

e-Filing Report

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THE ELECTRONIC FILING DILEMMA-VOLUNTARY OR MANDATORY?

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The decision to implement electronic filing in a court is a watershed moment which requires leadership and planning. It is an essential step toward a paradigm in which filings, and all working and archived “files” are electronic, and paper is produced only “on demand.” This journey is generally best accomplished in steps because it involves such a radical change both in business practices and in court culture. Electronic filing is one piece in the broader move from a “paper culture” to a “digital culture,” and the decision to go with mandatory e-filing plays an integral role in the overall move to a “paper-on-demand” culture.

Old-timers can draw upon their experience which began thirty odd years ago when courts first began collecting data on the “green-screen” to store in a mainframe database. Computer data entry replaced the typewriter. But the keyboarding was an addition to preparation of a paper file. With that, a change in the work performed by the clerk's office was begun and the transformation of their jobs and of the court business practices continues.

Before we begin the discussion on the merits of mandatory e-filing, it might be useful to define a meaningful e-filing program. Electronic filing is much more than simply an electronic transfer of an imaged document to or from the court - it is not faxing. E-filing includes the notion that the information entered by a filing party will automatically populate the court case management database so that the court will not have to enter this information. Similarly, filing fees and other moneys are transferred electronically to the court and auto-post to the court financial accounts without handling money or entering data. In the “outbound world,” court orders should also auto-populate the court's docketing record (e.g., the register of action), and reduce the need for outbound paper because the e-filing program serves and distributes information electronically. This is the beginning of an environment where data is more important than the documents and the infamous signature. Finally, judges and court staff should be able to access any of these documents from within the court case management system.

Sooo...where are we now in Colorado with Mandatory E-Filing?

There are 64 counties in 22 judicial districts in Colorado. Currently, Colorado has e-filing in the following case classes: district court general jurisdiction civil, domestic relations, probate and water; and selected case types in limited jurisdiction county court civil cases. The following chart illustrates the extent to which local jurisdictions have opted to make e-filing mandatory in their jurisdictions.

Table 1 clearly indicates that different locations have chosen different paths to mandatory e-filing. Only two of the 64 counties have adopted the whole package (district court, county court and water court) from a mandatory perspective. In general jurisdiction courts, only 10 counties have chosen to go mandatory in the three major case classes of CV, DR and Probate. In 23 counties, they have opted to make it mandatory in just GJ civil and probate. In total, only 28 of the 64 counties have opted to make GJ civil mandatory; however, the adoption rate for GJ civil is over 95 percent. This alone indicates that the program is so clearly beneficial to the attorneys that they voluntarily adopt it. In fact, most local chief judges opt to make it mandatory only as a cleanup tool, i.e., their adoption rate is very high and they just want to clean up loose ends. The lesson learned - avoid vendor pressures to make it mandatory at the beginning. Give the program an opportunity for voluntary adoption, and use mandatory as a cleanup tool. After a period of time, which will vary with each jurisdiction and the way they define e-filing, establish a firm mandatory date so that users are aware of when they can dispense with their paper crutch. Vendors have a strong economic incentive to recommend courts to adopt mandatory e-filing immediately, but courts need to move in steps that concur with their own culture and needs.

Table 1: Number of Counties in Colorado as of Oct 2007

Making a Specific e-Filing Case Class/Type Mandatory (out of counties)

GJ: Civil	GJ: Domestic	GJ: Probate	GJ: Water	GJ:120 Only	LJ:Money	LJ: FED
2	2	2	Included Below	Included in GJ:Civil	2	2
13		13		Included in GJ:Civil		
		1				
8	8	8		Included in GJ:Civil		
				2		
2				Included in GJ:Civil	2	2
3		3		Included	3	3

in GJ:Civil						
3						
28	10	27	3 of 7	2	9	9
counties	counties	counties	water districts	counties	counties	counties

FNNOTE: GJ indicates general jurisdiction and LJ indicates limited jurisdiction.

Don't Rush - It is Not a Sprint

Paper-on-Demand does not happen overnight, nor does e-filing, and it should not initially be forced upon the user community. The philosophy of the Colorado Supreme Court has always been, if the product is good, it will sell itself. The Court chose not to make it mandatory from a statewide perspective, but allowed local jurisdictions to make that call when they thought it was appropriate to their environment. Making e-filing mandatory from the beginning will create unnecessary anxieties and accomplish very little. After using e-filing on a voluntary basis for a period of time, users will soon come to the conclusion themselves that it is better to have a complete electronic file than a file that is part paper and part electronic. The real questions are:

- Is leadership prepared to support a mandatory environment;
- is change being managed;
- does the technical infrastructure exist to support mandatory e-filing;
- what factors determine the length of the voluntary period before it is made mandatory; and
- what has to be done to prepare for mandatory e-filing?

