



2014

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### Recommended Citation

Joseph Delehanty, Yvan Llanes, Robert Rath, and Danielle Sheff, *Enhancing Efficiencies in the Appellate Process through Technology*, 15 J. APP. PRAC. & PROCESS 77 (2014).

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# ENHANCING EFFICIENCIES IN THE APPELLATE PROCESS THROUGH TECHNOLOGY\*

Joseph Delehanty, Yvan Llanes, Robert Rath, and Danielle Sheff\*\*

## PART 1. INTRODUCTION

Reducing the cost of appeals in terms of both time and money is essential to the future of all appellate practitioners, and ultimately, to the precedent produced by appellate courts. Despite reports documenting significant increases in the volume of lawsuits following the economic downturn that was in full swing by 2008,<sup>1</sup> particularly in areas such as mortgage

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\*The formatting for this article is meant to enhance the reader's comfort, especially in e-reader formats, by using some recent suggestions from a technology-savvy author. See Daniel Sockwell, Student Author, *Writing a Brief for the iPad Judge*, CBLROnline, Announcements, <http://cblr.columbia.edu/archives/12940> (Jan. 14, 2014) (discussing growth in number of judges reading briefs on iPads, advocating the use of page layouts and fonts optimized for display on tablet computers, and promoting the use of header styles common in scientific writing, such as "Part 1, Section 1.1, Subsection 1.1.1") (accessed June 11, 2014; copy on file with Journal of Appellate Practice and Process).

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1. See generally Randall T. Shepard, C.J., Ind. S. Ct., Speech, *Dealing with the Recession: A Court System that Won't Roll Over*, <http://www.in.gov/judiciary/supreme/2361.htm> (Ind. Gen. Assembly Jan. 20, 2010) (noting that recession had by then led to a record number of new filings that included increases in mortgage-foreclosure, divorce, abuse-and-neglect, and domestic-violence cases) (accessed June 11, 2014; copy on file with Journal of Appellate Practice and Process); see also U.S. Dept. of Labor, Bureau of Labor Statistics, *BLS Spotlight on Statistics, The Recession of 2007-2009*, [http://www.bls.gov/spotlight/2012/recession/pdf/recession\\_bls\\_spotlight.pdf](http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf) (Feb. 2012) (indicating that recession began in December 2007 and ended in January 2009) (accessed June 11, 2014; copy on file with Journal of Appellate Practice and Process).

foreclosures and bankruptcies, by 2010 fewer appellate decisions were issued than in previous years.<sup>2</sup> At first glance, a lowered volume of appellate litigation may seem desirable, but upon closer inspection, decreased appellate volume appears to be linked to the economic downturn and the increase in the financial and temporal costs of pursuing appeals that may put them out of reach for all but the country's largest corporations.<sup>3</sup> Fewer appeals, and less precedent, may erode public confidence in the legal system.

With that reality as background, this article explores some of the benefits of technology and discusses specific forms of technology that can be used to increase efficiency and likely reduce costs of appeals. Empirical data regarding the correlation between improved efficiency and cost-savings through technology and enhanced delivery of appellate services by practitioners and courts is scarce; however, the substance of this article is based upon experiences by practitioners and observations from within appellate courts from current and former staff members.

Few things are certain and a familiar old adage might need some adjustment for the future: The top two certainties will be taxes and technology. Technological innovations are catalysts driving change in and, ultimately, improvement of the appellate process.<sup>4</sup> These new tools create opportunities for more streamlined appellate processes and reduce the considerable expense of appeals, which benefits practitioners, courts, and, most importantly, the parties and the public.<sup>5</sup> Cost reduction

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2. Robert C. LaFountain, Richard Schauffler, Shauna Strickland & Kathryn Holt, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* 38 (Natl. Ctr. for St. Cts. 2012) (noting that “appellate court caseloads fell four percent from 2006-10,” that “[m]ost of the decrease has occurred in the courts of last resort, where caseloads have fallen over 11 percent in the last four years,” and that the “drop in court of last resort cases has driven the decline in total caseloads, as the caseloads of intermediate courts are essentially unchanged”).

3. See e.g. Noam Scheiber, *The Last Days of Big Law*, New Republic (July 21, 2013) (describing technology- and recession-driven changes at the country's largest law firms and resulting loss of stability felt by partners and associates practicing in those firms).

4. See Laural Hooper, Dean Miletich & Angelia Levy, *Case Management Procedures in the Federal Courts of Appeals* 12–13 (2d ed. Fed. Jud. Ctr. 2011) (indicating that some benefits of adopting electronic case management/electronic case filing systems (CM/ECF) in federal courts include “reducing delays in the flow of information,” and “reducing costs for the judiciary, the attorneys, and litigants”)

5. See e.g. *id.* at 13–16.

contributes to the overall goals of promoting confidence in the legal system, efficiency for practitioners and courts, and accessibility for litigants.<sup>6</sup>

It is important to note that reducing costs for appeals or any aspect of attorney, law firm, and court work through technology necessarily assumes some level of technological infrastructure and knowledge. The inherent generational gaps in technology aptitude will subside in coming years; however, gone are the days when practitioners, law-firm managers, and court managers can place technology matters on the back burner and pass infrastructure building on to the next generation of leaders.<sup>7</sup>

Each practitioner and court should evaluate the various costs within the appellate process and the best means to effect cost savings and reduced appeal time. This article focuses on four primary elements of the appellate process that present cost-savings opportunities through technology: practitioner expertise and efficiency, research, court filings, and oral argument.

## PART 2. APPEALS ARE NOT “SECOND VERSE, SAME AS THE FIRST”

An appellate practitioner has unique and specific skills. The most important aspects of the appellate lawyer’s role involve the exercises of legal judgment, research, analysis, and writing that go into crafting an effective appellate brief; the appellate lawyer takes the factual record as it was created in the trial court and must weed through it to glean the factual predicates most favorable to his or her legal arguments, subject to the constraints that may be imposed by the applicable standard of review.<sup>8</sup>

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6. Cf. Roger A. Hanson, *Appellate Court Performance Standards* iii (Natl. Ctr. for St. Cts. 1995) (opining that “the central goals of state appellate court systems can be divided into four performance areas: (1) protecting the rule of law, (2) promoting the rule of law, (3) preserving the public trust, and (4) using public resources efficiently”).

