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BRIEFING AND ORAL ARGUMENT

NEW TECHNOLOGIES AND APPELLATE PRACTICE

Philip A. Talmadge*

Many appellate courts are doing their work at the dawn of the twenty-first century in a fashion not entirely dissimilar to the way they were doing their work at the dawn of the twentieth. Appellate courts process paper files physically transmitted to them by the trial courts. Appellate judges and their staffs read paper briefs. Upon the publication of a written opinion, the paper record is placed in physical storage. Too often, because of resistance from attorneys, staff, and the judges themselves, and because resources are unavailable to move to an electronic environment, appellate courts have not utilized new technology that can facilitate the business of those courts.

By necessity, appellate courts currently use some forms of new technology. Few appellate courts or their staffs could survive without modern word processing or electronic legal research services. But as trial courts change how they do their work, and as attorneys employ new technology to make the practice of law more productive, the appellate courts, too, must use more new technology in their decisionmaking. Appellate

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judges may be surprised to discover their ability to resolve cases will be enhanced as new technology is brought to bear. In many instances, appellate courts can abandon the unnecessary use of paper, including the storage of vast volumes of paper records, in favor of digitized submissions and records. The most significant reform resulting from the use of new technology in appellate practice will be a more accessible record for judges and law clerks, and briefs that give judges and clerks fingertip access to cases and record citations. This will improve the ability of appellate courts to process materials and decide cases.

In five particular respects, new technology can improve the operation of the appellate courts: (1) electronic filing and argument of appellate cases; (2) digital maintenance of the record; (3) briefs; (4) dissemination of opinions; and (5) record storage. I will discuss each in turn.

I. ELECTRONIC FILING AND ARGUMENT OF CASES

Many appellate courts already allow electronic filing of documents.¹ Through electronic filing courts may accept

1. Washington appellate courts have allowed e-filing by court order. The Washington Supreme Court, for example, adopted Order No. 25700-B-334 on September 4, 1997, which states:

WHEREAS, the Supreme Court has the ability to send and receive messages electronically, and

WHEREAS, the Court wishes to take advantage of his technology in order to facilitate access to the Court, and

WHEREAS, RAP 1.2(c) and RAP 18.8(a) provide the Court may waive or alter the provisions of the Rules of Appellate Procedure in order to serve the ends of justice;

Now, therefore, it is hereby ORDERED:

That the Supreme Court Clerk shall establish protocols for the electronic filing of documents and e-mail messages in the Supreme Court. That the provisions of RAP 18.7, which requires that each paper filed in the Court be signed by an attorney, are waived for all papers filed electronically, pursuant to this Order and protocols established by the Clerk.

When the parties in a case agree:

1. The provisions of RAP 18.5(a), which require that a copy of a pleading be served on all parties, amicus, and persons who may be entitled to notice, shall be construed to apply to messages sent through the electronic mail system.

2. The provisions of RAP 18.7(b), which sets forth methods of service shall be construed to include the use of "cc:" in all electronic mail message.

That this Order shall apply in all cases for all documents as provided in protocols established by the Supreme Court Clerk.

pleadings by facsimile transmission, as attachments to e-mail, or as direct file transfers. All of these formats require attention to the particular court rules for electronic submission of documents. Many courts, including those of the federal system and Washington State, confer substantial local discretion on courts to allow electronic filing.²

The address for the e-filing protocols is: <<http://www.courts.wa.gov/clerks/fax.htm>>.

2. Federal Rule of Civil Procedure 5(e) provides, in pertinent part: "A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." The guidelines established by the Administrative Office of the U.S. Courts for such filings are available on the Internet at <www.nysb.uscourts.gov/>. Although Washington courts have not yet adopted general rules for electronic filing, Washington State Rule of General Application 17 sets forth the procedures for facsimile transmission of filings, should a court wish to permit such filings:

(a)Facsimile Transmission Authorized; Exceptions.

