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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS THE DIGITAL RECORD

A REVIEW OF ELECTRONIC COURT FILING IN THE UNITED STATES

Bradley J. Hillis*

I. INTRODUCTION

E-filing documents with the courts will soon become an important service to the Bar. With the vast majority of lawyers and courts online, it is a natural extension to use e-commerce tools to securely file documents and query dockets.

Indeed, the technology developing around us is building expectations of increased accommodations from the court system. Since the Internal Revenue Service has plunged ahead with tax filing over the Internet,¹ attorneys and members of the public have come to expect similar convenience from the courts.

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1. Internal Revenue Service, *IRS e-file* <http://www.irs.gov/elec_sys/> (last modified Mar. 1, 2000).

When Yahoo!² offers e-filing, the legal culture responds. Many courts are caught up in the tide, and more courts will adopt e-filing as the success of existing projects is documented, more accessible systems are developed, and the large cost savings in storage are quantified. Already, court clerks, judges, and attorneys are excited by the prospect of accessing the full text of pleadings over the Internet.

Approximately twenty courts in the United States have eliminated paper in the case file, storing millions of pages of pleadings as images or in text format.³ In Seattle, Washington, Roger Winters leads the \$3 million records imaging project for the King County Superior Court. Now all filings are available on a broadband network so two or more judges at once can look at a file. The new suburban courthouse enjoys virtual access to the downtown clerk's office.

In addition, roughly thirty courts are accepting pleadings electronically.⁴ There is some overlap in the group of courts imaging and e-filing, but the majority of paperless courts use only imaging. Of the courts either imaging or e-filing, about half provide free public access to the documents, while the other half allows only court access or has public computers located in the clerk's office.⁵

Well-known and successful e-filing projects include the United States Bankruptcy Courts for the Southern District of New York and the Southern District of California. In California, the court has 40% of its cases filed electronically,⁶ a number expected to rise this year to 60% and likely higher.⁷ The court also images all documents filed in paper. The case file, then, is wholly electronic.

This article discusses the e-filing software packages

2. Yahoo! <http://www.yahoo.com> (accessed May 25, 2000).

3. Judge Monty Ahalt, *Electronic Filing of Court Documents* <<http://www.mdlaw.net/efile.htm>> (accessed Oct. 31, 2000).

4. Courts.net, *Electronic Filing and the Courts* <<http://www.courts.net/efiling.htm>> (accessed Oct. 31, 2000).

5. Doug Mataconis et al, *State and Federal Courts with Internet-based Electronic Filing Projects* <http://www.nelsonwolfe.com/e-file/e-file_links.htm> (last updated Sept. 2000).

6. Comments of Barry Lander, Clerk of the U.S. Bankruptcy Court, S.D. Cal., at the Glasser/Daily Journal LegalTech Conference, Los Angeles, Cal., Nov. 1999.

7. *Id.*

currently available to federal and state court, then discusses the benefits to and development of the extensible mark-up language (“XML”) for legal documents, and finally discusses the broad impact of increasing e-commerce on the future and development of e-filing.

II. E-FILING SOFTWARE PACKAGES: PUBLIC AND PRIVATE SYSTEMS AND VENDORS

A number of public and private software platforms are now operating in the federal courts. A growing number of the federal district and bankruptcy courts are using the United States Court Administrator’s Office e-filing software, which is free to the federal courts. The first appellate court version became available in Spring 2000.⁸ In addition, the United States District Court for the District of New Mexico developed its own system, as did the United States Bankruptcy Court for the District of Minnesota.

These three publicly developed systems—Court Administrator, New Mexico and Minnesota—are important because the source code is potentially available to other courts, though the complexity of the system often demands expert programming to convert it from one court to another.⁹ Nevertheless, the Westchester County, New York, state courts are already working to adapt the e-filing software from the United States Court Administrator’s Office. In New Mexico, the state courts have repurposed the United States District Court software for a state e-filing system.

