State Courts and the Transformation to Virtual Courts

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Your client calls you in the middle of the night. He was in a terrible car accident, he says. The driver of the other car appears not to be breathing, gasoline is spilling everywhere, and he has been drinking. Crying and distraught, he begs for your help. After you get him to calm down, he assures you that he will call the police but will not say anything to anyone; you tell him that you will be there momentarily.

Lawyers have been getting phone calls like these for many years, but technology has completely altered what happens next.

Your client does not know where he is, but his phone lets you know his precise location. You get directions quickly from your car's GPS. In fact, you beat the police to the scene. You immediately preserve evidence by taking photos and making notes on your phone. You have everything you need—including the ability to do legal research—literally at your fingertips. You do what you can, go home, and begin to prepare for dealing with the rest of the case and a possible trial.

The differences between yesterday's and today's litigation practice could not be starker—and that includes the courtroom. State courts are rapidly adopting technology to make their paper-based and face-to-face systems more efficient, and it is not hard to imagine the tipping point where virtual courts will be the venue for most civil cases and even some criminal cases. How did we get there?

There are four areas in which information and communication technology (ICT) has had, and is having, an impact on the law. Technology has changed what you do (e.g., work with clients, file cases, manage information related to cases). Technology has changed what you can do (e.g., manage cases remotely, manage massive amounts of information, present information to juries in amazing ways). Technology has changed what you must do (e.g., file online, manage e-discovery, manage data security risks). Perhaps most important is that technology offers many possibilities for what you may want to do (e.g., engage in online practice in ways not possible before the collision of the law and ICT). In the state court setting, what you can do is governed by local court rules. More than ever, those rules allow for technological innovation in an incremental, but not transformational, way. But even that may be changing.

From motions to depositions to trial practice, the tools at the disposal of today's litigator span a wide variety of instruments and approaches to better serve clients. For example, attorneys today almost never step into a library to do research; a phone and a wireless connection now provide more access to legal knowledge than any library ever did. Inevitably, the same technology that improves today's courtroom may make tomorrow's trials virtual, except for cases in which due process absolutely requires a physical courtroom. For now, however, technology remains a

tool used by an old institution to improve itself. And just as looking at the evolution of case law helps a lawyer understand current law, looking back at the progression of technology in court settings helps us understand how best to use modern technology.

The turning point for technological integration into courts coincided with the turn of the century. When the Supreme Court launched its official website in 2000, the justices signaled that technology was here to stay. The launching of the site seemed to happen overnight, electrifying the federal courts. But a lot of thought had gone into the process, and the carefully managed and cohesive changes included electronic filing, broadband intranet, and the transition of the docket by moving PACER (Public Access to Court Electronic Records) to the Internet.

State courts, with more limited resources and less overall organization than their federal counterparts, lagged behind. Problems arose, such as budget deficits or increased subject matter jurisdiction, and the state courts addressed those problems piecemeal. Nevertheless, today's state courts and private justice systems (e.g., alternative dispute resolution or ADR) are often more advanced and easier to use, and they have the potential to drive change even faster than the federal system. So what do changes in courtroom technology mean for today's litigator?

Categories of Change

There are three general categories of changes. First, there are the technologies that lawyers use to present evidence and arguments to the jury. From evidence cameras to intricate multimedia presentations, many courtrooms have state-of-the-art technology that transforms the relationship between an attorney and the jury. And those technologies can present interesting opportunities and issues for the appeal process as well. Second, the existence of electronic documents has fundamentally changed the discovery process. It is no exaggeration to say that it is essential for everyday lawyers to understand the new standards of document retention simply to avoid harsh penalties. Third, attorneys can use new technology outside the courtroom to start their cases, maintain their cases, and get the word out about their cases. E-filing, social media, telephones, and legal research have transformed the traditional work of lawyers. Just a short time ago, more than 900,000 people signed on to the Supreme Court's official live blog to await the Court's decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), deciding the constitutionality of the Affordable Care Act. With such new tools, practices, and strategies, lawyers need to work harder than ever to stay abreast of changes in the practice of law. And the new technology used to enhance the present court system will be the building blocks for the virtual courthouse of the future.

