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Use of Electronic Documents in US Courts: a Personal View

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About twice a year, I am invited by the US State Department to travel to southern Africa to consult on a variety of judicial issues. I first went to Lusaka, Zambia in 1994, and I was blissfully disconnected from my court and docket for most of the stay. There was no e-mail, faxes were unreliable and expensive, and telephone charges were exorbitant. I recall that during those days, I would always pre-arrange one short telephone call back to my chambers during a two-week stay to handle emergencies. Otherwise, I was completely cut off.

I have just returned from two weeks in Windhoek, Namibia. Each day I was in touch with my chambers by e-mail. My law clerks daily sent draft orders and opinions to me as e-mail attachments, which I edited and returned for entry. Twice I ruled on emergency motions submitted on the papers. As chief judge I have administrative responsibilities, so I was regularly in touch with my clerk about budgets and personnel. On the Friday before I left, I sat in the US Embassy at a computer and called up my calendar for Monday, which was current and showed which matters were settled or continued, and which remained for hearing. In those remaining, I read the pertinent motions, responses, and legal memoranda online by accessing each electronic case file. In a couple of instances where I was unsure of the applicable rule, I read the pertinent statute or decision. And in court on Monday when I mentioned I was a bit fuzzy due to jet lag, one of my experienced lawyers said with surprise, 'Oh, have you been away?' The way in which I work as a judge has fundamentally changed in the last five years.

This article will provide an overview of what is happening in the area of electronic documents in the US courts. It will start with some provisos. First, the article will discuss the federal court system only. There is an elaborate dual system in the United States, and it is beyond the scope of this article to lay out what is happening in each of the 50 sovereign states. And within the federal courts, the article will primarily deal with the federal trial courts, both the federal district courts and the federal bankruptcy courts – some 180 trial courts with a fair degree of organisational autonomy. And secondly, we are undergoing a massive transition in the federal courts in our case management system, essentially from a paper to an electronic file. Individual courts are scattered all along that grid, with some having a complete electronic database already, and others still a couple of years away.

We are in the midst of a massive deployment of a new software system for all of the federal courts that will effect the most far-reaching changes in court procedures certainly in my career, which spans some 25 years. We have been spending upwards of US$$15 million a year for the past several years to develop this. In some form, the system is now in place in about half of the federal bankruptcy courts, and has just been released to the first wave of the federal district courts. The concept is simple. The case file is completely electronic and access is internet based. Documents are submitted electronically by authorised filers, who have a personal password allowing access to the filing

menu through the court's web page. Judges also prepare their orders and file them electronically. Documents that are not capable of being prepared electronically in a PDF format (such as exhibits, or filings by persons representing themselves) are turned into electronic documents by the use of high-speed scanners.

In terms of rules, we have proceeded wisely and not made broad, detailed national rules at the outset. We realise that we are in a new world, and feeling our way. Instead, our national rules have been revised to delegate generally to local courts the authority to permit filing, signing and verification of documents 'by electronic means'. Each of the local courts moving into this area has come up with its own set of rules and procedures tailored to its judges, bar and technology-readiness. This may sound haphazard, but in fact it has worked rather well. In September, our Judicial Conference approved a model set of local rules for electronic case filing. These are not mandatory, but simply reflect the experiences of a number of courts who have been pioneers in this area.

Many issues arise from the implementation of such a system. This article will mention just a couple. From the point of view of a lawyer, how does the system work? In a court where you are admitted to practise, you would register as a filing user. The court is likely to require that you undergo a brief training programme, at the end of which you would be issued a unique password. This password is by rule deemed to be your electronic signature, so any document filed through its use binds you in precisely the same way as signing your name. In a case in which you are a lawyer, you would, through the internet, locate the court's website and choose the filing option. You would be asked for the case number in which you desire to file, and given a choice of captions identifying the document you are submitting. You would pick the correct caption, and attach the electronic document you had prepared to it. The court would prompt you to enter your password and, if it recognised you as a permissible filer in that case, it would allow you to proceed. Within seconds, you would receive an e-mail transmission from the court documenting the filing. A filing user also agrees to be served electronically. Whenever a document is filed in your case, it would come to you as a new e-mail message. This, of course, is a gross oversimplification that will at least get us started.

