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July 1999 Message from the Executive Director

Electronic Court Records: A Dream or a Possibility?

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When I was with the King County Courts, the County Council and Executive were concerned about the increasing expense for storage and microfilming of documents, and wondered whether there was a better way to deal with records in the electronic age. It was clear that electronic technology had improved greatly and would continue to improve, so I proposed an Electronic Court Records (ECR) project to the County, who were impressed by the potential for greater efficiency and better service to the justice system.

By the time I left the courts and came to the WSBA, it was already clear to everyone on the project that the success of ECR is in the hands of the people who file: the legal community. So I'm continuing, from the Bar side, to support the project. Many lawyers already recognize that new technologies such as e-mail and online research are changing the practice of law — and that such basic changes are only the tip of the iceberg. To file, store and access court records electronically as easily as we send e-mail or look at the RCWs online is not only a dream, but a real possibility.

First, clarifications: There's a difference between "digitized" and "digital" electronic documents. Digitizing is imaging — taking an electronic "picture" of a paper document for an electronic screen. Our goal, on the other hand, is digital documents — electronically created using word processing, encoded to identify the data within, searchable and hyperlinked to citations. Most electronic court-case files and client records will probably contain a mix of digitized (made from hard copy) and digital (word-processed) documents.

A number of pilot projects and special situations already use electronic records: motion practice in the Court of Appeals, Division I; briefs in Washington's Supreme Court; imaged files in Chelan County; imaged and digital documents in class actions (such as the asbestos or tobacco cases). This fall, King County will introduce document imaging and workflow in a Superior Court of substantial size (about 7,000 documents are filed there each day), moving toward a fully electronic court record. And the state of Utah is starting a digital court record for criminal cases.

These projects variously use imaging, word-processing files, and/or digital documents, each using specialized electronic document capture software. So far, however, none purports to have electronic files as the original, nor do they have a goal of building predominantly digital court files, available online for filing and for accessing. This is the goal of the ECR project. The following are a few considerations that favor the goal and some that need our attention.

Factors in Our Favor

The Washington State Digital Signature Act RCW Chapter 171

This statute enables electronic authentication of signed court documents. By having a digital signature, judges and officers of the court can file documents and instruments with their authentication, unalterability, and non-repudiability assured.

Court Leadership

Under Justice Phil Talmadge's chairmanship, the statewide Judicial Information System Committee (JISC), which oversees the implementation and use of technology in the courts, will soon be discussing the conventions and statewide practices necessary to assure usability and compatibility statewide. This could constitute a statewide forum for resolving questions and promulgating best practices.

The Emergence of XML (eXtensible Markup Language)

For ECR to be cost-effective for the courts, and to attract the filers of documents and those who access legal records, key data in documents must be "marked up" so the document can, as much as possible, be processed by software rather than by reading and re-keying information from it into the recipient's data system (SCOMIS or a firm's client files). "Tagging" or "marking up" documents tells the software what kind of document it is reading, where it goes, and what needs to be done with it. On traditional documents, such information is positional and idiosyncratic. For example, the first name in a civil filing is traditionally the plaintiff (positional), but to figure out who filed it requires interpreting the name of the document (idiosyncratic). With the emergence of XML, markup of such features is becoming more robust and flexible, meaning that electronic documents can be processed more intelligently by software. Staff in courts, clerk's offices and law firms can automate the data re-entry chores, so they are free to do much more valuable work with information.

Court Incentives

Many Washington courts are already learning the conveniences of imaged documents for processing, storage and access. More than one person can look at a file at one time; they don't have to be in the file room to do so; and they don't have to worry about the document, page or file folder getting misfiled, lost or stolen. Nevertheless, the greatest savings to court record-keepers lies in the conversion to digital, self-effectuating documents. The court can encourage this sort of digital filing, but the ultimate success will depend on whether those filing court documents will take the trouble to use markup. Since XML is something that can be embedded into "fill-in-the-blanks" forms and templates, the writers of digital documents will have to be amenable to using structured writing tools.

Issues Needing Our Attention

Citation Form

The flexible display options of digital documents conflict with maintaining page and line numbers. Accordingly, the ABA and the American Association of Law Librarians have endorsed citation to paragraphs. Some states have adopted this system by Supreme Court rule; others require both forms. Washington state needs to decide to take advantage of digital documents without destroying proper citation.

Authentication/Certification Levels

Not all documents in a court file, where there are many safeguards and remedies for assuring genuine and unaltered documents, need a full-fledged digital signature. Court rules need to address the unique circumstances of digital records; there is more than one way to attribute a writing to its author.

Practical Questions

The implementation and use by lawyers and the public of XML markup software will require planning and training. Widely used desktop tools such as Word 2000 are being designed with XML included. The electronic availability of the official court file documents may reduce the law firm's need to keep its own duplicate set of those records. There are likely to be many other practical ramifications to the online availability of court files that the Bar will want to study with a view toward developing guidelines.

The WSBA is stepping up to this exciting technological challenge. In June, we sponsored a demonstration of the Chelan County imaging system; in the fall, we will hold a series of focus groups around the questions of citing, authentication and court rules. We are making sure that the WSBA's representative to JISC, Virginia Kirk, is well equipped with information to convey our interests and ideas. We believe strongly that our members have important interests at stake and advantages to gain from the development in Washington of digital court records.

<http://www.wsba.org/media/publications/barnews/archives/1999/jul-99-message.htm>