

## Chapter 3: Court Rules

State statutes, administrative agency regulations, court rules, and administrative operating procedures help define interactions within and between litigants, courts, and other governmental entities. In the past, these statements of policy have been narrow and specific with respect to court operations, assuming that parties, attorneys, court staff, and elected officials required a great deal of help in playing their parts in the judicial process. These writings also assumed a stable court environment, with minimal and infrequent changes in practice.

In most states, circumstances have changed significantly in the last few decades. Greater specialization of staff, judges, and attorneys; a better-educated workforce; professional administration; higher caseloads and increasingly more complex cases; modern case flow management techniques; and rapidly evolving technology tools have contributed to a more sophisticated and dynamic judicial system. More is changing in our nation's courts than at any time in the past, -- and such change is rapid.

Rules designed to ensure consistent state-of-the-art management of judicial activities have become impediments to change and productivity. Perhaps most troubling is the degree to which state legislatures are responsible for procedural minutiae and administrative trivia in court operations. For example, some state statutes still define the precise nature of paper records (and entries on those records) to be maintained by a clerk, including docket books, paper ledgers, indices, fee books, etc.

Fortunately, many state legislatures have made great strides in allowing the judicial branch to manage its own internal operations in a progressive and efficient manner. These states are repealing the archaic and repressive statutory controls over internal court

procedures and replacing them with broader statements of policy, leaving the details of implementation to the judiciary.

Whether maintenance of rules governing judicial branch operations is the responsibility of a legislature, supreme court, judicial council, or local court, a great deal of work may be required to ensure that these rules are an asset, rather than a barrier, to implementation of an electronic filing system. Courts across the nation have been experimenting with various types of technology, and these activities often include the implementation of new or modified rules. Appendix B contains a summary of rules related to electronic filing, organized by topical category. Appendix C contains a similar summary organized by state. The purpose of this chapter is to outline some of the areas that have been or should be addressed by court rules, to show the response to this need in different locations, and to recommend action for court leaders. The widely varying environments will dictate different approaches from state to state, but the materials provided here should save a considerable amount of work and reinventing of the wheel.

The most important point made in the sections that follow is to ensure that new legislation, rules, and operating procedures are flexible. It is assumed that the accelerating pace of change will continue to challenge court leaders for many years to come. To replace an archaic rule about minute orders with one that requires the use of a specific word processing package or document format is to guarantee that the issue must be addressed again in the near future. On the other hand, an approach that specifies the content of the document and the order of presentation of materials can survive a transition through several generations of office automation technology.

The remainder of this chapter covers thirty-three topics, listed below. For each area, there will be a description of the issues associated with the topic, approaches used in

some of the states, and recommendations based on a national view of what is working well. The materials for some topic areas are more detailed than for others because of variations of complexity in each. Appendix E contains a complete listing of the statutes, regulations, rules, and operational procedures most often cited below.

The following list represents the topic areas that comprise the rest of this chapter.

1. Requirements to develop a plan and operating procedures
2. Authorization to accept electronically filed documents
3. Specific documents only
4. Technical standards for system use
5. Agreements between courts and filing parties
6. Making electronic filing mandatory
7. Specific data requirements
8. Electronic authentication
9. Digital signature
10. Requirements concerning passwords
11. Provisions concerning paper records
12. Retention schedule for electronic records
13. Exemptions from public disclosure laws
14. Public access to electronic records
15. Sealing and expungement of records
16. Collection of filing fees
17. Fees for electronic filing service
18. Electronic filing system constitutes docket and other records
19. Electronic document is written
20. Electronic document is usually deemed to be an original
21. Electronic document is conditionally deemed to be signed
22. Paper original, or follow up filing, is not required
23. Paper copy of electronic original may be used
24. Procedures for submitting electronic documents
25. Page limits on electronic filings
26. Attachments, appendices, or exhibits in different form
27. Filing time
28. Standards for organizing, identifying, and indexing documents
29. Acknowledgment of receipt
30. Electronic issuance of summons
31. Electronic service
32. Private service providers
33. Assumption of risk for system failure

## **Requirements to Develop a Plan and Operating Procedures**

Statutes and court rules in several states address the need to plan for the implementation of electronic filing systems. Each state takes a different approach to defining how required planning should occur, but there are three main issues that are raised consistently. They are 1) why testing the technology is important, 2) what questions an experimental test of the technology should answer; and 3) how to conduct the test.