7. The American Bar Association has recognized that technology is crucial to competent delivery of legal services. See Model R. Prof. Conduct 1.1 (Competence) cmt. 8 (recently revised to include a duty to remain abreast of changes “including the benefits and risks associated with relevant technology”).

8. See e.g. Ruggiero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 4–6 (rev. ed. NITA 1996) (describing the difference between skills needed for trial and appellate advocacy).

The specific and unique skills of an appellate litigator are little used within a trial practice. Therefore, a prudent and successful trial litigator may find her experience inapplicable to a client's needs upon appeal. Indeed, Judge Aldisert has noted that "appellate advocacy is specialized work" that "draws upon talents and skills which are far different from those utilized in other facets of practicing law."<sup>9</sup> Judge Silberman shares that view: "[T]he skills needed for effective appellate advocacy are not always found—indeed, perhaps, are rarely found—in good trial lawyers."<sup>10</sup>

Unlike trial counsel who must convince a jury, an appellate litigator labors to convince the members of an appellate court. Whereas a jury member may be more interested in factual interpretation, an appellate judge has a keen interest in probing the intricacies of the law and expects to receive polished briefs that carefully weave together the evidence at trial and the law.<sup>11</sup>

An appellate practitioner also plays an integral role in determining the merits of an appeal. A trial practitioner contemplates her cases, sometimes for years, and once a final judgment has been rendered, it may become difficult for an adept trial practitioner to separate herself from these necessary arguments. An appellate practitioner provides a new set of eyes and ears, which is essential in determining the most successful appellate strategy and whether an appeal is in the client's best interests.

An assessment that an appellate determination could greatly benefit a client does not always result in an appeal, much less a final determination on appeal. Important legal issues may not be appealed in some circumstances because the client cannot afford the expense or a protracted period of time waiting for a final decision.<sup>12</sup>

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9. *Id.* at 3; see also D. Franklin Arey, III, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. App. Prac. & Process 27, 29 (2000) (discussing Judge Aldisert's advice).

10. Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 20 Litig. 3, 3 (1994).

11. See e.g. Michael E. Tigar & Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* 11–14 (3d ed. Thomson/West 1999) (describing four-step method used by many federal appellate judges when making decisions).

12. See Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 Caseload Highlights 1 (Nat'l. Ctr. for St. Cts. Jan. 2013) (noting that post-disposition attorney and legal professional costs typically comprise less than fifteen percent

### *Section 2.1. The Practitioner's Technology Toolbox*

This section includes various examples of best practices and new techniques in keeping with an overarching theme of cost savings, while at the same time referencing innovations most practitioners and courts have yet to fully implement. All practitioners, from those in the largest firms to the solo practitioner, are feeling the crunch of the changing legal market,<sup>13</sup> and as a community of professionals, practitioners should view this changing world as an opportunity to grow and embrace many of the innovations that other industries have already made commonplace.<sup>14</sup>

#### *Section 2.1.1. Internal Organization*

Various tools are available to help practitioners efficiently allocate time and, in effect, lower costs, as well as increase practitioners' exposure to new legal developments and trends. Many case-management systems or practice-management systems and virtual assistants can relieve much of the stress caused by timekeeping and diary writing. Numerous websites compare the relative virtues of these organizational tools and their integration with practitioners' current technology.<sup>15</sup> A sampling of the case-management systems most commonly utilized by attorneys in private practice includes:

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of the total costs of civil litigation, pointing out that “[c]urrent civil justice reform efforts often focus on reducing the amount of time expended on trial and discovery tasks during litigation,” and arguing that “[t]o be effective, these efforts must not only decrease the amount of time involved in these litigation stages, but do so without shifting that time to other litigation tasks,” and asserting that “civil justice reform along these lines would not only reduce the litigation costs associated with each case type . . . but may also reduce the time to disposition, providing litigants with speedier, as well as less expensive, justice”) (copy available at [http://www.courtstatistics.org/~media/microsites/files/csp/data%20 pdf/csph\\_online2.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx)).

13. See e.g. Scheiber, *supra* n. 3.

14. See generally Hooper, Miletich & Levy, *supra* n. 4.

15. The American Bar Association has compiled a comparison chart that details the capabilities and prices of various software options. ABA Legal Technology Resource Center, *Tech Overviews and Charts*, [http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis.html) (scroll down to “Law Office Software,” click on “Case and Practice Management Comparison Chart,” click on “View the Chart”) (accessed June 13, 2014; copy on file with Journal of Appellate Practice and Process).

- Abacus, <http://www.abacuslaw.com>;
- Amicus, <http://amicusattorney.com>;
- Clio, <http://www.goclio.com>;
- My Case, <http://www.mycase.com>;
- Rocket Matter, <http://www.rocketmatter.com>; and
- TimeMatters, <http://www.lexisnexis.com/law-firm-practice-management/time-matters>.

Practitioners planning to add such technology to their office tools must assess which will best fulfill their requirements, and whether web- and cloud-based systems or server-based systems will provide the best solutions for their practices.

