

Washington Access to Justice Board

Best Practices

Providing Access to Court Information in Electronic Form

Introduction to the Best Practices

These Best Practices are the result of a project of the Washington Access to Justice (ATJ) Board, an entity created by the Washington Supreme Court to recommend policies and actions to maximize access to justice within the state. This project was supported by the American Bar Association with funding from the Public Welfare Foundation. The project has benefitted from a broad-based advisory committee composed of County Clerks, representatives of the Administrative Office of the Courts, a family court facilitator, representatives of the Washington State Bar, members of the ATJ Board's Technology Committee, and two consultants.

The project has been informed by and conducted pursuant to the Washington State ATJ Technology Principles adopted by order of the Washington Supreme Court on December 3, 2004; the Principles and the order adopting them are set forth in full as appendices to this document. Principle 6 is entitled "Best Practices" and reads as follows:

To ensure implementation of the Access to Justice Technology Principles, those governed by these principles shall utilize "best practices" procedures or standards. Other actors in the justice system are encouraged to utilize or be guided by such best practices procedures or standards.

The best practices shall guide the use of technology so as to protect and enhance access to justice and promote equality of access and fairness. Best practices shall also provide for an effective, regular means of evaluation of the use of technology in light of all the values and objectives of these Principles.

To understand these Best Practices, it is important to understand the context within which the underlying issues play out in the state of Washington. The judicial branch in Washington is not unified. The Washington state trial courts consist of several jurisdictional layers – the general jurisdiction Superior Courts, the limited jurisdiction District Courts, and locally created Municipal Courts. Local courts have leeway to set their own course within the broad context of policies and rules established by the Washington Supreme Court. The recordkeeping function of the Superior Court is performed by the County Clerk who serves “by virtue of his (or her) office” as clerk of the Superior Court.¹ Most County Clerks are elected officials. District and Municipal Court staff are employees of the court they serve.

For thirty-five years, the state judiciary has operated a statewide information system known as SCOMIS which County Clerks use to enter information on all Superior Court cases. SCOMIS serves as an index to all cases in the state but lacks modern case management and calendaring functionality. The state judicial branch has attempted several times over the past decade to procure or develop a modern replacement for SCOMIS. None of those efforts has succeeded. During 2013, the Administrative Office of the Courts entered into a contract with Tyler Technologies to license its Odyssey case management system for use by Washington’s trial courts.

Using a statewide advisory committee structure and with the involvement of Tyler Technologies, the Washington state judicial branch is currently designing the details of the Odyssey implementation for Washington state and developing processes and practices for the new system that must conform to and advance Washington law and Supreme Court Rules and policies. That process is addressing some of the issues addressed in these Best Practices.

The Best Practices have been informed in substantial part by information gathered through two surveys. One was of all County Clerks within the state of Washington, asking their current processes for providing access to court information in electronic form. Thirty of the thirty-nine Washington County Clerks responded to the survey. The other survey was of state court administrators in twenty-four other states that have elected clerks of court

¹ Washington Constitution, Article IV, Section 26 (parenthetical added).

and statewide court case management systems procured for all courts in the state (although the statewide systems are not used by all courts in eight of the states surveyed). Nineteen of the twenty-four states surveyed provided the requested information.

This document is constructed in three parts: “black letter” statements of a Best Practice, followed by commentary that explain the statements in general terms that are intended to have wide applicability (captioned *General Commentary*), followed by application of the principle within the state of Washington (captioned *Application in Washington*). All of the “black letter” statements are set forth in a single place at the beginning of the document. They are then repeated with the two types of commentary included.

As noted above, the implementation in Washington of many of the issues addressed in the Best Practices remains unresolved. It is not the intent of this Best Practices document to legislate or direct how those matters should be resolved, but rather to present principles, information and suggestions bearing on their resolution.

Best Practices

1. Court obligation to provide access to court information in electronic form

To the extent that a court maintains its public records and documents in electronic form, it should provide all court users access to that information, to the extent it is feasible, in the way that is most convenient for the user. This principle does not apply to records and documents protected by “practical obscurity” policies.

2. Implementation of security and privacy software features and procedures that ensure compliance with policies set forth in statutes and court rules

Systems implemented to provide public access to court electronic records and documents must ensure the security and privacy of

those records, preventing unauthorized access to non-public court records.

3. Single point of access to court information and documents for an entire state

Court users should be able to conduct a search for relevant information on a single site for records for an entire state.

4. Access to documents through docket

Although this may not be the only means of access to them, court users should be able to access court documents directly from the court's docket.

5. Ease of use

The processes for accessing court information should be easy to use for both infrequent and frequent users. Ease of use includes:

- a. Intuitive interfaces
- b. Easy to understand terminology to assist in the search function
- c. Language translation capability, to the extent feasible and affordable
- d. Ability to search for cases and documents using party name or case number, with initial screening for case type
- e. Ability to verify that a person whose records are found is the person for whom information is sought
- f. Easy to manage password function
- g. Availability of both individual and corporate accounts

6. Reasonable access fees

Fees charged for access to electronic court information should be as low as possible, should be reasonably related to the cost of maintaining and providing access to the information, and should not serve as a barrier to court user and/or public access to such information. These principles should apply whether access services

are provided by a public entity or by a contractor operating a system on behalf of a public entity. Such fees should be uniform across a state, set at the state level by legislation, court rule, or court policy.