What if you are not an authorised filer in a particular case, but you just want to look at it? Here is where the electronic file has completely changed court practices. All of us are familiar with the restrictions that inherently arise when there is only one paper file in the custody of the court. You must travel to the court to see it, the clerk may not be able to locate it, it may be with the judge, etc. All these potential obstacles have disappeared. If you wish to travel to the courthouse, there are free computers in every office where the file is always available. But even more revolutionary, there is an elaborate programme of remote public access so that you can read the files anywhere where there is an internet connection.

This system is called Public Access to Court Electronic Records. There is one national access point where you can go to register and obtain a password. There are no geographical restrictions, and the users come from all over the world. We currently have about 80,000 registrants. For any case in the US federal courts you can obtain skeletal information, and in many the actual documents. And, eventually, you can obtain all of the documents. There is a charge for this remote access of seven cents a page. All of these funds are kept and ploughed back into enhancing the electronic public access programme. Frankly, it is this funding mechanism that has allowed us to come so far so fast, because we are not dependent on the vagaries of our annual budgetary funding.

What are the advantages to practising lawyers in such a system? There are several. First, time and geographical limits on filing are largely eliminated. In a paper world, to be timely you must have the signed document delivered to the appropriate court official before the end of the business day. Time restrictions are gone. A filing at 11.59 pm is as timely at one at 4.30. And sending the courier to the courthouse is also a thing of the past. You can file from anywhere in the world as long as you have an internet connection. Secondly, the file in your case and the general court schedule are always available to you wherever you are. In my court, we have noticed that phone calls have diminished enormously because the routine questions about whether a document was received, whether the opposition had filed something, or the status of the court calendar can now be answered online.

Thirdly, and flowing from this, geographical proximity to the courthouse is less important. Although you may still need to go for a hearing or trial (and videoconferencing is changing even these fundamental rules), filing and retrieval can be done from anywhere. Lawyers tell me this has made

practice much more feasible from remote locations. Fourthly, it is much easier to monitor litigation in which a client is not a party but has an interest. You can check as often as you want on what is happening.

Privacy issues

One of the reasons I am involved in many of these issues is that I am a member of our national judicial committee on Court Administration and Case Management. About two years ago, one of the judges posed the question of whether there really was any particularly private information about citizens in our case files that ought to be protected. Because we were meeting in the state of Wyoming, I attempted to answer his question by going online to that bankruptcy court's website, picking a case at random, and pulling down the information.

The judges, particularly those who had no experience in bankruptcy cases, were horrified. And so that began the sojourn of a subcommittee on privacy and court records that has laboured endlessly in the last two years to craft a national policy. And we did, and as of about a month ago, it is the official policy of the US courts.

You can only understand our policy if you understand its historical context. Unlike in many (I think most) jurisdictions of the world, documents filed in litigation in the United States are presumptively public. This is not so with some categories, particularly those involving family and domestic matters, or matters concerning children. But these mostly take place in state courts. In the federal courts, the tradition is longstanding and vigorous. Generally, unless a judge has sealed a particular document for good cause shown, anyone can come to the courthouse and read it and order a copy.

Although the principle is a noble one, as the Supreme Court has said, the requirement that you should physically travel to the courthouse where documents were located and request a particular file made much of the information 'practically obscure'. The question for our subcommittee was the degree to which remote electronic access has changed this balance.

The process was challenging and difficult. We met some of the best thinkers in the country on the issues of personal privacy and electronic data, and formulated a list of different options we could employ. We asked for comments on the options, and received hundreds, ranging predictably from one extreme to the other. We also had lengthy public hearings. Our policy remains one in favour of largely unfettered public access, with some provisos.

First, we have identified certain personal identifiers that we are no longer going to require to be disclosed routinely in litigation papers. These are the bits of information that put citizens at peril of identity theft, and serve little purpose. We are also going to notify litigants and lawyers clearly of these policies so that they can make their own decisions about what to reveal in litigation papers, or when to ask for a sealing order in a particular case. And we are going slow in our criminal cases, because we are afraid that there may be real life-and-death security concerns with all of the details of criminal files made accessible remotely and relatively anonymously. This general policy has only just been approved by our Judicial Conference, and we are starting to work on the details of implementation now.