### *Section 2.1.2. Common Add-Ons*

In addition to practice management, cloud computing offers significant innovations that can improve document management, reduce the costs of document storage, and increase the ease of practitioners' access to file contents.<sup>16</sup> With cloud computing, a

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16. Note, however, that information security remains a major worry for attorneys. The introduction of cloud computing brought a new set of concerns, which have been recognized by some state attorney-ethics commissions and bar associations. See e.g. Iowa St. B. Assn. Comm. on Ethics & Prac. Guidelines, *Software as a Service—Cloud Computing*, Op. No. 11-01, [http://www.iabar.net/ethics.nsf/e61beed77a215f6686256497004ce492/02566cb52c2192e28625791f00834cdb/\\$FILE/Ethics%20Opinion%2011-01%20--%20Software%20as%20a%20Service%20-%20Cloud%20Computing.pdf](http://www.iabar.net/ethics.nsf/e61beed77a215f6686256497004ce492/02566cb52c2192e28625791f00834cdb/$FILE/Ethics%20Opinion%2011-01%20--%20Software%20as%20a%20Service%20-%20Cloud%20Computing.pdf) (Sept. 9, 2011) (declining to issue specific ruling, but discussing issues related to cloud computing, including the lawyer's access to, and ability to protect, data stored in the cloud) (accessed June 13, 2014; copy on file with Journal of Appellate Practice and Process); Pa. B. Assn. Comm. on Leg. Ethics & Prof. Resp., Formal Opinion 2011-200, *Ethical Obligations for Attorneys Using Cloud Computing/Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*, <http://www.slaw.ca/wp-content/uploads/2011/11/2011-200-Cloud-Computing.pdf> (concluding that “[a]n attorney may ethically allow client confidential material to be stored in ‘the cloud’ provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks”) (accessed June 13, 2014; copy on file with Journal of Appellate

practitioner with an Internet connection may access documents from different devices and from multiple locations. Low-cost document storage is another aspect of cloud computing. Through entities such as Dropbox, a small fee purchases gigabytes of possible storage space available from any device and in any location so long as an Internet connection is available.

*Section 2.1.3. Practitioners—Optimize the Technology  
Currently Used in Practice*

Simply purchasing what seems to be the correct software and licenses is not enough, however. Many practitioners are not well versed in the intricacies of the software employed in their practices. Such practitioners would greatly benefit from training and education in the use of their software in order to better leverage their time and expertise into polished work product. With a little training and use of Microsoft's Office Suite (including Word, Excel, and PowerPoint) or Adobe Acrobat, practitioners can create and format professional documents and briefs suitable for both paper and electronic filing. Proficient practitioners can automatically generate tables of contents or tables of authorities in Word, or use headings, formulas, charts and graphs in Excel to provide strong visual figures or exhibits in support of their legal claims. Even practitioners without the time for formal training in these essential types of software will find that step-by-step instructions are quickly accessible through an Internet search.

In addition, technology benefits practitioners in ways far beyond providing better document-creation and practice-management software or more efficient document-storage solutions: It presents connected practitioners with easier access to new legal trends and developments. Technological awareness

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Practice and Process). Lawyers and judges hoping to stay current in this area might consider following LegalEthics.com, a website devoted to the “[e]thics of technology use by legal professionals,” which often addresses issues related to cloud computing. As this article was being prepared for press in the summer of 2014, for example, the first page of the site featured an entry discussing data security in the cloud. See LegalEthics.com, *Which Companies Are Encrypting Your Data Properly?* <http://www.legalethics.com> (Nov. 20, 2013) (accessed June 13, 2014; copy on file with Journal of Appellate Practice and Process).



allows practitioners to work more efficiently and offer more choices and options to their clients. While the term “connected” is, admittedly, a broad one, it is purposely used here to reflect myriad ways in which a practitioner can develop her practice and skills. And that skill development will not necessarily require significant time. Resources in the local legal or appellate community may include various blogs supported by individual attorneys or local bar associations.<sup>17</sup> On the national level, the American Bar Association hosts an annual TechShow and Expo at which various vendors, developers, and practitioners highlight recent advances in legal technology.<sup>18</sup>

### PART 3. RESEARCH: LEGAL ARCHAEOLOGY IN THE DIGITAL AGE

Another major expense to practitioners and courts that increases appellate costs is legal research. Next to the efficient use of one’s time, research is perhaps the next most important cost that can be reduced through the use of proper, up-to-date technology. Westlaw and Lexis are the juggernauts of legal research and are great assets for any legal practice.<sup>19</sup> Practitioners must be judicious in their use of these services, however, which can quickly prove to be too expensive, especially when counseling a smaller client on a complicated appeal. But alternative legal research platforms exist: Google Scholar, for example, contains full-text versions of many publicly accessible documents and scholarly writings, including appellate-court decisions. Searches can be refined to show

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17. For example, the Indiana Law Blog, written by a local appellate practitioner and at least loosely connected with the state bar association, focuses largely on appellate practice in the state, regularly publishing information about oral-argument schedules, following important cases, and the like. See *Indiana Law Blog*, <http://www.indianalawblog.com> (noting on its opening page that “Supporters of the Indiana Law Blog include . . . the Indiana State Bar Association”) (accessed July 14, 2014; copy on file with Journal of Appellate Practice and Process).

18. Comprehensive information—including session descriptions, lists of CLE opportunities, exhibitor names, registration information, and even a blog—about the current year’s ABA event is available at <http://www.techshow.com> (accessed July 14, 2014; copy of main screen on file with Journal of Appellate Practice and Process).

19. WestLaw and Lexis have recently been joined by Bloomberg Law, which offers a range of legal information similar to that available through the two older services. See *Bloomberg Law*, <http://www.bna.com/bloomberglaw> (accessed July 14, 2014; copy on file with Journal of Appellate Practice and Process).

precedent from federal jurisdictions, specific states, regulatory agencies, or a combination of these sources. In addition, many state bar associations have partnered with free or low-cost legal research platforms such as Casemaker,<sup>20</sup> in order to provide their members with access to state-specific legal sources.

#### PART 4. APPELLATE-PROCESSES IMPROVEMENT AND EFFICIENCIES THROUGH COURT TECHNOLOGY— WHO WANTS E-FILING, ANYWAY?

Appellate judges and court administrators share an interest with the parties and practitioners who appear in their courts: the efficient administration of justice. Clients consider these efficiencies in terms of costs and time, and they challenge their attorneys to deliver services as efficiently as possible. Attorneys' options for improving their processes are limited by what services the courts provide.

Courts have been challenged to reduce spending, particularly since the start of the Great Recession.<sup>21</sup> Care must be taken to avoid simply transferring the expenses from the courts to the litigants; instead, elimination or reduction of costs should be the goal. Technology solutions that can reduce overall costs for the courts, practitioners, and litigants include electronic filing of case documents and information (“e-filing”) and online portals to court data and documents. Yet deploying these services can present many obstacles, not the least of which is determining how the services are funded.