7. Opportunity to verify the identity of a document before having to pay for it.

If fees are charged for access to or downloading of a document, a user should be provided with some means of verifying that the document to be accessed is the document the user desires before purchasing a copy of the document.

8. Exclusion of certain entities from payment of fees

No fee should be charged to legal services programs, *pro bono* attorneys working with a legal services program, public defenders, court-appointed attorneys, or public entities.

9. Waiver of fees for persons of limited means

If a general fee system is in place, fees should be waived for persons of limited means. The administration of the fee waiver process is as simple as possible for persons seeking access to court information, through implementation of these practices:

- Court users are informed of the availability of fee waiver on the website through which access is provided and how to find and use the fee waiver process
- Court users are again informed of the availability of fee waiver in the course of the process of requesting access to a court record – at the point that arrangement for payment of a fee is made
- The fee waiver application is as easy as possible to complete
- Court users are provided with a means for estimating whether they are eligible for fee waiver

- **If a filing fee waiver has been approved in a case, it applies automatically to the payment of electronic court record access fees by the party for whom the filing fee waiver has been approved, for documents in that case.**
- **If a fee waiver is denied the court user is informed of the reasons for denial and the availability of appeal or any other remedy.**

Best Practices and Commentary

1. Court obligation to provide access to court information in electronic form

To the extent that a court maintains its public records and documents in electronic form, it should provide all court users access to that information, to the extent it is feasible, in the way that is most convenient for the user. This principle does not apply to records and documents protected by “practical obscurity” policies.

General Commentary

As of the time of this best practices document, most courts use automated case management information systems to maintain their docket² of filings and actions taken in a case. They are increasingly maintaining all documents filed in a case in electronic form. The best practice is for a court to make this information available to its users through an automated, online access process. Such a process is initiated and controlled by the user; court staff are not involved in individual information look ups or downloads by court users.

This policy applies only to “public” records. Many court documents, and some court dockets, are confidential (“sealed”). Confidential documents are available only to judges and their direct staff, designated court staff, and authorized attorneys and parties. Federal law limits access to certain personally identifying information, such as social security and bank account

² Many courts refer to this resource as a “register of actions.” Washington courts use the term “docket.”

numbers. Court rules prevent access to trade secrets and other privileged information. Privacy policies adopted by many state court systems also restrict access to broad categories of court records, such as those in cases involving juveniles, mental commitments, guardianships and conservatorships. All of these restrictions apply to access to court records in electronic form. While most of these non-public records are maintained electronically, access to them is limited to persons authorized to view them; they are not available to the public.

A number of states restrict remote, online access to certain categories of public court records that may be obtained at a courthouse. A typical provision requires persons seeking information in a family law case to obtain the information at the courthouse where the case is or was pending. The access may be through an automated system – typically a public access terminal in the court clerk’s office or waiting area. This policy preserves the “practical obscurity” of these records. Anyone can access them because they are a matter of public record; but s/he must go to the courthouse to obtain them, as was the case before the advent of electronic court documents. Persons intent on obtaining information in particular cases may do so, but the information is not available to persons who are simply curious and would like to search for the information online.

Some court records begin as a public record but are later made confidential. One example is an adult criminal record sealed after the fact by an order of expungement. Another is a criminal charge that is handled through a deferred prosecution program – the offender is placed on a form of informal probation; if s/he does not reoffend within the informal probation period, the charge is treated as if it had never happened.³ The problem with this information is not with official databases, which are modified upon entry of an expungement order or completion of a deferred prosecution program. Rather, the problem is with private databases (such as credit reporting and background investigation companies) and online indices (like Google), into which information was entered at a time it was public. Even after a court record has been sealed pursuant to court order, the information

³ Drug court programs operate on one or the other of these approaches – suspending prosecution on a criminal charge pending attempted completion of a drug court program or entry of a guilty plea to the charge, which is expunged upon successful completion of drug court.

remains available in these private databases. All that the courts can do is to require entities that routinely obtain court information in bulk form to update their databases periodically to reflect current court data. However, in reality, these private databases are often not updated and this is vexing for the courts, and particularly so for the parties affected.⁴

These best practices require courts to protect the privacy of non-public information. But most court information is public. The best practice is to allow all users of court records to access all public information online – both for viewing and for downloading. There are many outside users of court records – attorneys, parties (some of whom are self-represented), credit reporting services, services that conduct background checks on potential employees, and other commercial users and resellers of court information, researchers, the press, and members of the public. Access by attorneys and self-represented parties is essential for them to gain access to the court and to its remedies. However, access by other users also serves important societal values – such as freedom of the press and the free flow of commerce through reliable credit information. And it is a basic tenet of an “open” court system that members of the public are entitled to information about court proceedings without having to justify their interest.⁵

“Screen scraping” technologies enable commercial information resellers to use public record look-up systems to download information for their

⁴ North Carolina has a unique process. Its criminal data extract provides only demographic information on the criminal defendant and a list of case numbers associated with that defendant. Access to more detail about the case is available only from the online access – which insures that the data obtained is current. However, court users can nonetheless record the data disclosed by the online access, which may be changed by subsequent court sealing or expungement orders.