### ***Why testing the technology is important***

Several states support technology testing to “promote economic development and efficient delivery of government services.”<sup>3</sup> There is inherent risk in implementing emerging technologies because so little is known about the benefits, shortcomings, and unanticipated consequences of these tools. Proving the technological concept, educating the court, legislative body, and the general public, and determining if there should be a regulatory role for government are among the reasons for conducting well-planned experiments. One state summarized these issues succinctly in statutory language enabling digital signatures.<sup>4</sup>

#### **5-24-3-3 Procedural standards**

Sec. 3. The state board of accounts shall implement a method of conducting electronic transactions using digital signatures that:

- (1) considers existing and potential technological advances and defects;
- (2) is practical, reliable, and effective; and
- (3) insures the security and integrity of electronic digital signatures.

### ***What questions should be answered?***

The planning process should ensure that the pilot test of the electronic filing technology answers several important questions. First, it is important to know if the

technology delivers the benefits that were promised, as well as any that were not expected. Second, what problems were encountered in the implementation and operation of the system? These problems should be compared to the original work plan to see if future implementation plans at other locations should be adjusted. Third, how did the cost of acquisition, implementation, and maintenance compare with original projections? A pilot test should provide more realistic estimates of the true cost of an electronic filing solution—they may be significantly different than expected. Fourth, given the strengths, weaknesses, and costs of the technology being tested, what is the value of electronic filing technology to the court?

The Maryland Rules of Procedure provide an excellent example of required planning for an electronic filing pilot project.

**RULE 16-307. ELECTRONIC FILING OF PLEADINGS AND PAPERS**

b. Submission of Plan. A County Administrative Judge may submit to the State Court Administrator a detailed plan for a pilot project for the electronic filing of pleadings and papers. After consulting with the County Administrative Judge, the Clerk of the Circuit Court, the vendor identified in the plan, and such other judges, court clerks, members of the bar, vendors of electronic filing systems, and other interested persons as the State Court Administrator shall choose, the State Court Administrator shall review the plan, considering among other things: (1) whether the proposed electronic filing system will be compatible with (A) the data processing and operational systems used or anticipated for use by the Administrative Office of the Courts and by the Circuit Court, and (B) electronic filing systems that may be installed by other circuit courts; (2) whether the installation and use of the proposed system will create any undue financial or operational burdens on the court; (3) whether the proposed system is reasonably available for use by litigants and attorneys at a reasonable cost or whether an efficient and compatible system of manual filing will be maintained; (4) whether the proposed system will be effective, not likely to break down, and secure; (5) whether the proposed system makes appropriate provision for the protection of privacy; and (6) whether the court can discard or replace the system during or at the conclusion of a trial period without undue financial or operational burden. The State Court Administrator shall make a recommendation to the Court of Appeals with respect to the plan.

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<sup>3</sup> Code of Georgia, 50-29-12 (a).

<sup>4</sup> Indiana Code, 5-24-3-3.

*How to conduct the test*

Again, the Maryland rule is instructive with respect to procedures for testing new technology.

**RULE 16-307. ELECTRONIC FILING OF PLEADINGS AND PAPERS**

c. Approval; Duration. A plan may not be implemented unless approved by administrative order of the Court of Appeals. The plan shall terminate two years after the date of the administrative order approving it unless terminated earlier or extended by a subsequent administrative order.

d. Evaluation. The Chief Judge of the Court of Appeals shall appoint a committee consisting of one or more judges, court clerks, lawyers, legal educators, bar association representatives, and other interested and knowledgeable persons to monitor and evaluate the plan. Prior to the expiration of the two-year period set forth in section c of this Rule, the Court of Appeals, after considering the recommendations of the committee, shall evaluate the operation of the plan.

e. Extension, Modification, or Termination. By administrative order, the Court of Appeals may extend, modify, or terminate a plan at any time.

f. Public Availability of Plan. The State Court Administrator and the Clerk of the Circuit Court shall make available for public inspection a copy of any current plan.