An appellate court incurs a range of costs in its operation—costs mainly borne by the public. Among the largest expenditures are salaries and benefits for the staff: judges, judicial law clerks, and administrative assistants; clerks of court

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20. See Casemaker, *Bar Association Consortium*, <http://casemaker.us/ProductsStateBarConsortium.aspx> (indicating that twenty-three state bar associations were providing Casemaker to their members in the early summer of 2014) (accessed June 13, 2014; copy on file with Journal of Appellate Practice and Process).

21. See e.g. Daniel J. Hall, *Reshaping the Face of Justice: The Economic Tsunami Continues, Future Trends in State Courts 2011*, [http://www.ncsc.org/information-and-resources/budget-resource-center/analysis\\_strategy/~media/files/pdf/information%20and%20resources/budget%20resource%20center/hall.ashx](http://www.ncsc.org/information-and-resources/budget-resource-center/analysis_strategy/~media/files/pdf/information%20and%20resources/budget%20resource%20center/hall.ashx) (2011) (accessed June 14, 2014; copy on file with Journal of Appellate Practice and Process).

and their staff; and court administrators and their staff, including staff attorneys and the back office teams of accounting, human resources, and information technology. Improving efficiencies in court processes may allow courts to reduce personnel redundancies through either headcount or reassignment of staff to other activities. For example, e-filing can reduce the manual effort required to manage documents and to process payments.<sup>22</sup>

*Section 4.1 Efficiencies through Electronic Filing—  
The Dollars and Cents of E-Filing*

Electronic filing of case-related information offers significant improvements in the overall efficiency of the appellate process. Some jurisdictions have even replaced paper filings with e-filing,<sup>23</sup> allowing practitioners and law firms to eliminate the costs of printing, assembling, and delivering filings to the court or clerk.<sup>24</sup> E-filing systems can transfer information about the filing into the court's case-management system

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22. Deciding whether to adopt these measures need not be undertaken in a vacuum. Rather, courts can estimate their savings from technology projects with online calculators, and then balance these savings against the costs to implement and operate the new systems. National Center for State Courts, *E-Courts Benefits Calculators*, <http://www.ncsc.org/information-and-resources/budget-resource-center/calculators.aspx> (scroll to bottom of page to click on calculators that enable courts to explore projected savings in storage, labor, and other costs associated with moving from paper records to electronic records) (accessed June 13, 2014; copy on file with Journal of Appellate Practice and Process). For an excellent overview of the essential considerations related to the journey to e-filing, see Nial Raaen, Jim Harris & Jim McMillan, *Michigan E-Filing Strategy Follow-Up Report*, <http://courts.mi.gov/Administration/admin/Documents/NCSC-Michigan-e-FilingReport.pdf> (Natl. Ctr. for St. Cts. Aug. 2014) [hereinafter "*Michigan Report*"] (accessed Sep. 29, 2014; copy on file with Journal of Appellate Practice and Process).

23. See e.g. Tex. R. App. P. 9.2(c)(1) (providing that "[a]ttorneys in civil cases must electronically file documents," and that "[a]ttorneys in criminal cases must electronically file documents except for good cause shown in a motion filed in the appellate court"); Fla. Admin. Order No. AOSC13-7, *In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal* (Feb. 18, 2013) (ordering mandatory e-filing in the Supreme Court of Florida), available online at <http://www.floridasupremecourt.org/clerk/adminorders/2013/AOSC13-7.pdf> [hereinafter "*Florida E-Filing Order*"] (accessed June 16, 2014; copy on file with Journal of Appellate Practice and Process).

24. During the transition to e-filing, some courts require a full complement of hard-bound copies of pleadings, motions, and briefs. For example, even though electronic filing is mandatory at the Florida Supreme Court, its e-filing regime does not apply to correspondence with the Court or Clerk, which must still be delivered in paper form. See *Florida E-Filing Order*, *supra* n. 23, at 4. True cost savings will be realized when the hard-bound document requirements are greatly reduced or eliminated.

(CMS), automatically recording the filing on the appellate docket and transmitting the corresponding document to the court's document-management system (DMS).<sup>25</sup> Many jurisdictions extend the e-filing capabilities to allow service of process on other parties with electronic-service features,<sup>26</sup> reducing or eliminating litigants' expenses for courier and other service fees.

### *Section 4.2 Infrastructure—Who Bears the Costs?*

E-filing can bring efficiencies to the appellate process, benefitting courts, practitioners, and parties, but at what cost? First, attorneys must be able to access a web portal known as an Electronic Filing Service Provider (EFSP) through which they will submit information and documents to the court. Courts must consider whether to develop an EFSP portal in house or contract the services of one or more EFSP vendors. This build-versus-buy decision is not to be taken lightly.<sup>27</sup>

The development of technical standards for system-to-system communications sets the stage for the proliferation of commercial off-the-shelf software applications and services that speak the same language: the LegalXML Electronic Court Filing (ECF) specification.<sup>28</sup> Conforming to the LegalXML standards offers the maximum level of flexibility in an e-filing system. However, internal court staff may not be familiar with LegalXML or even web-application development in general. Even under ideal circumstances, the development of an EFSP portal requires a material investment of time and money.<sup>29</sup>

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25. See e.g. *Michigan Report*, *supra* n. 22, at 25–27 (discussing results in some California and New York courts).

26. See e.g. Tex. R. App. P. 9.5(b)(1).

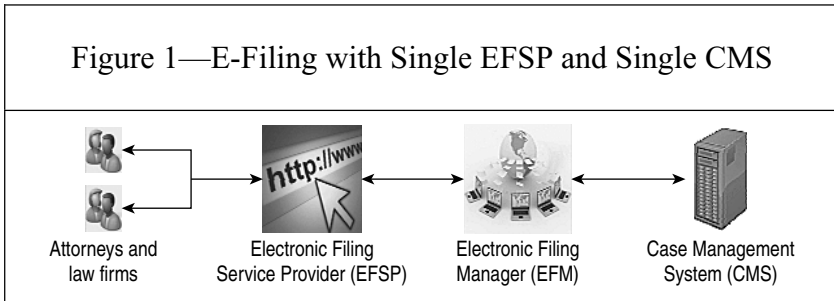
27. See e.g. *Michigan Report*, *supra* n. 22, at 36–37 (summarizing matters to consider).