One of the most dramatic changes technology has wrought is within the four walls of the courtroom—the relationship between lawyer and jury. Today, every substantive argument sounds better if it is accompanied by the right aids. But those virtual courtroom aids also can be made available to a jury that convenes virtually, instead of in a physical courtroom. This already has been done in e-commerce settings such as eBay's virtual "community courts," and these principles can be easily adapted to state courts.

To help the jury—physical or virtual—get the facts of the case in the most persuasive way, today's lawyer needs to appreciate the video technology available for his or her use. Gone are the days of paper displays. With the ubiquity of high-resolution flat-screen televisions, litigators employ dramatic reconstruction of accidents and distill complex issues with simple video explanations. Today's lawyer does not need words to explain his or her theory of the accident. Instead, the lawyer can present a dramatic video interpretation with computer generated actors and digitally recreated scenes. Add to this the advancements in multimedia programs and the litigator's ability to convince a jury increases dramatically.

With programs such as PowerPoint and Adobe InDesign, any litigator can easily combine photographs and illustrations into an interactive design presentation. Need to pause the video to explain where the bullet may have come from? Easily done. Need to rotate around the victim to better show where the shooter was standing? No problem. Want to intersperse photos of the crime scene? Well, you get the point.

Manage this carefully, though. Using multimedia technology may be costly. And don't overdo it. Courts do not favor interpretations that are too gory or dramatic, so keep it simple and within reason. Combine this with a document camera and you can present a letter, weapon, or blood stain in high definition to all your jurors at once.

Some technologies actually reduce costs and improve coordination between lawyers and witnesses. Consider video conferencing, for example. Gone are the days of paying exorbitant costs to haul witnesses across the country. If the best expert on DNA analysis for your trial in Phoenix happens to reside in Boston, you can hook up cameras for him to present his analysis. With real-time reporting, expert witnesses can respond instantaneously across the country. If you need to review it yourself before it goes out, connect your computer, phone, or tablet to the ubiquitous free Wi-Fi in many courtrooms today. And as these technologies reduce costs and increase the speed of review in the physical courtroom, they are just another step in the trend toward a virtual court system.

Other technologies address the problem of witnesses—or even jurors—who are unable to communicate in English or have disabilities that prevent them from leaving their homes. With modern-day interpretation technology, captioned material or evidence under the camera can be easily translated while avoiding the high costs of a human interpreter. Jurors with hearing disabilities can read what is being said, so they don't have to be excluded. All these technologies increase the possibilities of expanding the jury pool to reach those for whom jury service has been impossible.

Of course, with technology—like anything else—there is potential for error. So be careful in selecting the tools you use and the products you rely on. For instance, while digital recording devices increase efficiency and cut costs, they have not proven completely reliable. Sometimes, reporters are unable to record statements simply because they are inaudible. And the extra hours needed to complete the record may offset any cost efficiencies. In a 2003 criminal case in Trenton, New Jersey, for example, a digital recorder left more than 10,000 inaudible and indiscernible entries, including testimony by key witnesses. The trial court then had to go through the transcript of the eight-month-long trial, with both sides present, to fill in the blanks.

The advent of new technologies means being more cautious to preserve the record for appeal. Be sure to carefully preserve and document all the technology you use: Make sure the record shows what you used, how you used it, and what you used

it for. The rules really are no different than they always have been. Make sure everything is transcribed and recorded. Do what you can before trial so that you are not scrambling during or after. Make all electronic evidence and demonstrative aids part of the record, and be sure to save it in hard copy as well. Use hyper-linked PDF documents, but make sure everything is legible when making paper documents electronic. Preserve the record in a way that is easy for the judge to review.

An important part of record preservation involves metadata—embedded information within an electronic file that allows a user to access information not printed on the page; it remains even if the document is copied or deleted. Metadata make it possible to trace the history, access, or use of a file. Within prior versions of emails or documents, metadata can reveal deletions and hidden comments. For that reason, electronic files should include metadata so that the appellate court knows that the files have not been altered.