⁵ The Preamble to the ATJ Technology Principles states as follows: “This statement presumes a broad definition of access to justice, which includes the meaningful opportunity, directly or through other persons: (1) to assert a claim or defense and to create, enforce, modify, or discharge a legal obligation in any forum; (2) to acquire the procedural or other information necessary (a) to assert a claim or defense, or (b) to create, enforce, modify, or discharge an obligation in any forum, or (c) to otherwise improve the likelihood of a just result; (3) to participate in the conduct of proceedings as witness or juror; and (4) to acquire information about the activities of courts or other dispute resolution bodies. (Underlining added for emphasis).

databases. It is possible to block these processes, such as requiring a user to recognize and enter digits and numbers that are shown in a form that is not machine-readable. Courts take different positions on implementing such blocking technology. The best practice is to provide commercial users with customized reports or unique access through application programming interfaces so that courts can know who is accessing their information, can implement effective database updating requirements, and, when appropriate, generate revenue to support their technology applications from this source.

Courts realize practical benefits from making their records conveniently available online. The major court savings is in the form of staff time that is no longer required to respond to telephonic and in-person requests for information from court files. A secondary savings arises from the reduced need to make copies of such records, including certified copies. Even though courts are authorized to charge for such copying services, the fees received rarely cover the true costs of providing the service.

Although the best practice calls for courts to provide maximally convenient online access to electronic court records for all users, there are valid reasons for providing different access policies and processes for some users. Most states and urban areas have integrated criminal justice information sharing procedures to enhance public safety and efficient criminal case processing. These information sharing processes typically involve custom data exchanges and do not rely on public access processes. Courts are also justified in providing attorneys as well as self-represented litigants⁶ with online access to court records that are otherwise the subject of “practical obscurity” policies. Current thinking on access to justice in civil cases, particularly in family law cases, focuses on the importance for self-represented litigants to be able to obtain affordable unbundled (limited scope) legal representation from both legal services and private bar attorneys. Courts are adopting rules to encourage attorneys to provide such representation. Allowing attorneys online access to family court records,

⁶ Often referred to by courts and attorneys as “pro se” or “pro per” litigants – from the Latin phrase appearing “in propria persona.” Use of such terminology is discouraged in most court systems today because it simply confuses the very persons to whom it refers.

despite “practical obscurity” policies, would facilitate and reduce the cost of such practice.

Implementation of this best practice requires a significant investment on the part of a court system – in terms of resources invested in the development of policies to govern access processes, in the development and maintenance of automated systems to implement them, and in monitoring and improving the services provided. Most commercial off-the-shelf court case management information systems contain document management applications to support public access both to docket information and to court documents maintained in electronic form. And revenues generated from these systems generally more than cover the costs of implementation. But the systems must be paid for before the revenue can be generated. Consequently, the Best Practice contains a caveat that while features necessary to provide meaningful access are required, other particular features that maximize user convenience, while highly desirable, must be balanced against both the technical and fiscal feasibility of implementing and maintaining them.

Application in Washington

The policy background within Washington State for these issues are established by Washington Supreme Court General Rules 31⁷ and 22⁸. These general rules do not apply the “practical obscurity” principle to any categories of Washington court records. However, the Judicial Information Systems Committee in September 2013 added Section V to its Data Dissemination Policy prohibiting the electronic dissemination of juvenile offender records.⁹ General Rule 30 governing electronic filing includes provisions concerning the processes to be used for electronic collection of

⁷ General Rule 31 authorizes public access to court records that are not otherwise restricted by law, court rule, or court order, places responsibility for redacting personally identifiable information on the party or attorney filing a document, and requires persons obtaining “bulk records” to enter into a contract with the state court system or local clerk of court for such access

⁸ GR 22 applies to family law and guardianship cases and restricts access to financial source documents, personal health records, confidential reports and unredacted judicial information system database reports used in making judicial determinations to judges and court staff, parties in a case and attorneys of record in those cases

⁹ <http://www.courts.wa.gov/datadis/?fa=datadis.policyDiss#V>

filing fees, and requires waiver of filing fees for electronic processes consistent with those in non-electronic filing processes. General Rule 34 governs waiver of filing fees and surcharges in civil matters on the basis of indigency and sets the standards for indigency to be used by all judicial officers in reviewing fee waiver applications.

As of the time of this best practices document, 38 of the 39 counties use SCOMIS to maintain their docket of filings and actions taken in a case. The County Clerks are increasingly maintaining all case documents in electronic form in independent document management systems.

