All Aboard? Electronic Filing and the Digital Divide

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"Today, in the fast-changing, affluent nations, despite all inequities of income and wealth, the coming struggle for power will increasingly turn into a struggle over the distribution of and access to knowledge."

- Alvin and Heidi Toffler, Powershift

It is clear that the concept of electronic filing in our courts is taking off. What is not clear is whether this new technology will really function as a vehicle to increase access to our judicial system or whether it will have the opposite effect. As we design court electronic filing, it is important to again ask ourselves why we are using this technology. The primary reason given by most of us is efficiency: the digital filing, storage and access to court documents should mean that we are able to provide justice in a more timely and efficient manner. But there is another important, and interrelated, goal. Electronic filing can be a tool to increase access to a justice system that many in our society still regard as distant and inaccessible. Remote electronic access to our courts can bridge the geographic and fiscal gaps between many citizens and their judicial system. Widespread access to electronic filing is also directly interrelated to the goal of efficiency. It will not be efficient if courts permanently have to maintain both a digital filing and a paper filing system and it is crucial to the success of electronic filing that the system encourages its own wide-spread use. There are many opportunities however to design electronic filing systems that will in fact reduce access to the courts. A system that designed to be used solely by affluent, computer savvy attorneys will attract those users but it will also discourage all other attorneys and unrepresented litigants from electronic access to the system. The challenge to the courts is to design a system that will increase rather than decrease access to our judicial system.

An electronic filing system that focuses on electronic filing primarily by attorneys fails to take into account the large number of self-represented litigants who need access to our courts. Growth in the number of self-represented litigants is most apparent in state courts, especially in limited jurisdiction courts and domestic relations cases. One report indicates that In the mid-1990s at least one party was self-represented in more than two-thirds of domestic relations cases in California and almost 90 percent of divorce cases in Phoenix, Arizona and Washington, DC.(1) The computer literacy of that large group is a significant concern in the design of electronic filing systems. The digital divide in our nation should be a significant consideration in the development of electronic court filing systems.

An attorney-based electronic filing system may also be flawed by an overestimation of the computer and technology expertise of the Bar. Assumptions about the level of attorney use of technology may well be over-statements of the ability and/or willingness of litigation attorneys to utilize computer technology in the filing of lawsuits.

The Digital Divide in the General Public

How serious is this issue? On the one hand, the use of computers and internet technology has exploded at a rate unlike any other information tool in human history. No nation has experienced that explosion more than the United States.
One reliable estimate is that, as of November 2000, more than 153 million Americans were online comprising 55.83% of our population. But this also means that almost 45% of Americans are not online. This "digital divide" has been described in the following terms:

There has always been a gap between those people and communities who can make effective use of information technology and those who cannot. Now, more than ever, unequal adoption of technology excludes many from reaping the fruits of the economy.

We use the term "digital divide" to refer to this gap between those who can effectively use new information and communication tools, such as the Internet, and those who cannot. While a consensus does not exist on the extent of the divide (and whether the divide is growing or narrowing), researchers are nearly unanimous in acknowledging that some sort of divide exists at this point in time.

The Department of Commerce has been monitoring this disparity in the last few years. Since 1996, the Department has published annual reports in a series called "Falling Through the Net". The 2000 report examines both individual and household computer and internet access and finds that although the overall level of "digital inclusion" in rapidly increasing, the digital divide between many groups has continued or even widened slightly. Some of the significant data shows:

- The share of households with Internet access increased by 58% since December 1998 to 41.5% in August 2000 and more than half of all households (51.0%) have computers.
- The share of individuals using the Internet rose by a third, from 32.7% in December 1998 to 44.4% in August 2000. If growth continues at that rate, more than half of all Americans will be using the Internet by the middle of 2001.
- There are large gaps in internet penetration rates among households of different races and ethnic origins. Asian Americans and Pacific Islanders have maintained the highest level of home Internet access at 56.8%. Blacks and Hispanics continue to experience the lowest household internet penetration rates at 23.5% and 23.6%, respectively.
• The divide between internet access rates for Black households and the national average rate was 3 percentage points wider than the 15 percentage point gap that existed in December 1998.

• The internet divide between Hispanic households and the national average rate was 4 percentage points wider than the 14 percentage point gap that existed in December 1998. (6)

• With respect to individuals, while about a third of the U.S. population uses the Internet at home, only 16.1% of Hispanics and 18.9% of Blacks use the Internet at home.

The racial divide is shown graphically (7):

Not surprisingly, there is also a significant divide on the basis of income and education:

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And contrary to recent publicity, individuals over 50 years old are among the least likely to be internet users:

![Internet Use by Age Group](image)

These findings about the disparity in the availability and use of technology confirm what research at Vanderbilt University and elsewhere has shown about the nature of this gap.

**The Legal Digital Divide**

In an article last year, Jerry Lawson quoted a court clerk talking about electronic filing:

> A major problem to expanding electronic filing is the current level of computer illiteracy of attorneys. Those of us directly involved in using technology in the Courts sometimes forget the low level of technical expertise and high level of technical resistance rampant in most law offices. This is and will be a significant barrier.

Anecdotally, many judges and lawyers would agree. Some would add that we also forget "the low level of technical expertise and high level of technical resistance rampant in most" judicial offices.

Survey results compiled by the American Bar Association paint a different picture, at least as to lawyers. The 1998 ABA technology survey found that 58 percent of large law firms reported having a firm home page, up from 50 percent in 1997, and 11 percent of small firms reported a home page, up from 6 percent in 1997. 99% of large law firms and 80% of small firms reported providing full Internet access to at least some people in the firm.