Supplementing the three public e-filing systems in the federal courts is e-filing software from private vendors. Many of these vendors have consolidated in the past year. JusticeLink,¹⁰ based in Dallas, Texas, merged with the e-filing unit of Lexis-Nexis, acquiring the CLAD (Complex Litigation Automated Docket) court contracts. JusticeLink also bought LawPlus of

8. *New Case Management System Under Development*, The Third Branch (U.S. Court Administrator’s Office, Washington, D.C., Oct. 1999) (available at <<http://www.uscourts.gov/ttb/oct99ttb/newcases.html>> (accessed Oct. 31, 2000)).

9. A common refrain among software programmers is, “I’m the source code,” meaning the inventor’s intimate knowledge of how the software routines fit together is often needed to make modifications to a program.

10. *JusticeLink* <<http://www.justicelink.com>> (accessed May 25, 2000).

Denver, Colorado, which had operated the pilot e-filing project in the Arapahoe County Courts in 1998. In 1999, JusticeLink won the contract to provide the State of Colorado courts with e-filing services. JusticeLink also operates e-filing in individual cases in a few federal courts. West Group has released an improved, Web-based version of its WestFile software, and is implementing a large-scale system in Orange County, California.

Case management software vendors, including Wade Systems¹¹ and Sustain Technologies (formerly known as Choice Systems),¹² have impressive e-filing modules that clients can easily add. Wade Systems, located in Oklahoma, has implemented e-filing in the United States Bankruptcy Court for the District of Delaware, with several other courts using the Wade case management module to maintain a paperless court through scanning. The Toronto, Canada, provincial courts are continuing to expand their use of Virginia-based Sustain Technologies' e-filing tools. The Toronto project has been aggressive in its efforts to share court documents with other government agencies and create a network of compatible data sharing among law enforcement agencies.

In the state courts, there are made-from-scratch e-filing systems in New Jersey and Shawnee, Kansas. The Washington State Supreme Court accepts documents via e-mail, as does the Washtenaw County trial court in Ann Arbor, Michigan. The advantage of an email system is that it costs nothing to develop or implement.

The North Dakota Supreme Court does not accept e-filing per se, but it does require attorneys to submit their appellate briefs on diskette as well as on paper.¹³ The requirement for briefs on diskette is mirrored at the United States Court of Appeals for the First Circuit,¹⁴ which, like the Second Circuit,¹⁵ permits attorneys to submit briefs on CD-ROM. A leading

11. *Wade Systems, LLC* <<http://www.wadesystems.com>> (accessed May 25, 2000).

12. *Sustain Technologies* <<http://www.sustain.net>> (accessed May 25, 2000)

13. N.D. R. App. P. 31(b)(2).

14. 1st Cir. R. 32.1 (available at <<http://www.ljx.com/courthouse/electronic/cdromrules.html>> (accessed Oct. 31, 2000)).

15. 2d Cir. Admin. Order (Oct. 7, 1997) 1 (available at <<http://www.ljx.com/courthouse/electronic/cdromrules.html>> (accessed Oct. 31, 2000)).

vendor of e-briefs, realLegal.com,¹⁶ of Denver, Colorado, has recently prepared a writ of certiorari in the United States Supreme Court in the case of *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*¹⁷

III. XML STANDARD FOR LEGAL DOCUMENTS

One significant advantage to e-filing is the opportunity for extensible mark-up language (“XML”) of pleadings. XML consists of codes in the document text that describe the data: For example, a code may tell the computer that a certain named person is the plaintiff. Tagging in this fashion helps the court automate the processing of incoming electronic documents, allowing the maximum cost savings for the court in moving from a paper to a paperless system.

Once the document is in the court, an even greater efficiency is possible from information sharing with law enforcement or corrections. In the past, paper bridged the gap between any conflicting architecture of different agencies’ computer systems. Today, XML can allow agencies to share data by meeting a set of standards, a sort of “meet in the middle” strategy, while legacy systems continue to operate.

With many jurisdictions on the verge of implementing e-filing, XML is important because multiple vendors can serve as portals to file with the court. Because the documents all conform to a common, non-proprietary standard, any vendor’s website can serve as the point of filing by attorneys. Painted in broad strokes, whether restricted or free competition can occur in e-filing turns on the use of XML.

