems to Identify Access Issues

Management systems, including consultation systems, should be in place to identify problems with access as they occur.

8. Need for Long-Term Flexible Budgets

Long-term budgets should be drawn up to include flexibility to provide resources to address access problems as they are identified.

9. Senior Staff Responsibility for Access

Senior level staff must be assigned responsibility for access.

10. Ongoing reporting and status review of Access Issues

Ongoing reporting and status review, both within the project and to outside stakeholders should include access issues.

Commentary

In tough economic times, where financial pressures on courts have the potential to create conflict with access goals, it is particularly important to have a governance structure that protects access.

Where a private sector partner ends up with significant operational and/or management responsibility, it is particularly important to have in place a governance structure that minimizes access risks from this potential conflict

An access to justice commission is a logical stakeholder and planning partner in this process. The commission should be kept abreast of developments and receive periodic updates on the status of the project, access affects, and should have the ability and power to request special reports from the courts on topics of interest related to e-filing, as well as data.

Examples and Alternatives

Iowa created a Business Advisory Committee (BAC) made up of judges, clerks, prosecutors, the public defender, and private bar.

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XVI. Collaboration

The Issue

Regardless of whether developed by a court, or a vendor, e-filing systems ultimately need to be built in close collaboration with groups sensitive to the needs of the self-represented. Courts as the most necessary partner in any system must play a critical role in making sure that this happens. This can help ensure the usability of the system, as well as its accessibility.

Basic Principles

A. Including Broad Range of Partners in Building and Operating System

The system should be built and operated with the participation of a broad range of partners so that it reflects the complex needs of the self-represented.

B. Need for Knowledge of Needs of Self-Represented

These partners should reflect knowledge of the needs of the self, represented, and well as the capacity to assist in serving them.

Practices to Put the Principle into Effect

1. Involvement of Organizations that Serve the Self-Represented

Organizations that already directly serve the self-represented should be consulted and involved, both for their knowledge of the self-represented, and in order to ensure that the system supports them in their assistance to the self-represented.

2. Range of Consultation and Involvement

There should be a broad range of consultation and involvement, including focus groups, surveys, comment on proposed software, and user testing of software under development.

3. Those Facing Unique Barriers

Participation should also include those serving groups facing unique barriers to access such as persons with limited English proficiency, persons who are illiterate, and those with disabilities.

4. Interoperability to Overcome Barriers

Planning should include interoperability to optimize the ability for the software to work with software that facilitates access for barrier-facing groups.

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Commentary

Access to justice commissions, the bar, legal aid programs, public and law libraries are natural collaborators. Verification systems may require cooperation with other players such as banks and government benefit agencies.

Examples and Alternatives

The Minnesota Courts and Central Minnesota Legal Services are jointly developing their e-filing project.

The Legal Aid Society of Orange County California is actively involved in developing an e-filing module with the Court.

XVII. Assessment of Accessibility

The Issue

Ongoing assessment of the accessibility of e-filing – indeed of any court function – is critical to its ultimate success.

Basic Principles

A. Assessment of Accessibility Built In From the Start

Management attention to accessibility should be built in to the project from the start.

B. Ongoing Assessment of Accessibility

Ongoing assessment of accessibility should be a key management task so long as the service is in place.

Practices to Put the Principles into Effect

1. Initial Steps to Include Assessment of Barriers

One of the initial steps in the planning and design process should be an assessment of current barriers to accessible filing, and potential impacts of the e-filing project.

2. Assessment Included in All Steps

At each step in the planning and design process, such an assessment should be as much part of the process as the budget analysis or the staff impact analysis.

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3. Criteria and Goals Established Early in Process

These assessments should be based on criteria and goals established early in the process.

4. Systems for Continuing Assessment of Access

Systems should be put in place to ensure continuing assessment even when the project is fully operational, and no longer the subject of routine management focus.

Commentary

Such systems are particularly important when operations are contracted to vendors.

National organizations may be helpful in developing the systems for ensuring such ongoing assessment.

Examples and Alternatives

Iowa uses ongoing review and a special group to handle complaints and compliments

Conclusion

These Best Practices represent not the conclusion of a process, but the beginning of one.

It is hoped that as more experience is gained with deployment of access-friendly systems, it will be possible to expand these Best Practices, and to increase their utility and contribution to the accessibility of the court system.

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