The Washington judicial branch has provided public access to publicly available information in SCOMIS from the judicial branch website. Roughly half of Washington's counties currently provide access to superior court electronic court records. Nineteen of the thirty counties who responded to our survey report that they currently maintain some or all of their court records in electronic form and allow court personnel, attorneys and the public to access them. Five other counties have plans to implement electronic documents and public access to them some time in the future. Seventeen counties use a private vendor called Clerk ePass to provide access to online copies of their electronic documents, including certified copies. Other means used to provide access to electronic documents are through a vendor called LibertyNet, the use of LaserFische accessible from the county website, the digital archives at the Washington Secretary of State's Office, and the use of public kiosks in the County Clerk's office.

2. Implementation of security and privacy software features and procedures that ensure compliance with policies set forth in statutes and court rules

Systems implemented to provide public access to court electronic records and documents must ensure the security and privacy of those records, preventing unauthorized access to non-public court records.

General Commentary

Public access processes must not compromise the security of any court records, nor the confidentiality of court records that are not available to the public. Commercially available software is now available that provides sophisticated “role based” security – the extent of one’s access depends on one’s role in the justice process and in a particular case. Nonetheless, these processes require vigilant monitoring and require that court users maintain the confidentiality of their personal access codes. Maintenance of secure systems is the responsibility of a specified database manager or management group in any automated system.

Application in Washington

Our survey did not ask about the security features of current electronic access processes in Washington State.

3. Single point of access to court information and documents for an entire state

Court users should be able to conduct a search for relevant information on a single site for records for an entire state.

General Commentary

Requiring users to conduct searches on multiple websites within a state is time consuming, inefficient, and, in some cases, so burdensome that it constitutes a bar to effective access to those records.

Constructing a mechanism by which court records for an entire state can be accessed from a single site is a relatively straightforward technical effort with today’s powerful search engine technologies. The easiest way to provide this form of access is to maintain all records in a single database. Fourteen states with elected clerks of court and statewide case management systems that responded to our survey provide access to court docket information in this manner. Two additional states plan to create such a statewide database in the near future. North Carolina is a special case; the North Carolina legislature in 1997 authorized the Administrative Office of the

Courts to manage electronic distribution of and access to clerks' records through non-exclusive licensing agreements for remote public access.

Three states have similar systems for access to electronic court documents. One of them is North Dakota, an Odyssey system user. The other two are Nebraska and New York. Two other states – Kentucky and West Virginia – plan to institute such statewide access in the future.

However, that is not the only way in which to accomplish the objective of a single point of access. It is also possible to create links to multiple case management and document management systems for access to particular records. No state that responded to our survey currently uses such a process for access to electronic court documents although North Carolina uses that process for access to court docket information.

Access is rarely provided from a production database; it is typically provided from a redundant database that also serves as part of a system's security infrastructure. Use of a source other than a production database necessarily means that there will be some time lag between the entry of data and documents into official court record systems and their availability to the public. One approach is to perform backups to the public access site overnight, which can result in a lag of as much as a full work day for information entered in the morning. An access website should disclose the lag time to users so that they can accurately understand the currency of the information they obtain from a search.

Application in Washington

Washington currently provides a single point of access to SCOMIS court docket information. The state has not yet decided whether or how to provide a single point of access to court documents in electronic form.

4. Access to documents through docket

Although this may not be the only means of access to them, court users should be able to access court documents directly from the court's docket.

General Commentary

Accessing a court docket is the way that judges and court staff learn that an electronic court document exists. Being able to “click” on the document name or on an icon symbolizing the existence of an electronic document is the only acceptable means of accessing court documents for persons working in the court. Document management systems that do not use the court docket as the index to the document images are inefficient and irritating for court personnel. They require a judge or court staff to review the docket to learn of the existence of a document and then review a different index of electronic documents to locate and access that document. Such processes have the same effect on other users of court information.

Access through the court docket is a logical way for users of court information to access electronic court documents. Finding a case involving the person of interest and locating the document within the case docket is the most typical progression for most persons trying to locate a court document. However, this is not the process that bulk data users prefer. They prefer a download of all information relevant for their databases for a specific time period (for instance, information concerning all cases filed or disposed of during the last calendar month).

It may be that court users would prefer a different access process that would allow them to search directly for relevant documents without having to review a court docket – a process that works more like a modern web search engine. Court systems and their automated systems vendors should remain open to satisfying changing customer desires in this regard.

Application in Washington

The Odyssey application uses the court docket as the index to electronic court documents.

5. Ease of use

The processes for accessing court information should be easy to use for both infrequent and frequent users. Ease of use includes:

- a. Intuitive interfaces**
- b. Easy to understand terminology to assist in the search function**
- c. Language translation capability, to the extent feasible and affordable**
- d. Ability to search for cases and documents using party name or case number, with initial screening for case type**
- e. Ability to verify that a person whose records are found is the person for whom information is sought**
- f. Easy to manage password function**
- g. Availability of both individual and corporate accounts**

General Commentary

Design of court information access processes must take into account the needs of infrequent users, such as self-represented litigants who will likely have only one case in their lifetime and members of the press and public trying to find information on a single case or person, and frequent users, such as attorneys, public agencies (such as law enforcement, probation, corrections, child protection services, and child support enforcement entities), and commercial data resellers. A process that is simple enough for an infrequent user will prove cumbersome for a frequent user. Court information access processes must meet the needs of all users – requiring the development and support of multiple access portals. User accounts should be available in both individual and corporate or agency forms for the same reason.