Mississippi adds some specific requirements with respect to electronic filing technology.<sup>5</sup>

**Section 9-1-57. Plan for electronic storage system.**

A plan for the storage system shall require, but not be limited to, the following:

(a) All original documents shall be recorded and released into the system within a specified minimum time period after presentation to the clerk;

(c) The plan shall include setting standards for organizing, identifying, coding and indexing so that the image produced during the duplicating process can be certified as a true and correct copy of the original and may be retrieved rapidly;

(e) The plan shall provide for retention of the court records consistent with other law and in conformity with rules and regulations prescribed by the Administrative Office of Courts and adopted by the Mississippi Supreme Court and shall provide security provisions to guard against physical loss, alterations and deterioration; and

(f) All transcripts, exemplifications, copies or reproductions on paper or on film of an image or images of any microfilmed or otherwise duplicated record shall be deemed to be certified copies of the original for all purposes.

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<sup>5</sup> Mississippi Code 1972, 9-1-57 (a), (c), (e), and (f).

Several states provide additional requirements for testing technology. Delaware<sup>6</sup> and Mississippi<sup>7</sup> discuss promulgation and distribution of rules or operational procedures, Mississippi mentions use of industry standards and parallel paper systems,<sup>8</sup> and Georgia encourages public and private sector partnerships to minimize the use of public funds, implementation of user fees, and a request for proposals acquisition process.<sup>9</sup>

### ***Recommendations***

States with centralized technology administration and sufficient research and development funding to pay for pilot projects probably do not need specific rules to authorize pilot testing. Local courts with adequate resources and no requirement to coordinate technology projects with a state administrative office or other courts may be in a similar position. Others may be required or may elect to pursue development of a specific statute or rule to govern pilot testing of electronic filing technology.

With or without a specific policy statement, it is important to incorporate the plan elements discussed in this section that are appropriate for the court's circumstances. Good planning will encourage proper management and thorough evaluation. A well-run pilot project will answer questions about the replication and sustainability of the technology, both key issues in deciding whether to continue or expand use of electronic filing at the conclusion of the testing phase.

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<sup>6</sup> Delaware Superior Court Rules of Civil Procedure, Interim Rule 79.1, Complex Litigation Automated Docket.

<sup>7</sup> Mississippi Code 1972 Annotated, 9-21-3 and 9-21-5.

<sup>8</sup> Mississippi Code 1972 Annotated, 9-1-57.

<sup>9</sup> Code of Georgia, 50-29-12 (b).

## **Authorization to Accept Electronically Filed Documents**

Legal authority to accept digital documents is a basic requirement for an electronic filing project. Every state that has implemented or contemplated the development of statutes or rules to allow electronic filing has included some type of statement addressing this issue. Some authorize the program, others allow litigants to file documents electronically, and others enable the court to receive them. Some rules require individuals to accept court documents transmitted electronically, and others authorize a digitally signed acknowledgment of receipt. One state has a statutory provision equating legal issues surrounding electronic filing with the paper filing process.

Oklahoma vests authority for the development of electronic filing in its Supreme Court, and requires the administrative office to develop appropriate rules, as shown below.<sup>10</sup>

### **Section 3004. Electronic filing of documents**

The Supreme Court is authorized to provide for electronic filing of documents in the Supreme Court and the district courts. The Administrative Office of the Courts shall promulgate rules for the filing of documents transmitted by electronic device. Rules for electronic filing must have the approval of the Supreme Court.

The Los Angeles Superior Court uses a similar, but simpler approach.<sup>11</sup>

### **RULE 18.00 ELECTRONIC FILING AND SERVICE**

(a) Requirements for Electronically Submitted Documents. A litigant or the litigant's attorney may file an electronic document in a case via an electronic filing service...