28. See Organization for the Advancement of Structured Information Standards, LegalXML Court Filing Technical Committee, *Electronic Court Filing Version 4.01, OASIS Standard, Specification URIs for ECF 4.01*, <http://docs.oasis-open.org/legalxml-courtfiling/specs/ecf/v4.01/ecf-v4.01-spec/os/ecf-v4.01-spec-os.doc> (accessed June 16, 2014; copy on file with Journal of Appellate Practice and Process). More information about the OASIS LegalXML Electronic Court Filing Technical Committee is available at [https://www.oasis-open.org/committee/tc\\_home.php?wg\\_abbrev=legalxml-courtfiling](https://www.oasis-open.org/committee/tc_home.php?wg_abbrev=legalxml-courtfiling) (accessed June 16, 2014; copy of main page on file with Journal of Appellate Practice and Process).

29. See e.g. California Senate Rules Committee, Office of Senate Floor Analyses, *Bill Analysis—AB2073* at 5 (Aug. 21, 2012) (indicating that mandatory e-filing pilot project in

Selecting one or more commercial EFSP portals can significantly reduce the time and cost to implement compared to developing the applications in-house.<sup>30</sup>

An electronic filing manager (EFM) bridges the gap between the EFSP and the CMS. For filings to the court, the EFM receives the data and documents from the EFSPs and submits them to the appropriate CMS for processing. When the court issues a judicial action, the CMS transmits the data and documents to the EFM, which then transmits them to the corresponding EFSP(s). This relationship is demonstrated in its most basic form in Figure 1 below. This scenario typically applies where the EFSP and EFM services are delivered by the court's IT staff, whether through commercial off-the-shelf software or custom software developed by either a third-party consultant or the court's in-house IT staff.<sup>31</sup>



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The EFM's role is even more critical when multiple EFSPs are approved by the court or when the jurisdiction operates multiple CMSs. Each EFSP interfaces with the EFM, and the EFM interfaces with each CMS, as shown in Figure 2. Supporting multiple EFSPs allows attorneys and law firms to

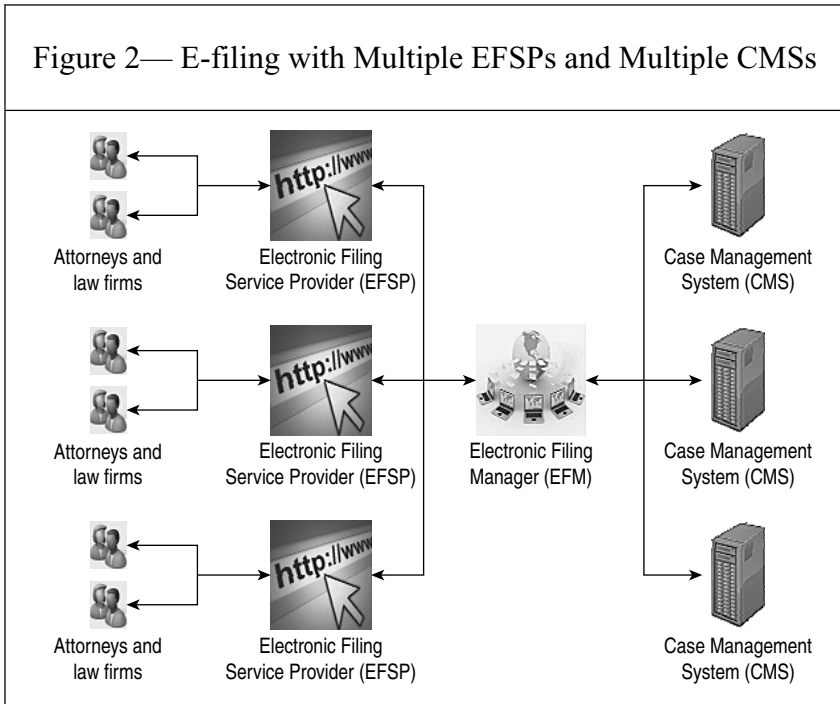
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Orange County would include one-time costs of roughly \$100,000 for set-up and evaluation of pilot, which was expected to deliver future savings in the range of \$2,000,000). An electronic version of the bill analysis is available on the website of the California Legislative Council at <http://www.leginfo.ca.gov> (click on "Bill Information"; enter "2011–2012" in "Session" box and "Assembly" in "House" box; click "Search by Bill Number," enter "2073" in search box, click "Search"; then click "Senate Floor" to display the full text of the analysis); see also *Michigan Report*, *supra* n. 22, at 18–19 (estimating costs).

30. See *e.g. Michigan Report*, *supra* n. 22, at 18–21.

31. See *e.g. id.* at 13.

select from among the many e-filing options on the market without worrying that their chosen vendor’s system might be incompatible with the court’s interface.