The 1999 ABA survey found that nearly 100% of all respondents indicated that their law firm offered full Internet access to at least someone in the firm, with 91.38% of lawyer respondents having full Internet access.

This impressive picture of a technologically savvy bar may be painted from a skewed perspective, however, since the respondents were lawyers who already had web access somehow and did not come from a random sample.

An even more recent 2000 survey compiled by the University of Florida's Legal Technology Institute showed that almost 88% of the lawyer respondents use the internet at work. However only 69% of respondents answered that everyone in their law firm had access to the internet. About 25% of the legal profession still accesses the internet using a 56.6 kbps or less modem.
These impressive surveys notwithstanding, most judges would stick by their intuition that the percentage of lawyers and judges who are technologically sophisticated is less than 50%. As the general population figures regarding the digital divide would indicate for this well educated group, a larger percentage probably do access the internet for email at home and even at work. However, experience suggests that this casual internet use does not yet translate into a desire or even willingness to use the technology in their professional activities.

The Relationship of Electronic Filing to the Digital Divide

So how does this digital divide phenomenon, in society as a whole and the legal profession in particular, relate to the decisions that we make about electronic filing in the courts? First, we need to recognize that the potential users of electronic filing include self-represented litigants and include them in our definition of potential users. In a recent essay, Ilene Mitchell described the potential for these users (13):

*As we approach the beginning of the 21st century, astonishingly rapid changes in technology offer the opportunity for courts to better serve their communities while improving efficiency in their own operations. New technologies will allow for a rethinking of the role of courts. Courts can become more accessible to pro se litigants. These litigants will no longer view the processes of the court as replete with barriers to access; they will see a system that provides them with fair access to the exercise of their legal rights.*

Many of those self-represented users are on the other side of the digital divide and if they do not utilize electronic filing a large portion of our court filing will remain manual.

Second, we need to recognize that an electronic filing system must not only accommodate but also attract the large group of lawyers who are not really computer literate or at least not comfortable with technology in their professional life. Some feel that lawyers will, willingly or by economic force, follow the courts’ lead and will adapt to whatever modern technology the court prescribes for electronic access. The reality however is that an electronic filing system that does not attract attorneys to use it or that requires special hardware or software will at least delay the time when those attorneys will utilize it.

Some basic concepts about electronic filing follow from these recognitions:

Access to the Internet. Although there is still a divide between those with access and those without, the internet remains the most important new communication tool for transmitting digital documents and every electronic filing system should be based around it and not around some other less available structure. To provide access to self-represented litigants or even attorneys who do not have computers or internet access, public computers at the courthouse, at libraries, and at other public places should be part of an electronic filing plan. The Department of Commerce 2000 data show that schools, libraries, and other public access points continue to serve those groups that do not have access at home. For example, certain groups, such as the unemployed, Blacks, and Asian Americans and Pacific Islanders, are more likely to use public libraries to access the Internet.(14) An open terminal with internet access and a scanner needs to be available at every court clerk’s office.

Hardware and Software Requirements. It is essential that access to our courts through electronic filing not be forced through single proprietary hardware or software systems. We should not force public users of our courts to buy, and necessarily "upgrade", a particular product in order to seek justice. As an internet based system, electronic filing should be browser-based
and should allow any common browser to be used. The software format can and should be designed to accommodate at least all of the commonly used text and image programs. Any conversion of the filings to "fit" the court's internal format requirements should be done internally. The federal system has unfortunately gone the other way in this process and entered into what many regard as an unhealthy alliance with a particular company and product.(15) Limiting judicial access to the use of proprietary products will deter the general public, and a significant segment of the Bar, from using electronic filing.

Training. Simplified training in the mechanics of electronic filing should be an important element of the system. For attorneys the court should plan for, and budget, open training sessions either directly or through the Bar. More importantly the interface with the system on the internet should contain an online tutorial, specific step-by-step instructions, FAQs, and trouble-shooting features. While on-line instructions are vital, the court should also plan for human assistance at the court clerk's terminal and scanner.

Conclusion

Electronic filing of court documents can be an important tool to make our justice system both more accessible and more efficient. But the decisions we make about the way an electronic filing system operates will dramatically affect whether it meets either of those goals. If we do not design a system that is attractive and usable by the Bar and the general public, it will not be used. If we do not design a system that is widely used by both attorneys and self-represented litigants courts will be forced to process both digital and electronic documents and the resulting process can be even less efficient than the current system. As M. Sean Fossmire recently put it (16):

"Ultimately, the courts exist to serve the public. The courts which best carry out this ultimate duty will be those which utilize all of the advantages of internet technology to make those documents more accessible and more useful to persons having business before them."

Footnotes


6. A separate study by the Tomas Rivera Policy Institute also documented disturbing technology data between Hispanics and the general population. On the one hand, computer penetration among Hispanic households grew from 13 percent in 1994 to 30 percent in 1998, a
change comparable to the general population (26 versus 43%). On the other hand, the reports also revealed that approximately one-third of Hispanic adults have never used a computer. Tomas Rivera Policy Institute, "Closing the Digital Divide - Latinos and Information Technology", http://www.trpi.org/information_tech.html

7. All of the graphs and illustrations here appear in the Department of Commerce report and are available at http://www.ntia.doc.gov/ntiahome/fttn00/chartscontents.html


15. The federal electronic filing system requires that all users buy an Adobe Acrobat product to file with the Court. The company offers discounts on its writer to attorneys only. While the current viewer to read such documents is "free", the federal courts are now imposing their own fee to read such documents.