Washington state goes a step further, requiring organizations and individuals to accept electronic documents as if they were prepared on paper.<sup>12</sup>

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<sup>10</sup> Oklahoma Statutes, Title 20, section 3004.

<sup>11</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

<sup>12</sup> Revised Code of Washington, 19.34.321.

**19.34.321. Acceptance of certified court documents in electronic form-- Requirements--Rules of court on use in proceedings**

(1) A person may not refuse to honor, accept, or act upon a court order, writ, or warrant upon the basis that it is electronic in form and signed with a digital signature, if the digital signature was certified by a licensed certification authority or otherwise issued under court rule. This section applies to a paper printout of a digitally signed document, if the printout reveals that the digital signature was electronically verified before the printout, and in the absence of a finding that the document has been altered.

An interesting addition to Washington's Electronic Authentication Act explicitly requires that business transacted electronically be treated the same as if conducted with paper, with respect to certain legal issues.<sup>13</sup>

**19.34.503. Jurisdiction, venue, choice of laws**

Issues regarding jurisdiction, venue, and choice of laws for all actions involving digital signatures must be determined according to the same principles as if all transactions had been performed through paper documents.

***Recommendations***

Authorization to accept electronic filings, whether implemented by statute or court rule, is a requirement in every state that has contemplated this type of project. Most of the variations are in how those filings will be transmitted or accepted, issues that are discussed in more detail in the remaining sections of this chapter.

**Specific Documents Only**

Some electronic filing pilot projects have focused on certain types of pleadings or specific types of cases. Nevada has two statutory provisions relating to juvenile and criminal cases.<sup>14</sup> The fifth appellate district of Ohio<sup>15</sup> and the federal district court for the

<sup>13</sup> Revised Code of Washington, 19.34.503.

<sup>14</sup> Nevada Revised Statutes, 62.206 and 432B.515.

<sup>15</sup> Local Rules of the Ohio Fifth Appellate District, Rule 2.

eastern district of Pennsylvania<sup>16</sup> have adopted court rules that also restrict the types of papers that may be transmitted electronically.

**62.206 Electronic filing of certain documents.**

1. A court clerk may allow any of the following documents to be filed electronically:

- (a) A petition prepared and signed by the district attorney pursuant to NRS 62.128 or 62.130;
- (b) A document relating to proceedings conducted pursuant to NRS 62.193; or
- (c) A study and report prepared pursuant to NRS 62.197.

**432B.515 Electronic filing of certain petitions and reports.**

1. A court clerk may allow any of the following documents to be filed electronically:

- (a) A petition signed by the district attorney pursuant to NRS 432B.510; or
- (b) A report prepared pursuant to NRS 432B.540.

**RULE 2. CLERKS OF THIS COURT; FILING DOCUMENTS;  
PROPOSED JUDGMENT ENTRY REQUIRED**

(C) Electronic Filing. Only motions to this Court and their responses may be filed with the appropriate Clerk of this Court by facsimile or other electronic transfer. Such motions shall be deemed filed when received and file stamped by the Clerk. No other pleadings, including the notice of appeal or briefs, shall be filed via facsimile or other electronic transfer.

**XLI. ELECTRONIC FILING AND RETRIEVAL OF DOCUMENTS**

Electronic filing and retrieval of documents is available for certain documents filed in the Eastern District of Pennsylvania. All civil and criminal documents will be accepted for electronic submission, including complaints, notices of removal and notices of appeal.

**APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR  
ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS**

Affidavits, Depositions and Other Signed Statements. Affidavits, depositions or any other sworn statement signed by any person other than the attorney making a submission may not be electronically transmitted to the court. Certificates of service that are normally signed by the attorney must be included as part of any electronic submission.

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<sup>16</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania, section XLI and Appendix V.