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Courts will incur expenses to implement and operate any EFSP and EFM, whether developed in house or contracted through vendors; these costs must be offset somehow. Options for funding an e-filing program might include:

- appropriation of funds by the legislature;
- allocation of funds from the judiciary’s project budget;
- imposition of additional user fees;
- imposition of additional filing fees on every case, regardless of whether e-filing was used; and

- generation of new revenue through the sale of data, documents, and other online services.<sup>32</sup>

The first two options are relatively straightforward, and would integrate e-filing into the court's operations without imposing additional fees or surcharges on litigants, but neither is feasible for many jurisdictions.<sup>33</sup> Some litigants would benefit more than others from e-filing; others may not benefit at all. Funding the services from general governmental revenue would avoid adding costs to those who would not see the benefit. The Conference of State Court Administrators has taken the position that "[i]f the purpose funded by a surcharge is for the greater public good, it should be worthy of consideration of funding from a broader general revenue source through the normal appropriation process."<sup>34</sup>

The third option—the imposition of additional fees on the filing user—allows the EFSP vendors to offer e-filing at no cost to the courts; the filers bear the financial burden.<sup>35</sup> Courts may take the third option a step further by imposing fees that exceed the vendor's share, thus generating additional revenue. These fees may be classified as "convenience fees" where e-filing is at the filer's discretion, although fees would be lower in jurisdictions where e-filing is mandatory.<sup>36</sup>

The fourth option—the imposition of additional filing fees on every case—may be more difficult to justify and sell than an e-filing convenience fee; however, compared to the third option, imposing additional fees across the board encourages the

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32. See *e.g. Michigan Report*, *supra* n. 22, at 37–38.

33. Hall, *supra* n. 21, at 1 (describing budgetary pressures caused by recent recession).

34. Carl Reynolds & Jeff Hall, *2011-12 Policy Paper: Courts Are Not Revenue Centers 4* (Conf. of St. Ct. Adminstrs.) (also available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx>) (accessed June 17, 2014; copy on file with Journal of Appellate Practice and Process).

35. See *e.g.* Cal. R. Ct. 8.75(b) (West 2014) ("The court's contract with an electronic filing service provider may allow the provider to charge electronic filers a reasonable fee in addition to the court's filing fee.")

36. When e-filing is mandatory, the EFSP and EFM vendors realize economies of scale, driving down each vendor's average cost per filing. See *e.g.* New Hampshire Judicial Branch, *E-Filing Policy #2 (Voluntary or Mandatory e-Filing)*, <http://www.courts.state.nh.us/nh-e-court-project/policy-issues/2-VolMandatory.pdf> (accessed June 17, 2014; copy on file with Journal of Appellate Practice and Process).

increased use of e-filing. E-filers would enjoy the improved efficiencies without paying a higher cost than conventional filers. Texas recently converted to this model, applying new per-case filing fees for both civil and criminal matters.<sup>37</sup>

The fifth option—the generation of new revenue through the sale of data and documents, and other online services—is becoming increasingly common. Courts have realized revenue by charging users to search and access case information online<sup>38</sup> and through the sale of bulk data. Documents are another potential source of revenue. The federal courts' system, Public Access to Court Electronic Records (PACER), generates far more revenue from the sale of documents than it costs to operate the system,<sup>39</sup> even at a relatively modest cost of eight cents per page.<sup>40</sup>

A hybrid approach is also possible. The sale of online services and documents can be combined with the contract for EFSP services, thereby granting the EFSP vendor a license to sell the information and documents in exchange for the e-filing services. In other words, an EFSP vendor can provide its services at no charge to filers and to the courts in exchange for a license to sell the information and documents it processes as an EFSP. This offers the illusion of free e-filing for everybody; however, the courts would cede control over sensitive information and a potentially significant source of revenue, as demonstrated by PACER. Courts should be wary if presented

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37. See Tex. H.B. 2302, 83rd Legis. (2013–14) (adding new § 51-851 to the Texas Government Code). An electronic version of the bill is available on the website of the Texas Legislature at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB2302> (click on “House concurs in Senate amendment(s)” to display the full text of the bill).

38. See e.g. LexisNexis, *Colorado Courts Record Search, Pricing, Search Costs*, <https://www.cocourts.com/cocourts/pricing.xhtml> (showing a maximum charge of \$7.00 for each search request) (accessed June 17, 2014; copy on file with Journal of Appellate Practice and Process).

39. John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, 158 N.Y. Times A16 (Feb. 13, 2009) (noting that PACER runs a budget surplus of \$150,000,000). An electronic version of the article is available on the website of the New York Times at <http://www.nytimes.com/2009/02/13/us/13records.html?pagewanted=all>.

40. PACER document fees have been increased twenty-five percent since Schwartz wrote in 2009, to ten cents per page. See United States Courts, PACER, *Electronic Public Access Fee Schedule* (Dec. 1, 2013), [http://www.pacer.gov/documents/epa\\_feesched.pdf](http://www.pacer.gov/documents/epa_feesched.pdf) (accessed June 17, 2014; copy on file with Journal of Appellate Practice and Process).



with such an opportunity. “There ain’t no such thing as a free lunch.”<sup>41</sup>

Finally, appellate practitioners are well served by courts that offer a robust online portal into the case dockets, including the posting of appellate briefs online. Much of the initial preparation of an appeal is the analysis of applicable law as applied to the client’s situation. Reviewing appellate briefs that support and contradict a client’s position may offer insight into common issues, allowing the attorney to evaluate the merits of an appeal in less time than if starting with a blank slate. Although appellate briefs are often available for purchase through commercial services, courts can reduce the cost of appellate practice by making briefs available for free or at a low cost.

Electronic services, such as e-filing, e-service, and online case-search portals, can reduce costs and improve efficiencies for practitioners, courts, and litigants alike. Courts may need to impose new fees in order to provide these services; however, the electronic services can reduce the costs to clients for (1) attorney and staff billable hours and (2) expenses relating to document preparation and courier services. To the extent that the savings exceed the fees, the appellate process efficiency has been improved.

## PART 5. APPELLATE ORAL ARGUMENT

In examining the appellate process and cost-savings opportunities, oral argument is riddled with hazards that can drain a client’s purse, cost the practitioner unreimbursed expenses, and strain court resources. It is also full of opportunities for effecting cost-savings measures. Ubiquitous technology options could preserve the tradition of oral argument and provide substantial savings to all concerned.<sup>42</sup>

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41. See e.g. *Great Lakes Dredge & Dock Co. v. Chi.*, 260 F.3d 789, 794 (7th Cir. 2001) (Easterbrook, J.).

42. See Tom Clarke, *Trends in Appellate Court Technology* 80 (Nat'l. Ctr. for St. Cts. 2005), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPT R=583> (pointing out that as early as 1997, Texas implemented videoconferencing to address the costs of appellate oral argument) (accessed June 16, 2014; copy on file with Journal of Appellate Practice and Process).