An effort is underway to create a national XML standard for legal documents, led by Todd Winchel of the Georgia court automation project, Dan Greenwood of the Massachusetts Institute of Technology, and John Greacan, Administrative Office of the Courts Director for New Mexico state courts, among many others. Copyright in the legal XML standard will

16. *realLegal.com* <<http://www.reallegal.com>> (accessed May 25, 2000).

17. See 120 S. Ct. 1575 (2000). For subscribers to *The Journal of Appellate Practice and Process*, a sample CD-ROM brief is enclosed with this issue. The CD-ROM contains all the briefs, the joint appendix, the authorities, and the oral arguments in *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*

be free to all users. The debate continues as to the best publishing format for legal opinions—ASCII text, HTML or Adobe Acrobat Portable Document Format (PDF). With XML, a publisher can separate raw content, say the words of a case opinion, from the format of publication, even from the platform of the viewing device. In the future, XML will enable court data to appear on wireless phones and handheld computers, which is called “device independence.”

However, some drawbacks in XML remain unanswered. One problem is how to apply the mark-up tags to the documents. Does each attorney do it with custom toolbars built into Microsoft Word or Corel WordPerfect? Or does the court mark-up the pleadings after filing? How efficient are forms or style sheets in applying codes? The move toward XML continues because the cost savings from handing around an intelligently tagged document is worth the effort to make it that way when it first comes into the court.

IV. THE IMPORTANCE OF E-COMMERCE TO E-FILING

The growth of e-commerce between 1995 and 2000 has provided an incentive for private vendors to more aggressively pursue the e-filing market. Despite what some might call a mess of legal rules in e-commerce, current legal doctrine is sufficient to allow courts to go forward immediately with paperless systems. E-commerce has broadly influenced the legal culture, specifically by encouraging the recognition of e-signatures and by changing the cultural expectations of consumers and users.

A. E-Signatures and Court Documents

Legal rules for signing electronic documents have made strides toward stability, notably with large volumes of e-commerce sales though the 1999 holiday shopping season. However, state electronic signature and digital signature laws have yet to help e-commerce in a measurable way. These laws were passed in many cases without the benefit of experience, so they have not adapted well to the rapid changes in e-commerce or Internet security.

On June 30, 2000, President Clinton signed into law the

Electronic Signatures In Global and National Commerce Act¹⁸, which became effective on October 1, 2000. This law provides a standard definition of an electronic signature, but is limited to transactions in or affecting interstate commerce, so state law will continue to apply in many intrastate cases. But e-commerce, and court e-filing, do not need any new laws to succeed; contract rules developed for trading partners and electronic data interchange provide sufficient legal support for e-filing with electronic signatures. Indeed, the online transactions occurring today are based on Article 2 of the Uniform Commercial Code, not on the Uniform Computer Information Transaction Act (UCITA);¹⁹ most transactions are based on a credit card customer agreement (e.g., a Visa cardholders agreement that states use of the card number by the customer creates a legally binding sale), a formal Electronic Data Interchange (“EDI”) agreement, or even an informal agreement between trading partners.²⁰

Electronic signatures offer great promise in the next year or two. An e-signature is a procedure for associating a document with a person, and can be accompanied by a written, signed trading partner or a data sharing agreement, e.g., EDI agreement. The federal courts, which operate an excellent e-filing system, use an e-signature approach. The attorney types his or her name on the signature line, preceded by the “/s/” denoting “signed.” Prior to e-filing, attorneys sign an agreement that e-filed documents are the equivalent to documents personally signed as required by rule 11 of the Rules of Civil Procedure.²¹

An important facet of e-signatures is click-through or click-wrap license agreements.²² This is a method of signing that does

18. E-SIGN Act, 15 U.S.C. 7001 *et seq.*, 114 Stat. 464, Pub. L. No 106-229 (enacting Senate Bill 761).

19. Testimony of Andrew Konstantaras, vice president and general counsel, Visa International Service Association, before Domestic and International Monetary Policy Subcommittee of the Banking and Financial Services Committee of the House of Representatives, July 9, 1997 <<http://www.house.gov/banking/7997kons.htm>> (accessed Oct. 31, 2000).

20. Georgios I Zekos, *EDI: Electronic Techniques of EDI, Legal Problems and European Union Law*, 2 Web J. Current Leg. Issues (May 1999) <<http://webjcli.ncl.ac.uk/1999/issue2/zekos2.html>> (accessed Oct. 31, 2000).