***Recommendations***

If a court wishes to restrict the types of cases or documents submitted to a court electronically, particularly in a pilot-testing environment, then this information should be made available to all attorneys and parties. It seems unwise to include this type of language in state statutes—the preferable course would be to dictate such requirements in court rules or operating procedures. This would allow expansion of the program or alteration of the test without waiting on a modification process that could take months to complete.

Because of the cost and difficulty of maintaining parallel systems, it would be better for a court to move all the cases in a work area to an electronic format, using an internal scanning unit to convert paper submissions. Trying to process some cases electronically and others on paper creates so much extra work that the productivity gains brought by the technology could be canceled out entirely.

**Technical Standards for System Use**

Some courts have adopted very specific requirements for the submission of pleadings, including technical detail about document format, system availability and use, etc. These specifications are included in local rules or procedural handbooks. While this exercise may seem overdone to non-technicians, it is essential that the information be provided in one way or another. If it is not published, technical and clerical staff may spend countless hours on the telephone assisting would-be filers. The following examples are

from the bankruptcy court for the southern district of New York<sup>17</sup> and the U.S. District Court for the eastern district of Pennsylvania.<sup>18</sup>

#### **CLAD ADMINISTRATIVE PROCEDURES**

##### IV. Technical Requirements.

###### A. Document Format.

1. All pleadings and other documents which are filed electronically shall be filed in WordPerfect 5.1 format or in ASCII format. If a pleading or other document is filed in the WordPerfect 5.1 format, it shall be set up with the following initial style set up:

[T/B Mar:1"] [Pg Numbering: Top Right] [Just:Left] [Ln Height:0.167"] [Ln Spacing:2] [L/R Mar:1.25",1.25"] [Hyph Off] [W/O Off] [Font: Courier 10cpi]

After the initial style set up, the document may contain format codes for appropriate presentation (e.g., single space and block indent).

2. DO NOT USE THE AUTOMATIC DATE CODE FEATURE IN ANY WORDPERFECT DOCUMENT FILED ELECTRONICALLY.

3. Documents which are filed in the ASCII format will NOT contain page numbers when viewed electronically on CLAD. In addition, when ASCII documents are printed from a word processing software, the pagination will not be uniform. Therefore, it is recommended that all documents filed electronically be in the WordPerfect 5.1 format.

B. Hardware Requirements. To access CLAD, it is necessary to have a computer (i) operating under a DOS operating system and (ii) equipped with a Hayes compatible modem with a speed up to 14,400 baud. Each attorney having access to the CLAD BBS for the purpose of filing and retrieving pleadings and other documents must have a computer equipped with a hard disk drive.

The legal agency or law firm utilizing electronic filing must first submit an application to the clerk's office which explains the equipment specifications needed to transmit electronically.

B. Equipment. The electronic submission of documents requires the use of a terminal, a 2400 baud modem, and a computer capable of processing ASCII or XMODEM or Word Perfect 5.0. At the present time, these are the only acceptable means to transmit documents electronically to the district court.

#### **APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS**

Acceptable Communication Protocols. The electronic filing system will presently accept files that are transmitted via either ascii, xmodem-checksum,

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<sup>17</sup> Bankruptcy Rules of the U.S. District Courts for the Southern and Eastern Districts of New York, Appendix G.

<sup>18</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania, section XLI and Appendix V.

xmodem-crc or ymodem. Only one of these communications protocols may be used.

**Acceptable Terminal Types.** The following terminal types are presently recognizable by the system: vt100, ansi, and dumb. Users should specify the dumb terminal type if they are unsure as to which terminal they have. Only one of the above terminal types will be specified.

**Modem Settings.** The court dial-in modem is presently set as follows: 2400 baud, 8-bit, 1 stop, no parity. Data can be transmitted at 1200, 2400 or 9600 baud. User dial-out modems should be set appropriately.