Appellate practitioners relish the opportunity to engage in a dialogue with jurists in order to drive home important points, gauge reception of their positions, and assess the relative strength of the other parties' positions. After reading the parties' briefs, courts on review might desire clarification on some aspect of the issues raised. Oral argument provides those opportunities. But at what cost?

State appellate rules range from those requiring oral argument if not waived,<sup>43</sup> to those allowing parties to request oral argument,<sup>44</sup> to those allowing parties to opt out or decline while allowing opposing parties to argue,<sup>45</sup> to those allowing the court to set oral argument sua sponte,<sup>46</sup> to those providing for oral argument if at least one party in an appeal as of right has timely requested it.<sup>47</sup>

As of 2012, all but ten of the fifty states had two-tiered systems with supreme courts and at least one intermediate appellate court.<sup>48</sup> When both courts on review are located in the state capital,<sup>49</sup> attending oral argument may require practitioners from far-flung areas to expend funds for travel, accommodations, and meals. Incidental costs to all practitioners, no matter where they are located in relation to the court, are broad-ranging: lost time from the office, non-productive time, and missed family activities, among numerous others.

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43. See e.g. Cal. R. Ct. P. 8.256 (Courts of Appeal); Cal. R. Ct. 8.524 (Supreme Court); Cal. R. Ct. 8.885 (addressing argument by videoconference in the Courts of Appeal); Cal. R. App. P. 8.929 (addressing argument by videoconference in the Appellate Division).

44. See e.g. Ill. R. App. P. 352; Tenn. R. App. P. 35.

45. See e.g. Mass R. App. P. 22(e) (providing both that “[i]f the appellee fails to appear to present argument, the appellate court will hear argument on behalf of the appellant, if present,” and that “[i]f the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present”).

46. See e.g. Ind. R. App. P. 52(A) (indicating that oral argument will be held in the court's discretion or upon motion by a party).

47. See e.g. Alaska R. App. P. 505.

48. John P. Doerner & Christine A. Markman, *The Role of State Intermediate Appellate Courts: Principles for Adapting to Change* 3 (Council of C.J., St. Cts. of App. 2012), <http://cdm16501.contentdm.oclc.org/cdm/singleitem/collection/appellate/id/1016/rec/2> (showing distribution of intermediate courts of appeal) (accessed June 16, 2014; copy on file with Journal of Appellate Practice and Process).

49. Some states, such as California and Ohio, allow intermediate appellate court judges to sit in panels in districts throughout the state. See Cal. Gov. Code § 69100 (dividing state into six appellate districts); Ohio Rev. Code § 2501.01 (dividing state into twelve appellate districts).

Courts do not fare any better. Costs to courts include security, physical space, and labor costs for additional staff. Not inconsequential are the time considerations. In order to better serve litigants and the public with timely appellate decisions, many appellate courts have self-imposed timeframes within which final decisions should be issued. Balancing case-completion goals with the time necessary to give advance notice to the parties for adequate preparation for the oral argument may result in very narrow margins for issuing decisions.<sup>50</sup>

These financial and temporal costs may dramatically increase when courts travel to other venues to hold oral argument.<sup>51</sup> While traveling oral arguments provide the public with a better understanding of the role of courts on review by bringing the appellate process to schools, civic centers, hospitals, and long-term care facilities within local communities,<sup>52</sup> the security, travel, accommodations, meals, and extraneous costs increase when courts travel.

Courts and practitioners are concerned when the costs of appeals prevent litigants from bringing potentially meritorious questions on appeal.<sup>53</sup> Courts have made an effort to assist pro

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50. See e.g. Ind. R. App. P. 21 (regarding expedited consideration of certain appeals, including “interlocutory appeals and appeals involving issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute” and “[b]y motion of any party, other appeals that involve the constitutionality of any law, the public revenue, public health, or are otherwise of general public concern or for other good cause, may be expedited by order of the court”). Additionally, extensions of time to file briefs are prohibited in termination-of-parental-rights appeals, and are not favored “in appeals involving worker’s compensation, issues of child custody, support, visitation, paternity, adoption, and determination that a child is in need of services.” Ind. R. App. P. 35(C), (D).

51. One example of a traveling appellate court is the Indiana Court of Appeals, which travels the state in a program nicknamed “Appeals on Wheels.” See <http://www.in.gov/judiciary/appeals/2550.htm> (accessed June 18, 2014; copy on file with Journal of Appellate Practice and Process); see also Ingrid A. Nelson, *More Judicial Outreach: “Justice on Wheels” from the Supreme Court of Wisconsin*, 7 J. App. Prac. & Process 167 (2005); Mary J. Deits & Lora E. Keegan, *Getting to Know Us: Judicial Outreach in Oregon*, 6 J. App. Prac. & Process 237 (2004).

52. See William C. Vickrey, Douglas G. Denton, & Wallace B. Jefferson, *Opinions as the Voice of the Court: How Supreme Courts Can Communicate Effectively and Promote Procedural Fairness* 13 (Executive Session for St. Ct. Leaders in the 21st Century [no date]) (noting that educational outreach promotes public perception of procedural fairness and understanding of opinions).

53. Although no specific data is available as to the causes for the drop in the number of appeals in 2010, it is not unreasonable to assume that a contributing factor was the cost of appeals in light of the economic downturn that commenced in 2008. The comprehensive

se litigants through self-help websites.<sup>54</sup> Yet, litigants with limited financial resources are often ill-equipped to navigate the appellate process and especially oral argument.<sup>55</sup>

### *Section 5.1. Technology for Cost Savings*

It is beyond the scope of this article to examine whether oral argument makes a positive contribution to the appellate process such that it should be universally retained.<sup>56</sup> Assuming the need to bring immediate and near-term costs-savings to the

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data regarding appellate court caseloads compiled by the Courts Statistic Project of the National Center for State Courts indicate that appellate case filings decreased only slightly in 2010, “slowing a decline that began in 2007 after reaching an apex of over 284,000 cases the previous year.” LaFountain, et al., *supra* n. 2, at 38.