(1)Except as set forth in subsection (a)(5), the clerks of the court may accept for filing documents sent directly to the clerk or to another by electronic facsimile (fax) transmission. A fax copy shall constitute an original for all court purposes. The attorney or party sending the document via fax to the clerk or to another shall retain the original signed document until 60 days after completion of the case. Documents to be transmitted by fax shall bear the notation: "SENT on _____ (DATE) VIA FAX FOR FILING IN _____ COURT."

(2)If a document is transmitted by facsimile to another for filing with a court, the person responsible for the filing must attach an original affidavit as the last page of the document. The affidavit must bear the name of the court, case caption, case number, the name of the document to be filed, and a statement that the individual signing the affidavit has examined the document, determined that it consists of a stated number of pages, including the affidavit page, and that it is complete and legible. The affidavit shall bear the original signature, the printed name, address, phone number and facsimile number of the individual who received the document for filing.

(3)The clerk of the court may use fax transmission to send any document requiring personal service to one charged with personally serving the document. Notices and other documents may be transmitted by the clerk to counsel of record by fax.

(4)Clerks may charge reasonable fees to be established by the Office of the Administrator for the Courts, for receiving, collating, and verifying fax transmissions.

(5)Without prior approval of the clerk of the receiving court, facsimile transmission is not authorized for the judge's working copies (courtesy copies) or for those documents for which a filing fee is required. Original wills and negotiable instruments may not be filed by facsimile transmission.

(6)*Facsimile Machine Not Required.* Nothing in this rule shall require an attorney or a clerk of a court to have a facsimile machine.

(b)Conditions.

(1)Documents transmitted to the clerk by fax shall be letter size (8 1/2 by 11 inches). Documents over 10 pages in length may not be filed by fax without prior approval of the clerk.

Many attorneys still do not utilize electronic filing of documents because of concerns about the reliability of transmission. The comfort level of attorneys might be enhanced if, for example, filing fees are adjusted to provide financial incentives for electronic filing and courts send out official confirmation of receipt. E-filing must offer tangible rewards to practicing attorneys if it is to succeed.

In addition to e-filing, appellate courts could allow argument of motions in electronic form. Today, many appellate courts serving large areas frequently allow telephonic argument of motions.³ The technology to support interactive video communications—or even argument in a chat room or asynchronous e-mail format—is readily available and should be considered for argument of appellate motions, and perhaps even for final arguments on the merits.⁴

(2) Any document transmitted by the clerk by fax must be accompanied by a fax transmittal sheet in a format prescribed by the court. The form must include the case number (if any), case caption, number of pages, the sender's name, the sender's voice and facsimile telephone numbers, and fax fee remittance certification. Transmittal sheets are not considered legal filings.

(3) A document transmitted directly to the clerk of the court shall be deemed received at the time the clerk's fax machine electronically registers the transmission of the first page, regardless of when final printing of the document occurs, except that a document received after the close of normal business hours shall be considered received the next judicial day. If a document is not completely transmitted, it will not be considered received. A document transmitted to another for filing with the clerk of the court will be deemed filed when presented to the clerk in the same manner as an original document.

(4) Court personnel will not verify receipt of a facsimile transmission by telephone or return transmission and persons transmitting by facsimile shall not call the clerk's office to verify receipt.

(5) The clerk shall neither accept nor file a document unless it is on bond paper.

(6) The clerk shall develop procedures for the collection of fax service fees for those documents transmitted directly to the clerk. Nonpayment of the fax service fee shall not affect the validity of the filing.

(7) Agencies or individuals exempt from filing fees are not exempt from the fax service fees for documents transmitted directly to the clerk.

3. See, for example, Washington Rule of Appellate Procedure 17.5(e), which states:

The appellate court may direct the parties to conduct oral argument of a motion to the commissioner or clerk or to the court by conference telephone call. The expense of the call will be paid by the moving party, unless the appellate court directs otherwise in the ruling or decision on the motion. A party may request telephone conference argument by letter or telephone call to the appellate court clerk.