E-filing requires a flexible and patient approach at the outset dependent on a variety of factors discussed below. If an e-filing system is good enough, it will sell itself to judges, court staff and the attorneys.

Is Leadership Prepared to Support Mandatory E-Filing?

The importance of leadership and planning cannot be overstated. Leadership begins at the top, but a successful e-filing project requires leadership at many levels, including end-users and IT management. Identifying key personnel to participate from the beginning on committees of users and developers is essential. Development staff should be required to listen to the discussions of the users in order to understand the current business process and to participate in a dialogue that ensures that bad business practices are not automated and to take advantage of opportunities to improve business practices. User groups are critical to evaluate e-filing systems as they are developed and deployed. This user involvement helps to avoid nasty surprises and builds a sense of ownership in the new system. It is important to create an attitude in which line staff, while a bit anxious, can't wait to get started and feel safe in doing that. Failure to have leadership support at all levels of the food chain will doom voluntary programs-no less mandatory programs.

Managing Change and Selling the Concept

Electronic filing is no less of a change for the attorneys and their staff. The ritual of creating a document and carrying it to the courthouse is strong. After all, it offers a "break" from the office and an

opportunity to socialize! While younger lawyers introduced to e-filing will “get it,” more seasoned members of the bar are only now becoming convinced e-mail is a good way to communicate with the grandchildren. They may not want to get high-speed access or want to build a network in their office. Resistance will vary by local legal culture, age of the bar, size of the law firm and technology level in the law office. Those familiar with current litigation support software will applaud the move to e-filing. Those who carry yellow legal pads will groan and stiffen. Other attorneys will argue they cannot afford the internet, that it is just another added cost to their clients as well, or that the court is selling its soul to private industry. Concerns will be raised about putting confidential personal information in databases controlled by “foreign corporations.” Then there are the lawyers who brag they cannot use a computer and will not learn as though that were a badge of honor. It will take some members of the bar a while to appreciate the benefits. Others will decide to retire.

An advantage of a permissive e-filing program at the beginning is that you can utilize the enthusiasts as a *beta group* to be sure you have things right. There will be clerks who are enthusiasts. There will be lawyers who immediately get the advantages to them. There will be law office legal staff who see they will benefit. These people will not use the problems and glitches that are inevitable as excuses to resist. They will find the problems for you and work with you to resolve them and then they take ownership and pride in helping to make the changes. If you are building from scratch or adopting a system from another jurisdiction, there will be unanticipated problems with the coding that will take time to find and address. Not everyone who we work with is equally comfortable or adept at such changes. Patience and encouragement help, but we suggest it is unreasonable to make everyone move at one time on all these changes.

The bottom line is that courts who want to impose mandatory e-filing on their customers (both internal and external) must sell the concept. A passive mandatory installation will result in a major revolt. The fact is, however, if the PR campaign is done right it is not hard to sell.

Mandatory e-filing has the following benefits to all groups:

- For the judges, it provides a more reliable method for accessing documents; eliminates the “wait and deliver” manual method for getting file folders and documents; provides enhanced and more efficient methods for searching for documents; and facilitates mobile judging from anywhere a judge has Internet access.
- For the clerks, it means reduced costs in processing document intake, retrieval and maintenance; improved service to litigants through faster document retrieval; reduced mailing costs in both postage and handling; reduced service costs; reduced data entry time in creating a case and docketing pleadings; reduced time in posting financials and managing cash; no more misplaced/lost files; no more transporting files between the file room and the judge; and reducing the amount of time it takes to prepare the trial court record/transcript for appeal.
- For the attorneys, it means less travel costs to the courthouse, reduced courier costs, reduced mailing costs, reduced service costs, faster delivery and receipt of documents, and since most e-filing systems have an 11:59 p.m. filing deadline on the document due date, it provides attorneys another seven hours of billable time. Most importantly, most e-filing systems not only provide the attorney with an inexpensive means to file their documents with the courts, but have a residual benefit of providing attorneys with an electronic document management system to help reduce the maintenance costs associated with paper at their offices. When the courts install a capacity for attorneys to access these files electronically in the courtrooms, then attorneys won't have the burden of transporting hard files to and from the courthouse.

Does the Technical Infrastructure Exist to Support Mandatory E-Filing?

It is critical to the success of mandatory e-filing that you have a secure, reliable high-speed network including the security for the network and the hardware to display the data and documents in a way users, including judges, find equal to or better than display on paper. If the entry of data or the retrieval of data is not immediate and reliable, the clerk's office will implode into a maelstrom of discontent and confusion. It is hard enough to change from a familiar paper world into a digital system when the new system is reliable and intuitive. If it is unreliable, buggy and slow, morale will sink and good people will look to move on. This infrastructure is not free. There will be initial costs and ongoing costs including replacement of hardware and in providing reliable immediate backup, VPN and mobility. Clerks will need high-speed networked scanners. Judges will want Tablet PCs with VPN. They will want multiple large monitors to ease the viewing pain and allow for the display of multiple functions/documents at the same time. Most importantly, if you are going to force both the lawyers and the judges into the mandatory world, you better ensure that your backups and redundancies (network and server and hardware) are adequate. Judges and court staff will need the electronic documents when they want them, not when the system can make them available.