Access paths must comply with a number of “ease of use” principles.

All interfaces must be intuitive and presented in language understandable by the intended users of the interface. For infrequent users, all instructions and information descriptions should be in plain English understandable at a third grade reading level. While it may be infeasible in many jurisdictions to provide multiple language translation services for all court documents, it should be feasible to provide user interfaces in the principal languages of the community served by a court. This feature would allow interested persons to locate and identify relevant documents – for which they would be obliged to find their own translators.

Court jargon – such as case type and document type descriptors – should be translated into plain English or presented together with a glossary of terms allowing a user to navigate a court docket. Courts face special problems with simplification of terms when obscure language is contained in state statutes.¹⁰

Users should be able to conduct searches using either party name (including corporate or business name) or case number. They should have a means of verifying that a person or entity located (James Jones or Smith Corporation) is the James Jones or Smith Corporation about whom they are seeking information. Ability to verify address and date of birth for a party are helpful in this regard.

Court information access processes should also support straightforward user name and password functions – functions that do not require the user to change their passwords repeatedly. For instance, some courts allow attorneys to use their bar number as their user name and their last name as their password.

Application in Washington

It is not clear the extent to which Odyssey access processes are consistent with these principles.

6. Reasonable access fees

Fees charged for access to electronic court information should be as low as possible, should be reasonably related to the cost of maintaining and providing access to the information, and should not serve as a barrier to court user and/or public access to such information. These principles should apply whether access services are provided by a public entity or by a contractor operating a system on behalf of a public entity. Such fees should be uniform across a state, set at the state level by legislation, court rule, or court policy.

¹⁰ For instance, the Washington state legislature has renamed “divorce” as “dissolution” – a term not in widespread use among the general public.

General Commentary

Research conducted for this best practices project shows that court systems with statewide case management systems and elected clerks of court employ a wide range of fee structures and fee amounts for accessing court information. Our survey addressed three different types of fees – fees for accessing court docket information about the events and filings in a case, fees for accessing court documents maintained in electronic form, and fees for filing documents electronically. Fee structures are very different for access to court docket information and for access to court documents and electronic filing. Most states do not charge for the former – to the extent that the information is provided from a statewide aggregated resource.¹¹ Nebraska, North Carolina, and Wisconsin are exceptions, as outlined below.

Nebraska provides access to court electronic documents through its docket information access process. It charges for access to each case record, which includes both the docket and document information for that case. Users who plan frequent access can subscribe to the service and receive monthly bills for their use. They are charged \$1.00 per case accessed; this charge includes access to all PDF document images in the case. There are two other payment options: “Bulk rate” users can make searches of unlimited numbers of cases per month for a single \$300.00 monthly charge; persons only seeking access to cases for a single individual can pay \$15 by credit card for each name search and can view up to 30 case records identified by the search (but cannot access documents associated with the case through this process).

North Carolina provides access to basic criminal and civil case information free from public terminals in each courthouse. But if a user wants access to that data online, it pays a \$495 set up charge which includes two user IDs (additional user IDs cost \$70 each). It then also pays a charge of 21 cents per transaction for access to case information. North Carolina also provides eight tailor-made data extracts, such as a monthly output of criminal case

¹¹ In a number of the 24 states surveyed, statewide docket information is available for only some case types or court types, or only for counties that use the statewide case management system. In those states, some local clerks of court often have their own processes for providing access to information not available through the statewide system, often with some sort of charge.

data (for \$478 per month), an historical compilation of demographic information on all criminal defendants in the state database (\$1,948), a daily demographic extract on new criminal defendants (\$312 per month), and historical and weekly extracts of evictions and tax lien cases (from \$2,839 for the historical evictions data to \$365 per month for the monthly tax lien data extract).

Wisconsin offers a SOAP application allowing users to conduct bulk record searches for \$500 per month or \$5,000 per year.

Relatively few of the states surveyed have progressed to statewide electronic court records systems available online. Of the nineteen states that responded, only two – Nebraska and New York (for some case types) currently provide statewide online access to electronic documents. Three states – North Carolina (for its e-filing pilots), North Dakota, and Wisconsin – provide online access to electronic documents for attorneys (and, in Wisconsin, for parties) for cases in which they have entered an appearance; these states do not provide online access to the public. Two other states – Arizona and Arkansas – provide public access to electronic documents, but only in those counties in which e-filing has been implemented. In nine states¹² the initiative for creating electronic documents – generally by scanning documents filed in paper form – has been at the local level; in these states online access to electronic documents is available in a few counties but not statewide. In Arkansas, the electronic records process has been provided through a statewide automated system, but the decision whether to provide online access to documents resides with each county clerk. The remaining four states that responded to the survey have no current online electronic document access processes. Access to electronic documents is available in a number of these states through public terminals in courthouses.