4. Washington court rules already permit limited use of interactive video in trial court proceedings. Washington State Rule of General Application 19 addresses video conference

II. APPELLATE RECORDS

In most appeals, copies of the clerk's papers (pleadings in a case) and the trial transcript are physically reproduced at the trial court and mailed to the intermediate appellate court. If further appellate review is sought, the record is again transmitted to the next level of appellate court. This process requires the expenditure of considerable time and effort on the part of support staff in both trial and appellate courts, not to mention substantial reproduction and mailing costs. Further, after the record is used by the appellate court, considerable costs are incurred in the storage of these records.⁵

The implications of paper records for the judges' work on cases are also profound. No two appellate judges can work on the same case file simultaneously unless the court has reproduced the whole record for each judge, an expensive proposition. Moreover, for a voluminous record, the judge and his or her staff do not have the luxury of keyword searches through the record. Judicial personnel must rely on laborious treks through the record, relieved only by the sketchy indices prepared by trial court staffs and court reporters.

Ironically, more and more court reporters use computer technology to create transcripts. The steno machines of most court reporters are nothing less than small computers and many reporters can provide the court and counsel with real time transcripts.⁶ But often reporters must reduce an electronic record to paper for appellate courts. Transcripts can and should be processed electronically.

Many courts now use new forms of record keeping. In the Chelan County Superior Court and several other Washington State counties, all pleadings received are scanned and

proceedings, requiring the Office of the Administrator for the Courts to promulgate standards for facilities and equipment and directing it to provide courts with the technical assistance they may require.

5. The Washington Supreme Court alone spends more than \$5,000 per year just for records storage. In 1999, the Court sent 150 banker's boxes of records to Washington's Archivist for storage. At Court Technology Conference 6 in Los Angeles in September 1999, Roger Warren, president of the National Center for State Courts, estimated the national cost for court records storage at \$3 billion annually.

6. See e.g. Tom Sowa, *Turbocharged Touch*, Spokane Spokesman Rev. A12 (Jan. 28, 2000) (reporter preparing transcript in real time which can be accessed by judge linked to reporter's system by cable).

electronically maintained. Washington courts have also experimented with scanned records in appellate cases. The obvious benefit of an electronic record is that an appellate court judge and his or her staff can access the record through keyword searches. A court does not have to rely on the rudimentary index most court reporters provide for trial and deposition transcripts, or the all too cursory index to the clerk's papers that trial court clerks prepare.

The benefit of electronic processing of an appellate case was recently demonstrated in Washington. In *Aluminum Company of America v. Aetna Casualty & Surety Company*,⁷ the parties agreed to provide the Washington Supreme Court an electronic record in the case in the form of CD-ROM disks produced and formatted with operating software by a commercial enterprise. This agreement was born of near necessity. The clerk's papers consisted of over 57,000 pages, and the report of proceedings (the trial transcript) was over 12,000 pages in length.

The CD-ROMs containing the briefs, clerk's papers, trial exhibits, appendices, and transcripts in the *Alcoa* case were all located on a central server so that any justice or law clerk could access any part of the record from their own computer terminals. Considering that the paper record in this case was stored in approximately fifty banker's boxes, the availability of the record via computer made access immeasurably more convenient.⁸

While scanned records are a distinct improvement over paper records, it is something of an interim technology, reinforcing business practices built on paper. Scanning may actually impede transition of court systems to true electronic case processing, unless courts are cautious in choosing the technology so that the transition to direct electronic data interchange is built into the system. Some form of electronic record will inevitably be adopted by appellate courts. A CD-ROM record might be a means of ensuring an electronic record without a vast investment and major planning with local trial

7. 998 P.2d 856 (Wash. 2000) [hereinafter *Alcoa*].