**Document Formatting.** Presently this system will only accept documents containing standard ascii characters or in WordPerfect 5.0 format (See Attachment B to this application for a list of the standard ascii characters). Most word processing packages have an option whereby the user can convert the word processing formatted file to an ascii file. When this option is used, the word processing system will strip out all special formatting characters and retain only the ascii characters. As a matter of practice, the attorney should review any file that is converted to ascii prior to the electronic submission of the ascii file to the court. The symbol "&" must be used in lieu of the section symbol when referring to a title and section of a code. Title 18, Section 495 of the U.S. Code would be typed as 18 USC & 495. Footnotes must either be treated as end notes or manually inserted on each page. Page breaks (CONTROL-L) must be inserted for each page of the document being submitted. Otherwise, the system will automatically insert a page break every 66 lines.

Routine system backups will be accomplished between the hours of 8:30 am and 9:30 am Monday thru Friday. The system will not be available for use during these hours.

### ***Recommendations***

The court should publish very detailed instructions and specifications, similar to those shown above. They should not be included in statutes or court rules, but should be controlled by the clerk's office and technologists. The statute or rule, at most, should authorize the clerk or AOC to prepare and maintain the instructions. The best approach is to make them available from the court's World Wide Web site, so changes can be incorporated and distributed immediately. Paper copies should be kept at the clerk's front counter for those who do not have Internet access.

## **Agreements Between Courts and Filing Parties**

Often courts have initiated agreements with parties who participate in electronic filing programs. Some of these courts publish lengthy instructions, forms, and so forth, in procedural manuals.<sup>19</sup> The Los Angeles County Superior Court has a rule that requires a party to execute a contract with the court before filing documents electronically.

### **RULE 18.00 ELECTRONIC FILING AND SERVICE**

(1) The filing litigant or the litigant's attorney executes a contract with the court in a form approved by the executive officer of the court, which contract shall include a promise not to send harmful or deleterious matter into the court's information system....

### ***Recommendations***

If parties are required to pay to use the court's electronic filing service, then a contractual arrangement may be in order. Sometimes this is the only way the court can generate sufficient revenue to cover the cost of constructing and maintaining the capability. It is better to pay for electronic filing infrastructure through appropriated funds or surcharges on filing fees.

## **Making Electronic Filing Mandatory**

Most states make it clear that electronic filing, and the use of digital signatures in conjunction with electronic filing, is only to be done at the option of the parties involved. Even systems used in large-scale litigation have given users the option of submitting paper. Here are samples of statutory language.

### **Section 9-1-53. Authority to electronically file and store court documents.**

Courts and county offices are hereby authorized but not required to institute procedures for the electronic filing and electronic storage of court documents to further the efficient administration and operation of the courts.<sup>20</sup>

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<sup>19</sup> For example, see Bankruptcy Rules of the U.S. District Courts for the Southern and Eastern Districts of New York and the Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

<sup>20</sup> Mississippi Code 1972, 9-1-53.

**Section 14.01. Digital signatures.**

(b) The use or acceptance of a digital signature shall be at the option of the parties. Nothing in this Section shall require a State agency to use or permit the use of a digital signature.<sup>21</sup>

**Section 59.1-469 State agencies' use of digital signatures.**

Every agency, department, board, commission, authority, political subdivision or other instrumentality of the Commonwealth may receive digital signatures in lieu of manual signatures, provided such digital signatures meet the standards established by the Council on Information Management. The use or acceptance of a digital signature shall be at the option of the parties. Nothing in this chapter shall require a public entity to use or permit the use of a digital signature.<sup>22</sup>

***Recommendations***

During the development of electronic filing technology, the courts must be able to receive both paper and electronic documents. As time goes on, the judiciary must be able to increase the incentive or pressure on lawyers to implement electronic filing. A mixed system may be less efficient than a paper one. Only when the bulk of the materials received by the court are in digital form will the courts realize the full benefits of the technology. Of course, a small portion of the documents submitted to the court may always be on paper; the judiciary must be able to scan or convert these pleadings for those who lack the means to do so themselves.

**Specific Data Requirements**

Some court rules and administrative procedures require that certain data are included or give specific directions concerning information provided in the electronic filing. An example of each should suffice.

**Rule 61. Procedures Following Filing--Issuance of Summons**

(b) Except in cases charging parking violations when the citation is electronically filed, a copy of the citation shall be served with the summons.