Seven of the states with no current online access, or online access in only a few counties, are planning to develop and implement systems that will provide online access to electronic court documents to the public through

¹² Arizona, Idaho, Maryland, Michigan, Nevada, Pennsylvania, South Carolina, Virginia, and West Virginia.

statewide applications.¹³ An eighth state (Montana) is planning a system of statewide online access for attorneys only.

Fees for access to court documents in electronic form vary significantly and are often related to fees charged to file a document through an e-filing application. North Dakota (whose e-filing system was provided by a vendor but operated by the state court system) does not charge an e-filing fee and provides free access to electronic court documents (which are available only to attorneys). North Carolina charges a training fee of \$50 for each attorney participating in its pilot e-filing system, plus a convenience fee for use of a credit card for paying filing fees (which goes to the credit card vendor, not to the court system) but does not charge for viewing documents filed electronically.

Wisconsin charges \$5 per case for e-filing of all documents in a case; e-filing users have access to all documents in their case. Wisconsin does not allow public access to electronic documents. Wisconsin built and operates its own electronic filing and records system.

Arkansas (whose e-filing system was similarly provided by a vendor but operated by the state court system) charges a one-time \$100 registration fee to persons participating in the e-filing system. Like Wisconsin, Arkansas' e-filing system, which is in operation in only one county, charges \$20 per case, but only for cases for which a filing fee is required.

Michigan has six current electronic filing pilots. Each pilot uses an e-filing vendor, but different commercial e-filing vendors serve different counties. One pilot charges \$4 per document filed electronically or \$7 if the filer uses electronic service as well as electronic filing; the other five pilots charge \$5 and \$8 per filing.

Arizona also uses a commercial electronic filing vendor. It charges both e-filing fees and fees for viewing electronic court documents. Its e-filing fees are \$6 per document filed; \$5 goes to the e-filing vendor and \$1 to the state court system. Its document access fees have several tiers: access to a document can be obtained for \$10 paid by credit card; frequent users can

¹³ Arizona, Idaho, Kentucky, Maryland, Massachusetts, Oklahoma, and West Virginia.

subscribe at various rates, e.g., 20 documents for \$80; for the highest volume users, rates are roughly \$2 per document.

Nebraska's fee system has been described previously.¹⁴ There are three processes – all based on a name search in the case management information system. Persons conducting an individual name search are charged \$15 per search and are entitled to view case details (but not documents) in up to 30 cases reported in the name search. Subscribers get free name searches but pay \$1 per case to view case details, including all electronic documents. Bulk subscribers avoid the per case viewing fee; they get access to unlimited name searches and all of the documents in those cases for a \$300 monthly subscription fee.

By contrast, the federal court system's¹⁵ electronic filing is free. Access to electronic court documents is through its PACER application. A party to a case receives free access to all filings in that case; however, if the party or attorney does not download the document for its future use when it is provided automatically, s/he is charged for subsequent access to the document. PACER charges \$.10 per page, with a cap of \$3 per document. Fees of \$15 or less per quarter are waived.

Recognizing that the survey for this project was addressed to less than half the states, the results nonetheless suggest some conclusions. Systems operated by commercial electronic filing vendors appear to cost filers far more than systems operated by state court systems (compare North Dakota with no fees, North Carolina with only a one-time \$50 training fee per user, Wisconsin with a \$5 fee per case, Nebraska with no e-filing fees and a name search based access to information and records fee system, and Arkansas with a one-time registration fee per user and a \$20 per case fee with Arizona and Michigan whose commercial e-filing vendors charge fees of \$5 to \$8 per document filed). Wisconsin reports that its \$5 per case fee pays for the

¹⁴ Nebraska did not answer the question concerning use of an e-filing vendor. It appears that Nebraska operates its own e-filing and electronic records system since its fee system is unlike any used by an e-filing vendor.

¹⁵ Federal court clerks are appointed by the court; they are not independently elected officials. Consequently, the federal courts are not comparable to the 24 state court systems surveyed.

support, maintenance and upkeep of its internally developed electronic filing system by its IT department.

The best practice is to charge fees for access to court electronic information that are:

- as low as possible,
- reasonably related to the cost of providing the service,
- in no event so high as to constitute a barrier to court user and public access to court information,
- uniform throughout a state, and
- established according to these principles whether services are provided by a public entity or by a contractor operating an access service on behalf of a public entity.

The processes that result in the lowest fees are those that charge no fees, charge only one-time registration or training fees, or charge fees on a per case basis. The processes that result in the highest fees are those using commercial e-filing vendors who charge fees on a per filing basis.

Wisconsin's example suggests that a modest per case fee, coupled with a bulk user convenience fee for access to information in electronic form, will generate sufficient income to support and maintain statewide e-filing and electronic records systems. The experience of the federal courts provides support for that point of view.

It appears relatively obvious that policies by which courts share in commercial vendor e-filing fees are receiving revenues unrelated to the cost of providing the service.