21. Fed. R. Civ. P. 11(a).

22. Douglas C. Tsoi et al., *Click-Wrap Agreements: Background and Guidelines for Enforceability*, (Hale & Dorr, LLP, San Francisco, Cal., June 2000) <<http://www.haledorr.com>>

not require association of an individual with an event. Instead, any user is deemed to have assented to the terms of use, a sort of *res ipsa loquitur*. In other words, the only way into the e-filing system is through the license that said "I agree," so every user must have signed the terms of use. Most e-commerce transactions, such as the purchase of concert tickets at Ticketmaster.com,²³ are based on click-through licenses. These are an example of a "signature" that was almost entirely created by the Internet within the past two years. Even when a document signature is based on the attorney's manually signed EDI agreement, a court will typically also include a click-through agreement imposing some terms of use at the e-filing website.

This phenomenon of technology-driven legal rules is notable in electronic contract formation. E-commerce thrived well before introduction in state legislatures of the Uniform Electronic Transaction Act (UETA), concerning the validity of electronic agreements. Culture also shapes legal rules for e-filing, as transactions outside the courts become so commonplace that it is unnecessary to question their legal status.

B. The Broad Effect of E-commerce

The explosion of e-commerce and non-court e-filing, especially in tax, has smoothed the trail for the courts culturally. E-filing in courts will become simpler and more widespread not because of success of pilot projects in the United States Bankruptcy Court for the Southern District of New York. Instead, the cultural shift to e-filing will come from millions of consumers and businesses filing their taxes online, or paying for their car tabs at the Department of Licensing web site, or voting online.

Arguably, the ease of plugging into payment processing systems, which has made great advances the past year, is a vital component to increased adoption of e-filing. After all, courts have filing fees and fines to collect, jury payments to post to citizens. Now courts may use storefronts with e-commerce capability, which are offered as part of web hosting packages for

com/publications/internet/2000_06_clickwrap.html> (accessed Oct. 31, 2000).

23. Ticketmaster.com <<http://www.ticketmaster.com>> (accessed May 25, 2000).

a few hundred dollars a month.

The growing number of paperless courts has also created a knowledge pool that will permit rapid growth in electronic document systems. Archiving is an example of a complex issue that has an evolving solution. It is a daunting prospect to dive into e-filing when you know that the archiving solution today is CD-ROMs of PDF files, and that tomorrow it is going to be XML style sheets on digital video disk (DVD). With millions of documents in state and federal courts already e-filed or imaged, solutions to an array of problems are documented for other courts to rely on. Court rules for e-filing are by now almost "plug and play."

V. CONCLUSION

What are some remaining challenges for e-filing? Clearly many attorneys and private litigants are clamoring for the benefits from the convenience. The pressure to find solutions to e-filing also comes from interested governmental agencies; at least one agency along every court's chain of data is operating electronically and would benefit from a data hook-up to the court. Consequently, the police agencies or county recorder or finance office in the various governments will also help move courts toward e-filing.

However, there is a need for a truly advanced system that allows a court to create an e-filing system on the fly, in the way that GeoCities²⁴ offers free web home pages. With 17,000 courts in the United States, and about twenty operating totally paperless and perhaps 1,000 courts with websites, some radical improvement in distribution of software tools has to occur for e-filing to make a significant penetration of the market in the near future.

The developing e-filing tools have improved the ability of courts to offer online services. With an emerging consensus on data mark-up using XML, the cost savings from adoption of e-filing will make it more attractive to courts. Because a number of courts already operate in a paperless environment, questions about archiving, document formats, and cost benefits are not the

24. *GeoCities* <<http://www.geocities.com>> (accessed May 25, 2000).

obstacles they once were. How vendors will provide the service to courts and attorneys is a process that will likely turn to an open model, allowing many websites to feed filings to a court.

Because so many courts and law firms have the tools they need to work with electronic documents, the magnet that will bring all the elements together is close at hand. When courts can easily sign up for e-filing service—instead of having to customize software or engage in database integration—courts will rapidly adopt e-filing.