E-Discovery

With the advent of electronic communication, discovery now involves millions of documents. Although volumes have been written on the subject, we would be remiss not to say a few things about how e-discovery has become the primary way lawyers access evidence in civil disputes. Today, there are all sorts of new devices and software that interact in different ways. People use their phones to make phone calls, but they also use them to play games, to text, to search on Facebook, and to tweet constantly. This changes the discovery responsibility of litigators, with guidance coming from the court. In 2006, the Federal Rules were amended to explicitly address e-discovery. And district court judges, such as Shira Scheindlin, are getting into the mix. On November 29, 2006, Scheindlin created a best practices guide through the release of frequently asked questions (FAQs). She suggests that in all cases, counsel must issue a hold letter, have a preservation strategy, and monitor preservation throughout the process.

But even before Scheindlin's FAQs, her opinions in *Zubulake v. UBS Warburg LLC* made us all aware of electronically stored information. Courts everywhere have increasingly adopted the *Zubulake* standard for e-discovery: "[O]nce a party reasonably anticipates litigation, it *must* suspend its routine document retention/destruction policy and put in place a litigation hold." *Zubulake*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Beyond this standard, establishing a violation involves showing that the opposing party had a duty to preserve a culpable state of mind and that the electronic document destruction was intentional, reckless, or grossly negligent.

Advances in technology also have changed the way lawyers or litigants start cases.

E-filing enables lawyers to start or respond to actions online. Arizona's TurboCourt, for example, allows you to start cases electronically for evictions, small claims, and civil law suits; it also lets you file appeals electronically. TurboCourt makes registering simple: Submit a name and contact information, select case management settings, identify whether the user is an individual, a lawyer or an organization, and the process begins.

After directing the user to the correct court, the system gently guides the user through the application process. A prompt helps make all the checks a lawyer would make for a client: Are there alternatives to courts? Does the claim meet the legal requirements? Is the claim within the statute of limitations?

New York is more circumspect in letting lawyers interact online with the court system, which requires the lawyer to create a login with an additional form. This form requires prior approval, which makes the process more cumbersome. Nevertheless, New York balances this by offering superior document assembly services to self-represented litigants.

Self-Representation

Electronic filing systems also can enhance the ability of non-lawyers to represent themselves. The New York City Civil Court's Access to Justice System (A2J) offers a service that helps an unrepresented person respond to a variety of requests from the court. The system is remarkably smooth. It allows anyone to complete a form and to print it out. The system translates into French or Spanish. If users have questions, the system allows them to learn more. The program guides a pro se litigant through various types of documents, and it transcribes the responses onto a form template. Upon completion, A2J presents the user with a finished document.

A2J is similar to services offered by private companies. LegalZoom, for instance, offers a variety of different forms and assistance in filling them out for different states. But LegalZoom is simply a business that offers services directed specifically at low-income groups; it is not approved by any court. Similar to A2J, LegalZoom guides the user through a series of questions that ostensibly have been reviewed so as to comply with the laws of a given state. Whether the concept behind LegalZoom might provide a low-cost alternative to those who cannot afford legal services remains to be seen. In fact, LegalZoom and companies like it have faced litigation for the unauthorized practice of law.

One obstacle to the virtual courts of the future involves the issue of identifying the parties and authenticating the papers they are filing. Digital signatures might help solve this problem. The idea behind virtual signatures originated with the invention of the Pantelegraph, the first long-distance signature work having

been sent in 1862 between Paris and Lyons. In the computer age, Diffie and Hellman proposed the concept of digital signatures in 1976. Today, advances in cryptography enable us to ensure that digital documents sent through non-secure channels are properly identifiable both as to who sent the document and what is contained within it. In fact, today's digital signatures are even more difficult to forge than handwritten ones.