Access to justice

It is a bit early to know exactly how the new system will affect access – but some educated guesses can be made:

(1) In some ways, access is increased because the virtual court is never offline. Lawyers, litigants and the public can find out what's going on anytime, anywhere. Geographical proximity to a paper file and filing office is irrelevant.
(2) The technological divide is overplayed as a problem. The equipment and software necessary to file and utilise systems like this are modest, and for those who really can't afford it, all systems will have options to incorporate paper filings.
(3) The relationship between lawyer and client may change, as the lawyer's control of information about the case is diminished. The client can check as often as it likes to see what is happening in a case, and read all of the documents.
(4) The increased transparency leads to much more media and public scrutiny of individual cases and judges. Reporters now routinely follow cases from their offices rather than coming to the courthouse. And it is much easier to see trends of an individual judge when you can look at all of the cases he or she handles.
(5) The increased transparency may have the effect of causing litigants to shy away from the public courts and either leave disputes unresolved or choose private tribunals, such as arbitration or hired judges.

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Notes

* Thomas Gleason serves as a member of the New York Office of Court Administration Advisory Committee on Civil Practice, and as the Chair of its Subcommittee on Technology. He has taken an active part in the drafting of the legislation discussed in this article; the rules that implement the programme; the User's Manual; and the design of the system's web pages.

1 This statute (chapter 367 of the Laws of 1999) amended several sections of the New York Civil Practice Law and Rules (CPLR) dealing with the commencement of an action or special proceeding (§ 304), the form of papers (§ 2101), and the service of papers (§ 2103). It also created a new § 8023 of the CPLR and amended Judiciary Law § 212(2)(j) to deal with the payment of certain court fees by credit card.

2 The composition of the court-related Steering Committee included judges, law clerks, court clerks, court administration staff (from its Technology Division, Court Operations Division, Counsel's Office and Office of Reference Services), as well as representatives from the Chief Administrative Judge's Advisory Committee on Civil Practice. The Attorney Advisory Committee included representatives of major bar associations in the locales selected for the pilot projects (including the New York State Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers Association, and the Monroe County Bar Association); individual practitioners, including managing partners from major law firms in New York City who had experience with the SDNY Bankruptcy Court system; and other institutional litigants such as the City of New York and the New York State Attorney-General. This Attorney Advisory Committee, with the court-related committee, worked hand-in-hand in developing the FBEM programme. They reviewed proposed legislation, the proposed FBEM implementing regulations (see 22 NYCRR 202.5-b), and assessed the planned FBEM software.

3 Prior to the FBEM development process, and before New York State adopted the Commercial Divisions in some New York courts, commercial litigators were polled and asked what technological innovations they would like to see, and at the top of their list was electronic filing.

4 A fully functional practice system also is available to Filing Users.

5 The implementing legislation states that participation in any electronic case will be 'strictly voluntary, and will take place only upon consent' (L1999, Chap 367, section 6). The requirement of consent will protect the digitally challenged – an affliction that from time to time affects us all – from revealing such frailty in court. Even in the affected counties, no unwilling practitioner will be forced to accept electronic filing.

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Will virtual dispute resolution change practice?

There is some suggestion that virtual dispute resolution might send us more towards doing everything on paper, rather than with live testimony. I am not sure of this. I'll give you an example. I had a case recently where a local company was attempting to enforce covenants not to compete against two of its former employees who had gone to work for a competitor in California, on the other side of the United States. Their lawyer asked for permission to submit their affidavits, stating that air travel in the last month was difficult for many people and that neither could afford the trip. I suggested that for a preliminary hearing they testify telephonically from California, and we were set a date to have them testify at the trial by videoconference from 3,000 miles away until the case settled the day before. My point is that technology may make it possible to assemble participants and lawyers from all over the world at one time in cyberspace for fairly traditional dispute resolution. I know that we are spending a great deal of money to equip our courtrooms to do this. Videoconferencing is coming quickly to our courtrooms. My hope is that it will be easier and cheaper to resolve disputes with geographically dispersed participants using traditional techniques.

On the other hand, I think what we will see is a growing dissatisfaction with the expense and time that litigation has historically required. Transactions in cyberspace are instant – and participants will not be patient with procedures that take years to complete. I anticipate that we will see efforts to radically speed up, simplify and streamline pre-trial procedures to get to the merits more quickly. In the United States, we have taken one step in this direction in civil cases by a mandatory disclosure of relevant evidence rule, requiring that, early on in the litigation, evidence relevant to one's claims or defences should be identified for the other side. Although highly controversial, it is an attempt to streamline the pre-trial process so that the merits of the dispute can be reached more quickly. More and more efforts like this will be undertaken. ■