8. It is noteworthy that this record utilized a large part of the space of the Washington Supreme Court server drives. While this may be a feature of the Court's own network, if many appellate cases are handled in this medium, there may be significant impacts on the court's computer network, server space, personal computer resources, and staff time.

courts. Alternatively, remote access to trial court record keeping could be used, requiring significant trial court-appellate planning and coordination of effort. In this model, lawyers submit pleadings to the trial courts in digital form and the trial courts are the repositories of the records in digital form. Appellate courts across a state would be able to access the records directly from the trial court's storage system. No reproduction or mailing costs would be entailed in such a system. However, it is also true that adoption of this approach is hindered by the lack of bandwidth, or equal access to sufficient bandwidth, for the telecommunications portion of the necessary infrastructure.

As this day of the electronic appellate court is rapidly approaching, judges and court administrators must address several troubling issues associated with using the electronic medium. Security is an enormous concern. Protection against hackers is vital to the integrity of the court. No court can tolerate tampering with an electronically-maintained record. In particular, the possibility of introducing counterfeit documents into an electronic record would be very troublesome. The sealing of documents raises another important issue. How an appellate court handles public access to the electronic record and limits public access to sealed documents will be an important consideration of any electronic record system.⁹ These problems,

9. Attorney Andrew Cohen framed the question quite succinctly in a recent *USA Today* article:

But the coming sea-change also will create tremendous questions and problems, both practical and legal. Perhaps the most important of these is whether the technology can adequately protect sealed court records. When a judge seals a record to protect a victim's identity or the identity of a juvenile defendant, for example, the record is physically sealed. No one but the clerk and the court and the parties see it. Not only that, courthouses and clerks' offices are set up, intentionally or not, to discourage passersby from perusing a particular case file. Ever try to weasel your way into a "public" court file in some dingy and dusty basement in the corner of some courthouse?

These practical obstacles to the openness of the court system will be gone when the Internet Age finally meets the world of law. Will some hacker be able to download all cyber-sealed files? Will some clerk inadvertently leave open a supposed-to-be-sealed file, thus exposing it to the world? Will pranksters get into the system and change pleadings and orders? (I can see it now, some Brainiac hacking out a multi-million dollar judicial order against IBM which he then tries to cash at some bank). And will the threat or promise of international exposure lead more parties in more cases to ask to have their case file sealed, for one reason or another, thus defeating the purpose of the new legal *Glasnost*?

Andrew Cohen, *Courts Prepare to Take Legal System Online*, *USA Today* (Feb. 4, 2000).

though significant, can be overcome.

III. BRIEFS

The old system of paper briefs is simply archaic. Lawyers should submit briefs in electronic form to appellate courts. The technology exists, and it should be used.

In the *Alcoa* case, all the briefs were submitted to the Washington Supreme Court on CD-ROMs. A justice and his or her staff could hyperlink immediately to the record or to the key portion of the case cited by the parties straight from the text of the party's brief. Additionally, footnotes in the briefs are hyperlinked. Clicking once on a hyperlinked footnote superscript brings one to the footnote itself, which typically contains a reference to the record, also a hyperlink. Clicking once on that reference, a clerk's paper page number, for instance, brings one instantly to that actual document. Compare clicking a mouse button twice with getting up from one's chair, walking to the place in our Temple of Justice where the record is stored, rummaging through fifty boxes to find the one with document you are looking for, and then, perhaps, making a copy of the document to take back to your office for perusal.

While this scanned record clearly was more convenient than traditional paper-based approaches to case processing, such a system has its costs. This quantity of detailed material is not always easy to read in an electronic setting, as not all of us find scrolling through information on a computer terminal to be entirely enjoyable, nor as efficient. Moreover, there are limitations to the utility of records in an electronic format. Absent electronic books and software, such records are not entirely portable. Attention to user needs is a critical issue for such records, if their use is to become widespread.