54. Some self-help resources are available in every state, *see* National Center for State Courts, Access and Fairness, Self-Representation, *Resource Guide*, <http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx>; National Center for State Courts, Access and Fairness, Self-Representation, *State Links*, <http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/State-Links.aspx> (both accessed June 18, 2014; copies on file with Journal of Appellate Practice and Process). Representative state-sponsored self-help sites include those in California, Illinois, and Tennessee. *See* California Courts, Self-Help, *Online Self-Help Center*, <http://www.courts.ca.gov/selfhelp.htm>; Illinois Courts, *Citizen Self-Help*, <http://www.state.il.us/court/citizen.asp>; Tennessee Appellate Court, *Pro Se Litigant Filing Guide for the Appellate Courts of Tennessee*, <http://www.tsc.state.tn.us/sites/default/files/docs/prosefilingguide3-31-10.pdf> (all accessed June 18, 2014; copies on file with Journal of Appellate Practice and Process).

55. Some state rules allow for limited representation. Presumably, clients in those states could retain counsel for a limited purpose, perhaps in connection with writing an answer brief, for example, and counsel’s representation would not include representation at oral argument. *See e.g.* Ind. R. Prof. Resp. 1.2 cmt. 6 (recognizing that “limited representation may be appropriate because the client has limited objectives for the representation,” and that “the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives,” including “actions that the client thinks are too costly”). These arrangements are useful, but courts’ and lawyers’ embracing additional low-cost technologies could allow more parties to afford fuller appellate representation.

56. *See e.g.* Jacob Z. Goldstein, *May It Please the Court: Approaching Your First Appellate Oral Argument* (“There is an old saying in the law that while you can win appeals on the briefs, you can only lose them at oral argument.”), [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/may\\_it\\_please\\_the\\_court\\_approaching\\_your\\_first\\_appellate\\_oral\\_argument.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/may_it_please_the_court_approaching_your_first_appellate_oral_argument.html) (accessed June 18, 2014; copy on file with Journal of Appellate Practice and Process); *cf.* David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119, 119–20 (2012) (pointing out that in the federal courts of appeals, “the role of oral argument has been greatly diminished,” and that “[i]t is now the exception rather than the rule,” its incidence having declined dramatically between the late 1980s and 2011).

oral-argument component of the appellate process, inexpensive and ubiquitous technology options exist.

Oral argument and the appellate process may realize the most cost-savings benefit from inexpensive technology because typically the courts on review are not assessing credibility, and appellate oral arguments are usually open to the public. Thus, security of the information is not a typical concern. In fact, the goal is most often allowing maximum public access to the oral argument.

*Section 5.2. Technologies and Applications Potentially Useful for Oral Argument*

Technological development continues at breakneck speed, and no list of products and strategies can remain current for long. That said, the list that follows may nonetheless give lawyers and judges a useful starting point as they consider how best to apply new technologies to appellate oral argument.

- Use computer or mobile device cameras to Skype or FaceTime with counsel or pro se parties while preparing for argument. Most practitioners, and at least some pro se litigants, have or could gain access to computers or mobile devices with cameras. Currently, up to ten people can video-conference on Skype for up to four hours per meeting if at least one participant has upgraded to Skype premium at a cost of about \$10.00 per month. FaceTime works to video-conference from any iOS7 or OS X operating system (iPhone, iPad, iPod Touch, or Mac) to another iOS7 or OS X operating system with a single tap from the contact screen.<sup>57</sup>

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57. As this article went to press, Apple was developing patches for various glitches in its newly released iOS8, so we have no experience with its functionality this respect. It seems reasonable to assume, however, that similar options will soon be available on devices running iOS8.

- Use teleconferencing, which many state rules permit, to hold oral argument.<sup>58</sup> Many business applications would meet the needs of oral argument.<sup>59</sup>
- Use VoIP technology to host audio-only oral arguments inexpensively or at no added costs by using computers and telephone systems already in place at many courts and practitioners' offices, or hold audio-only oral arguments by simple conference call.
- Share webcasting or podcasting equipment in place for other governmental units.

## PART 6. CONCLUSION

The appellate process presents many cost-savings opportunities through technology, chief among them innovations relevant to practitioner expertise and efficiency, research, court filings, and oral argument. Yet the ever-changing technological landscape can be daunting. To better serve clients and the public, however, appellate practitioners and appellate courts cannot remain on the sidelines. Indeed, even rules of professional conduct require basic technology knowledge by attorneys, and the public expects no less of the courts. In order

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58. See e.g. Alaska R. App. P. 505 (providing that oral argument may be held telephonically “in an expedited appeal or in a case that is entitled to preference by law, court rule, or order”); see also Cal. R. App. P. 8.885 (specifically allowing teleconferencing for oral argument, by order of the court or upon motion).

59. GoToMeeting allows for online meetings with up to twenty-five attendees and integrates with HDFaces for video-conferencing, allowing audio conferencing (via VoIP and telephone) in real time. Attendees can join from a Mac, PC, iPad, iPhone or Android device. See GoToMeeting, *Online Meetings Made Easy, How It Works*, <http://www.gotomeeting.com/online/meeting> (click on menu entries at left margin to explore functions) (accessed June 18, 2014; copy on file with Journal of Appellate Practice and Process). AT&T Connect allows users to “[l]everage a range of existing devices: desktops, laptops, tablets and a variety of mobile devices” and take advantage of existing devices, such as “iPads, laptops and Smartphones,” and will integrate “with many common desktop applications, like Microsoft® Outlook®, Lync®, iCal® and IBM® Notes®.” AT&T Enterprise, *Products & Services, AT&T Connect*, <http://www.business.att.com/enterprise/Family/unified-communications/business-collaboration-services> (accessed June 18, 2014; copy on file with Journal of Appellate Practice and Process).

to preserve confidence in the legal system and promote efficient use of client and public resources, technology is the way forward.