To our knowledge, no research has been done to determine what fee level would constitute a barrier to user and public access. However, keeping this principle in mind when determining access fees should contribute to sound court system decisions on fee issues. A one-time registration fee of \$50 to \$100 dollars for access to electronic filing and electronic record access provides very inexpensive access for frequent court users such as attorneys and information resellers. However, this practice creates a significant barrier for self-represented litigants desiring to present one case to the courts. It

would be advisable to waive the one-time fee for self-represented litigants or for having a much lower fee applicable to them. Having adequate exclusion and fee waiver processes, as discussed below, will be also be relevant to ensuring that access fees do not become a barrier to access to information and thus meaningful access to justice for court users or for members of the public.

It is also a best practice to have uniform access fees across a state. The survey¹⁶ disclosed that uniform fees are currently set at the state level, or will be made that way for future systems, in ten states. They are made at the local level in two states. One state makes fee decisions at the state level, but the fees vary from county to county. In four states, some fees are set at the state level and others are set at the local level.

The survey information suggests that access fees differ markedly when they are provided by contractors rather than by public entities themselves.

Application in Washington

Access fees in Washington are currently set at the local level, and vary from county to county.

King County's award-winning e-filing system¹⁷ is mandatory for attorneys (unless the requirement is waived) and recommended for other court users. There is no charge for filing documents electronically. The County Clerk's ECR Online application provides access for viewing, printing and saving documents in certain case types¹⁸ filed since 2004 for \$.15 per page. Users are required to establish a declining balance account in order to use the system.

¹⁶ Two states do not currently have policies on this issue.

¹⁷ 2007 Innovation in American Government Award from the John F. Kennedy School of Government at Harvard University.

¹⁸ Criminal cases, civil cases other than petitions for domestic violence or antiharassment protection orders, and probate cases, except for guardianship cases. See Local General Rule 31, Access to Court Records.

Pierce County¹⁹ charges a \$25 set up fee to subscribe to its electronic data base. The cost of subscriptions for unlimited access to public electronic court records is \$150 per year or \$25 per month for attorneys and \$150 per year for non-attorneys. Access to all documents in a single case for non-subscribers (for an attorney, a party, or a non-party) costs \$25. Chapter 4.119 of the Snohomish County Code limits the access fees the County Clerk may charge to “the costs of providing access to electronic superior court records and maintaining, enhancing, and operating said service.”²⁰

A number of counties use ClerkePass – a commercial service – which charges a \$4 convenience fee for each case accessed, plus \$.25 per page for access to electronic court documents.

A number of County Clerks send their electronic court records to the digital archives at the Secretary of State’s office, where they can be accessed online. The fee for access is \$1 per document plus \$0.25 per page.

Fees to be charged in Washington in the future have not yet been set and will depend on the configuration of a future access to electronic court information process.

7. Opportunity to verify the identity of a document before having to pay for it.

If fees are charged for access to or downloading of a document, a user should be provided with some means of verifying that the document to be accessed is the document the user desires before purchasing a copy of the document.

General Commentary

Arizona’s access process allows the user to view $\frac{3}{4}$ of the first page of a document before deciding to pay for access to the full document for review

¹⁹ Pursuant to Pierce County Ordinance No. 2005-85, incorporating Code Chapter 2.08. These code sections are attached as an appendix.

²⁰ Chapter 4.119 is attached to these Best Practices as an appendix.

or downloading. This practice, or a similar one, should be a best practice for access processes for which a fee is imposed. The purchaser should be able to ensure that what s/he is buying is what s/he wishes to buy.

A number of states provide free access to the court docket or register of actions for public cases and public documents in those cases. While the docket sets forth the full title of the document as used by the filer (including a judge filing an order or a court clerk filing a notice), that title is not necessarily sufficient for an unsophisticated user to ensure that the document is the one s/he is seeking.

Application in Washington

The Washington Secretary of State's Digital Archives, to which a number of County Clerks send copies of their records, provides free access to the top half of the first page of a document for this purpose.

The state court system has not yet addressed this issue in its design of a statewide access to court electronic information process.

8. Exclusion of certain entities from payment of fees

No fee should be charged to legal services programs, *pro bono* attorneys working with a legal services program, public defenders, court-appointed attorneys, or public entities.

General Commentary

Three states responding to our survey reported that public entities are exempt from paying access fees. In Nebraska, any entity may petition to be exempt from payment of access fees; half of all access requests filled in the state each year are free. Only one state reported that it requires public entities to pay access fees; Arkansas' \$100 registration fee is applied to each individual user regardless of that person's employer. Many states responding to the survey have not yet established policies on these issues.

Waiver of fees for court-appointed and *pro bono* attorneys presents a technical challenge not presented by waiver for public entities and their

employees. Waivers for entities apply to any information request made by an employee of the entity. Waivers for court-appointed and *pro bono* attorneys apply only for access to documents in a specific case on behalf of the party represented for free or at state expense in that case.

Programming an application to record and apply a case-by-case fee waiver determination is harder than those that apply to an attorney or party generically. Nevertheless, the Best Practice is to exclude attorneys in these categories from paying access fees in recognition that these forms of representation are clearly a form of public service; performance of such public service should be encouraged in every way possible, including by waiver of electronic access fees.