While the *Alcoa* case involved a very large record, attorneys can submit briefs in electronic form along with paper briefs in the average appellate case. This would help the appellate court and its staff. However, each judge must have a ready means of reading the brief in electronic format, and that judge and judicial staff must become comfortable reading briefs electronically in the routine appellate case. Moreover, as of this writing, most appellate court rules are silent as to whether briefs

may be submitted electronically; this silence does not suggest the courts would welcome briefs in electronic format.¹⁰

IV. DISSEMINATION OF OPINIONS

The traditional method for dissemination of appellate opinions is by means of a printed volume. With the explosion of information on the Internet, the print medium is no longer the best way of disseminating appellate opinions for public use. The Washington appellate court opinions are available in the traditional printed volume format. Paper opinions by Washington appellate courts are posted physically in those courts and given to the Associated Press. But few other printed

10. For example, Washington's appellate rule on the format of briefs makes no mention of alternatives to paper briefs, stating:

(a) Typing or Printing Brief. Briefs shall conform to the following requirements:

(1) An original and one legible, clean, and reproducible copy of the brief must be filed with the appellate court. The original brief should be printed or typed in black on 20-pound substance 8-1/2- by 11-inch white paper. Margins should be at least 2 inches on the left side and 1-1/2 inches on the right side and on the top and bottom of each page.

(2) The text of any brief typed or printed in a proportionally spaced typeface must appear in print as 12 point or larger type with no more than 10 characters per inch and double spaced. The same typeface and print size should be standard throughout the brief, except that footnotes may appear in print as 10 point or larger type and be the equivalent of single spaced. Quotations may be the equivalent of single spaced. Except for material in an appendix, the typewritten or printed material in the brief shall not be reduced or condensed by photographic or other means.

(3) The text of any brief typed or printed in a mono-spaced typeface shall be done in pica type or the equivalent at no more than 10 characters per inch. The lines must be double spaced. Quotations and footnotes may be single spaced. Except for material in an appendix, the typewritten or printed material in the brief shall not be reduced or condensed by photographic or other means.

Wash. R. App. P. 10.4(a). This is hardly an inducement to lawyers to provide electronic briefs along with their paper briefs.

By contrast, Fed. R. App. P. 25(a)(2)(D) states, "A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." For example, the Court of Appeals for the Eighth Circuit and the Court of Appeals for the Eleventh Circuit permit electronic filing. *See* 8th Cir. R. 25A(a); 11th Cir. R. 31-4. A smattering of state appellate courts also permit electronic filing. *See* Ind. R. App. P. 7.1(D); Miss. R. App. P. 28(m); Mont. R. App. P. 20(a); N.M. R. App. P. 12-307.2; N.C. R. App. P. 26; Tex. R. App. P. 9.2(c). Uniquely, North Dakota *requires* briefs to be submitted on 3.5" diskettes, unless the briefs were not prepared on a computer or word processor. N.D. R. App. P. 31(b)(1)(C). Other states should follow North Dakota's enlightened leadership on this.

copies are distributed. The Washington courts also publish opinions on their home page on the Internet. As soon as an opinion is issued by the Washington Supreme Court or Court of Appeals, it is posted on the Internet and remains on the Washington court system's home page¹¹ for a period of ninety days. This is an effective means of giving public access to court opinions, particularly for the Washington Supreme Court. The court broadcasts all of its oral arguments on Television Washington (TVW), Washington's version of C-SPAN.¹²

Dissemination of opinions on the home page, however, raises the question of published versus unpublished opinions. Washington Court of Appeals opinions may be unpublished.¹³ It is difficult to make a distinction between a published and unpublished opinion disseminated over the Internet. New terminology will be required. Plainly all of the opinions disseminated through the Internet are "published," but the real issue is whether or not they have precedential value. Appellate courts should eschew the "published/unpublished" terminology in favor of "precedential/non-precedential" opinions.

A final problem with respect to dissemination of opinions is the citation of cases. The traditional method of citation to cases by printed volume and page number must certainly give way as more and more of the opinions are electronically published. I advocate the addition of an electronic case citation to the traditional state and regional reporter citations for cases.¹⁴

11. *Washington State Courts*, <<http://www.courts.wa.gov>> (accessed Aug. 15, 2000).