But thorny issues remain. For instance, in *Prudential Insurance Company of America v. Dukoff*, the court had to decide whether a checked box at the end of an application constituted a valid signature under New York's Electronic Signatures and Records Act. Other questions include biometric qualifiers, age verification, and email authentication. But notwithstanding the legal issues involving digital signatures, many courts still use them. And the courts are merely following the lead of the private sector: In real estate transactions, for example, real estate brokers use digital signatures to close deals without any party being physically present.

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Today, judges issue electronic warrants with e-signatures to speed along the process. A 2010 California law specifically permits electronic signatures on warrants, and California now gives its judges iPads to sign warrants electronically off-hours. On an even broader scale, Nebraska has authorized court personnel to use digital signatures for just about everything, including orders and warrants. And iPads are only one small technological tool that lawyers and judges use to make it easier to do their jobs.

What is more, new technological tools not tied to the courts are changing the practice of law in general, and litigation in particular, at an even faster pace. Perhaps the most obvious example is the smartphone—something that has become almost a necessity for every litigator. But with the increased use of smartphones come a number of issues. Take security, for instance, and issues ranging from someone finding your lost phone and reading your emails to the highly complex viruses that might send unintended messages to millions. The first, and simplest, rule is don't lose your phone. Even if you have a code to lock your phone, hackers can get around most codes given a little time. Nevertheless, if you do lose your phone, it helps to have a good password. Don't use 1234, and switch it up. Use a friend's birth date at random. Add a time-out function that locks your screen after the phone has not been used for a certain length of time.

If your phone is lost or stolen, there are certain steps you can and should take. Most phones now come equipped with a remote wipe. This will clear all data—emails, contacts, texts, and documents—off the handset. If the IT department at your law firm cannot help you with that, there are several simple and cheap options. Lockout Mobile Security is available on Android, BlackBerry, and Windows Phone 7; it is managed through a website and requires you only to sign on and tell your phone to wipe itself. The system costs $3 a month or $30 a year, but it is well worth the investment. Every iPhone now comes equipped with a free app called "Find My iPhone," enabling the user to locate, remotely lock, or wipe the lost or stolen phone. All these services will help you find your phone through GPS.

But these solutions do not combat more invasive threats. The advent of apps and downloadable content on phones has made malware (which sometimes permits access to all the data on your phone) a greater risk. So what should the responsible litigator do to prevent losing important files? Turn to third-party apps like Lookout, software that scans your phone for malware and spyware, even examining the applications that you download. iOS doesn't offer the same tools, instead relying on stringent policies for admission to its App Store, so be careful about the sites you visit. Beyond this, police yourself by monitoring the ratings of third-party apps before you download them and being prudent about what you download. Even familiar names like Facebook and Pandora are selling your information.

Of course, the best thing about smartphones is that they help us stay in touch. For litigators, that includes staying in touch in court. In fact, today's apps are starting to make access from the virtual office to the courtroom seamless. Apps such as Dropbox, ReaddleDocs, and GoodReader let lawyers upload, access, and interact fully with their documents in the courtroom, in the boardroom, or in a coffee shop. This provides a tremendous advantage to the lawyer looking to manage his or her cases on the road. Combine this with programs like Penultimate, which allows users to apply a stylus to the iPad or iPhone, and you have an instant notepad for sketching, diagramming, or taking simple notes.

Some apps, specifically targeted at lawyers, are driving courts and lawyers closer than ever to the virtual courthouse. Fastcase, for example, allows its users to search case law for free; for a fee, it provides access to a larger database that offers secondary material, Shepardizing, and statutes, among other things. This makes your briefcase iPad a powerful research tool. Combine this with TrialPad, and you can create a presentation on the way to work. TrialPad allows attorneys to organize, annotate, and manage their files. You can highlight, redline or redact, and display images using a projector or monitor.

Digitization of the legal world is not only improving access

but also changing the way litigators practice law. For example, now that decisions are published online, easily accessible, and searchable, lawyers can get a much more comprehensive and up-to-date picture of precedent. What is more, until recently, only certain decisions made their way to reporters for publication. Today, everything that is written by courts is available: Pursuant to section 205 of the E-Government Act of 2002, all federal court opinions are published online, even the "unpublished ones." And that changes the way we write briefs and cite cases.