Application in Washington

Washington does not yet have a statewide policy on this issue. General Rule 34 calls for the automatic waiver of filing fees and other surcharges, the payment of which is required to gain access to the court system for persons represented by Qualified Legal Services Providers. But while this rule does not apply to other public entities and General Rule 34 does not apply to fees charged for access to court information, it should be considered as a model adaptable to this situation.

Snohomish County does have such a policy, set forth in Chapter 4.119 of the Snohomish County Code (included as an appendix to these Best Practices). The Snohomish County policy is both broader and narrower than the recommended Best Practice. It authorizes the County Clerk to exempt “employees of not-for-profit organizations or corporations whose primary purpose is to provide access to justice for the poor and infirm” which empowers the County Clerk to waive electronic access fees for organizations such as domestic violence advocates and the Public Defenders’ Association. The Snohomish County policy does not apply to court-appointed attorneys who do not meet the above criteria.

The Pierce County Code exempts all Government Subscribers, defined as “any federal, state, local governmental entity or non-profit legal services, legal aid, or pro bono agency which registers as such with the Clerk.” Government Subscribers are not exempt from the \$25 set up fee.

9. Waiver of fees for persons of limited means

If a general fee system is in place, fees should be waived for persons of limited means. The administration of the fee waiver process is as simple as possible for persons seeking access to court information, through implementation of these practices:

- Court users are informed of the availability of fee waiver on the website through which access is provided and how to find and use the fee waiver process
- Court users are again informed of the availability of fee waiver in the course of the process of requesting access to a court record – at the point that arrangement for payment of a fee is made
- The fee waiver application is as easy as possible to complete
- Court users are provided with a means for estimating whether they are eligible for fee waiver
- If a filing fee waiver has been approved in a case, it applies automatically to the payment of electronic court record access fees by the party for whom the filing fee waiver has been approved, for documents in that case
- If a fee waiver is denied, the court user is informed of the reasons for denial and the availability of appeal or any other remedy.

General Commentary

Ten states responding to our survey have, or plan to have, a fee waiver process in place for its e-filing and electronic information access processes. No state reported that it has declined to implement such a practice. A number of states do not yet have policies on fee issues for electronic court record access.

For a fee waiver process to be effective in eliminating the possibility that access fees will become a barrier to access to court electronic information, a number of specific practices must be followed:

- The availability of fee waiver is prominently announced on the website through which access is provided, so that persons interested in obtaining court information in electronic form are told of the availability of waiver for persons of limited means whenever fees are mentioned. They are also told where and how to access the fee waiver process.
- The option to prepare and submit a fee waiver application is a prominent alternative to the payment of access fees by credit card or otherwise – and provided to the user at the same point in the process for requesting access to court information that payment is requested.
- The fee waiver application itself is as easy as possible. State policies should allow persons to qualify for fee waiver automatically if they are recipients of public benefits. The financial information required for a fee waiver for a person not receiving public benefits should be as limited and straightforward as possible. The fee waiver application should be an electronic form provided by the access application at the time payment is requested, fillable online and submitted automatically, without pre-payment of the fee, at the time the request for access to information is made. Court action on the fee waiver request, if not automated, should be as quick as feasible. The requester should receive email or text message notification of the action taken on the fee waiver application.
- The fee waiver requester should receive immediate feedback from the access request system whether the information entered into a fee waiver request is likely to result in a fee waiver. The requester can then choose to pay the access fee rather than proceed with an application that will be rejected, or add additional information providing grounds for making an exception to the court's standard fee waiver policy.
- If a filing fee has already been waived, all electronic access fees are waived automatically for that party in that case, and this policy is applied automatically during the access request process to a person requesting access to court information whose filing fee has been waived, and the person is promptly and clearly told that has happened.
- If a filing fee is denied, the user receives information on the reason(s) for denial and the availability of appeal or any other avenue available to the user to obtain a different decision.

These policies have significant technical implications for the development of automated court applications needed to implement them. The processes described above require considerable automation sophistication. It is not reasonable to expect that courts can implement them without the support of automated applications. The inclusion of the phrase “as possible” in the second sentence of this Best Practice is intended to recognize that issues of technical and fiscal feasibility may require postponement of the implementation of some of the features of a complete fee waiver process.

Application in Washington

The Pierce County ordinance recognizes that the per case fee for access to court electronic documents can be waived, and provides that General Rule 30.6(b) will apply with respect to waiver of litigant case subscriber and set up fees. That is probably a reference to current General Rule 30(e)(2) which provides that electronic filing fees will be waived whenever non-electronic filing fees would be waived.

Washington’s General Rule 34 governs waiver of filing fees and surcharges in civil matters on the basis of indigency and sets the standards for indigency to be used by all judicial officers in reviewing fee waiver applications. The Washington rule provides that persons receiving various forms of public benefits are automatically entitled to fee waiver. However, the rule does not presently apply to fees charged for access to electronic court information. The rule also does not contain all the specific implementation practices recommended in these best practices. They will have to be addressed as Washington’s statewide electronic filing and access to electronic court information processes are developed.