12. The arguments are also available in real time audio at the TVW home page, <<http://www.tvw.org>>. Many courts are broadcasting cases in real time audio and video over the Internet. See Hope Viner Samborn, *Plenty of Seats in Virtual Courtrooms*, 86 ABA J. 68 (Feb. 2000) (noting at least three state supreme courts that have broadcast cases on the Internet).

13. See Wash. R. App. P. 12.3(d). See also *State v. Fitzpatrick*, 491 P.2d 262, 267 (Wash. App. Div. 2 1971) ("[U]npublished opinions of the Court of Appeals will not be considered in the Court of Appeals and should not be considered in the trial courts. They do not become a part of the common law of the State of Washington.").

14. See generally Coleen M. Barger, *The Uncertain Status of Citation Reform: An Update for the Undecided*, 1 J. App. Prac. & Process 59 (1999).

V. RECORD STORAGE

An increasingly difficult problem for appellate courts is the storage of case files. Courts must bear the cost of storage themselves or pay another public or private entity to store their records. The maintenance of vast volumes of paper records over a long period of time becomes a significant space and cost factor for appellate courts, particularly in criminal cases where collateral attacks on judgments are a reality and records must be retained for prolonged periods.

Trial court record keeping in digital format would do much to limit the cost of storage for appellate courts. And the elimination of paper briefs in favor of briefs submitted in an electronic format would dramatically reduce the volume of records stored by the average appellate court. This effort could effect a significant cost savings for an appellate court, although court managers must also carefully balance these cost savings against the added cost of periodic copying of records into new media as the technology for record storage evolves over time.

VI. CONCLUSION

New technology will make the processing of appellate cases in the twenty-first century more efficient for appellate court judges and staffs. The transition of appellate courts from paper to electronic systems will require a change in attitude on the part of lawyers, judges, and judicial staffs. Several important steps suggest themselves in order to encourage the development of new technology for the deciding of appellate cases.

First, lawyers, judges, and judicial staffs must together explore ways of increasing competence and comfort with new technology for case processing. Continuing legal education and judicial education seminars, perhaps jointly conducted, on the use of new technology in appellate cases would be a very useful way of encouraging lawyers, judges, and judicial staffs to process appellate cases electronically. Moreover, courts must address the question of pro se court access in this context because many pro se litigants may not have ready access to the needed technology for electronic case handling. Electronic case processing will only be as successful as the system users permit

it to be.

Second, appellate courts must be certain their information systems have the capacity to handle the kind of electronic case processing recommended here. In particular, a court must be certain its digital infrastructure is ready to access a higher volume of cases processed in electronic form. Careful attention to this issue by court information technology staffs is critical.

Third, courts should assess their internal and external policies regarding court records. Internally, appellate courts must decide how best to maintain electronic records storage in a secure environment and when to begin, if at all, the process of putting older stored records in electronic format. Externally, the information revolution will make public records, like all information, more easily available to anyone, anywhere. Court policies on security and information disclosure deserve serious discussion.

Fourth, courts must evaluate their own rules of procedure to ensure that new technologies may readily be accommodated. In particular, court rules for electronic filing of all forms of pleadings should be examined to encourage electronic records and briefs. Moreover, filing fees should be set to offer financial incentives for electronic filing of appellate pleadings.

Finally, the rules for costs on appeal should be amended to allow prevailing parties in appellate litigation who submit their case in electronic format to recover the full costs of such submissions. In particular, attorneys who agree to provide the court an electronic record and submit briefs in electronic format should be able to recover the costs of so doing.

In an era when the public demands more government efficiency in the handling of public issues, courts are not immune. The employment of new technology for the handling of appellate cases can bring greater efficiency to appellate court operations. Moreover, in improving review by judges and judicial staffs of the record and briefs in a case, this new technology advances the administration of justice.

As opposed to being reluctant participants in new technology, dragged kicking and screaming into the twenty-first century, courts and judges should instead be technological leaders. Appellate courts must be friendly to new technology that can only enhance the process by which appellate cases are

decided, thereby improving public access to, and confidence in, the appellate courts.