What Factors Determine the Length of the Voluntary Period Before it is Made Mandatory?

Case type-some are easier to do than others. The most challenging cases for implementation of e-filing are usually domestic relations cases. This is true for several reasons. Domestic relations cases have high percentages of *pro se* parties. This will require scanning the paper documents they bring to the courts as well as the review of these documents for redaction and for proper designation in the electronic filing system. If a court is not already equipped and trained to scan large numbers of documents and to upload them into the new system, this will be a disaster. Domestic relations cases contain important personal information that the courts must protect from public access and scrutiny, such as social security and bank account numbers and mental health records. Ideally, a court has in place a clear public access policy; and court rules require mandatory forms that place all the confidential information on documents that will seal automatically when properly designated at filing by either an attorney or by the clerks. A "clerksmart" form would automatically seal even if the attorneys mislabel it as "other" or otherwise incorrectly designate it. Probate files can also contain important personal information that must be sealed for protection. This is another area with increasing *pro se* filings and where the state or county human services department is often a party acting as conservator or guardian.

How quickly do you and the vendor want the revenue? Obviously, if the court and the vendor want to recover their revenue quickly, then they will require everyone to participate quickly. To be frank, this is a very bad reason to go mandatory. You will collect your revenue but may destroy a program.

Is it integrated with your CMS? If your e-filing system will integrate with your CMS, that will require more testing and production time to iron out the glitches. It is never a good idea to iron out glitches in a mandatory environment.

Minimizing confusion over voluntary or mandatory e-filing for the attorneys. As with the implementation of any new system, especially systems that are running parallel with existing systems for a period of time, it is best to minimize the parallel world and move to a single environment when it best suits the needs of the local legal culture. In a statewide system, failure to go mandatory will lead to

some confusion about where attorneys must e-file and where they may e-file. It is our experience, however, that attorneys will work this out-they will just start e-filing everywhere whether it is mandatory or not in order to eliminate the confusion.

How soon do you want to start realizing the benefits? Much like the revenue model above, the sooner a jurisdiction wants to maximize the benefits of e-filing, whether they are monetary, time savings or customer service, the sooner you should implement mandatory e-filing - balancing this, of course, with the culture challenges you will have to endure.

How much technopain can they absorb and how quickly can they change? Some individuals and jurisdictions can endure more technopain than others. Know your jurisdiction and staff, and then gauge the amount of time that jurisdiction will be able to tolerate the pain associated with a new, required system.

Make sure the various technical infrastructures are ready for a mandatory environment. Do not even consider going mandatory unless you are certain that the bulk of the court and attorney infrastructure issues have been addressed. These issues involve network capacity, hardware and software issues.

What has to be done to Prepare for Mandatory E-Filing?

Training is part of a continuous cycle in modern courts. It takes a year for the average clerk to become familiar enough with the court case management system and the various processes to be effective in their job. Even so, there are many gaps in their knowledge. Hence we train and retrain.

Training and providing technology support to the bar is a significant problem. If a court is considering mandatory filing, it must be able to train all potential people who will file in their jurisdiction and be ready with a "help" desk in perpetuity. The advantage of having a vendor to do this is substantial. If there is not sufficient training on the front end and continuous training thereafter, e-filing will not succeed even with an excellent e-filing process. There are numerous examples of the same e-filing program succeeding in one jurisdiction and failing in another because of the failure to address this in the failing jurisdiction. Mandatory e-filing at the outset increases the risk of failure on this score.

With a voluntary approach at the outset, of course, you will begin with the attorneys who want to file electronically. They will learn faster, and there will be a small number with which to deal. The trainers can concentrate on the court staff and a smaller group of lawyers and their staffs. The lawyers' comfort level is high since they do not have to start immediately. They can try it and see how it works. A good e-filing system gives great value to the bar. It will sell itself, and the early adapters will help "sell" e-filing to the rest. A smooth transition from voluntary to mandatory e-filing ensures that you will survive to see the final product deployed.

Making e-filing mandatory, even after a period of time (to bring along the slackers) does not address the next logical question - When do you give up the paper all together? It is very difficult to manage both a paper environment and an electronic version simultaneously. Few judges will be willing to go from paper filing directly to no paper file at all. They will reasonably want a comfort level with the electronic file before they agree to eliminate the paper file. At some point, the routine production and maintenance of paper files must succumb to an environment where paper is produced only on demand – a topic for the next article.

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