In the past, an unpublished decision at the state level was considered non-precedential. Today, the courts are split on the use of unpublished decisions: Some expressly discourage it, some prohibit it, some allow it. In May 2009, the Arkansas Supreme Court abandoned the distinction between published and unpublished decisions; in Arkansas, at least, every opinion now has precedential value.

The technologies above, although truly in their infancy, stand to transform the way traditional courts operate. And even though state courts are still catching up with the federal system, they have definitely taken notice. In fact, projects are under way to offer virtual courthouses for at least some cases, with the traditional court system remaining an option with shorter waiting times.

But as innovative and exciting as courtroom advances might be, the opportunity to change dispute resolution outside the courtroom is even more dramatic. Because courts have due process considerations, they must adopt technology methodically and carefully. The same is not true of ADR, however, which gives lawyers and their clients the chance to develop private alternatives to the courtroom and therefore to test new ways to get to resolution. And so online dispute resolution outside the courtroom may well be where the future is taking us. Improved adjudication software and increasingly ubiquitous high-speed access to the Internet can take the pressure off the courts by making it possible for cases to be handled privately and electronically. Already, millions of transactions—presumably simple and straightforward ones—have been adjudicated through private online and off-line mediation services such as eBay and Amazon.

The Future

So what will the future look like? Certainly the lawyer and the courtroom will continue to play the lead role; cases are simply too difficult for computers to handle alone. As the scenario at the beginning of this article demonstrated, the client needs understanding, responsiveness, and advice that technology simply cannot provide. But tomorrow's lawyer may be able to resolve his or her client's disputes without even leaving home through online dispute resolution (ODR).

Today, people meet their spouses through Internet dating sites, book dream vacations through online travel sites, and find jobs and apartments through sites like Craigslist. Fifty years ago, few would have predicted any of that. And 50 years from now, ODR may be the way we resolve disputes. Already recognized by the United Nations and the European Union, ODR has been slowly moving into the traditional ADR arena. In the United States, for example, the Federal Mediation and Conciliation Service (FMCS) and the National Mediation Board (NMB) both have taken notice of ODR: The FMCS pioneered the use of online tools to negotiate contracts, while the NMB has offered secure online tools in lengthy, complex negotiations among parties spread across the country. The private sector is also taking advantage of opportunities to engage in ODR. Private firms, like Modria.com, offer flexible platforms that allow lawyers and other dispute resolvers to do traditional face-to-face work online and thus to expand their practices to areas unique to the new technology-rich environment.

For example, consider false online reviews and the damage they can cause. Your client finds a series of factually false damaging reviews about his new restaurant on Yelp. A tech-savvy competitor then posts the bad reviews to increase her own business. Currently, Yelp offers no recourse for such reviews other than a not-so-helpful link to the Wikipedia page on defamation. So the restaurant owner can sue for defamation, but with the limited resources of a new restaurant and the relatively low dollar value of the claim, this may not be a feasible alternative. Platforms like Modria, with case handling, mediation, and arbitration modules, offer an alternative. If sites like Yelp were to adopt an ODR system, lawyers and mediators could resolve the case between the parties online at low cost and without the need for face-to-face interaction.

Thus stands the final frontier for litigators: How do we take a practice rooted in people, places, and paper and adapt it to a virtual environment? Sophisticated ODR systems provide a way to work virtually through phases of problem diagnosis, direct negotiation, mediation, and evaluation. At the same time, trusted advisers work with clients to minimize the costs and time spent in dispute resolution. Although the lawyer and the courtroom likely will remain the bedrock of the system, not every case needs to be resolved in the courtroom, live and in person. And so the future may well bring with it virtual courts, virtual juries, online mediation, and other ways to resolve cases that we cannot yet imagine. Managed correctly, this will lead to increased justice for all. ■