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<sup>21</sup> Illinois Statutes, 405/14.01.

<sup>22</sup> Code of Virginia, 59.1-469.

(c) In cases charging parking violations when the citation is electronically filed, the summons shall also include:

- (1) the date, time, and location of the parking violation;
- (2) a description of the vehicle and the license number; and
- (3) a description of the parking violation.<sup>23</sup>

## **CLAD ADMINISTRATIVE PROCEDURES**

### **F. Title of Docket Entries.**

1. The person electronically filing a pleading or other document will be responsible for designating that the title of the document falls within one of the categories contained in Schedule D hereto.

2. The title of a pleading or other document filed electronically **MUST** (i) identify the party filing said pleading or other document and (ii) be of sufficient detail to describe the subject matter of said pleading or other document.

**CORRECT:** Debtor's motion to sell nonresidential real property located in Block 11, Lot 6 New York City to Buy It, Inc.

**INCORRECT:** Motion to sell property

3. The title of a docket entry **MUST** identify all documents being electronically filed together under one docket number.

**CORRECT:** Debtor's Notice of Motion to Assume XYZ lease with Motion, Affidavit and Memorandum of Law in support thereof.

**INCORRECT:** Debtor's motion to assume XYZ lease<sup>24</sup>

## ***Recommendations***

Administrative procedures created and maintained by the clerk's office or technologists should provide clear, precise instructions concerning any issue that is important in making the electronic filing process function smoothly and correctly. To ensure adequate flexibility, specific information concerning data elements should not be included in statutes or court rules.

## **Electronic Authentication**

A more complete discussion of legal and policy issues concerning authentication is contained in the next chapter. A New Mexico statute provides a general approach to solving the problem.<sup>25</sup>

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<sup>23</sup> Pennsylvania Rules of Criminal Procedure, Rule 61.

<sup>24</sup> Administrative Procedures for Electronically Filed Cases, II. F.

**14-3-15.2 Electronic authentication; substitution for signature.**

Whenever there is a requirement for a signature on any document, electronic authentication that meets the standards promulgated by the commission may be substituted.

States have adopted or are considering five methods of determining the authenticity of documents, as recorded in statutes, rules, and procedures. These methods are passwords, electronic approval, electronic signatures, signature dynamics, and digital signature. Each is discussed below.

***Passwords***

The earliest experiments in electronic filing relied on passwords to authenticate submissions. As more secure methods were developed, some argued that password protection was easier and less expensive than the newer technologies. It was also claimed that password protection was far more secure than the systems used for decades in the world of paper.

Delaware provides a simple example of a rule prescribing password authentication.<sup>26</sup>

**INTERIM RULE 79.1 COMPLEX LITIGATION AUTOMATED DOCKET**

9. The utilization of a password for the purposes of filing a pleading shall constitute a signature of the registrant of that password under Superior Court Civil Rule 11.

***Electronic approval***

Minnesota statutes allude to a process for approving transactions electronically without a signature.<sup>27</sup>

**16B.05. Delegation by commissioner**

Subdivision 1. Delegation of duties by commissioner. The commissioner may delegate duties imposed by this chapter to the head of an agency and to any

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<sup>25</sup> New Mexico Statutes 1978, 14-3-15.2.

<sup>26</sup> Delaware Superior Court Rules of Civil Procedure, Interim Rule 79.1, Complex Litigation Automated Docket.

<sup>27</sup> Minnesota Statutes, Administration and Finance, 16B.05.

subordinates of the head. Delegated duties are to be exercised in the name of the commissioner and under the commissioner's supervision and control.

Subd. 2. Facsimile signatures and electronic approvals. When authorized by the commissioner, facsimile signatures, electronic approvals, or digital signatures may be used in accordance with the commissioner's delegated authority and instructions. Copies of the delegated authority and instructions must be filed with the commissioner of finance, state treasurer, and the secretary of state. A facsimile signature, electronic approval, or digital signature, when used in accordance with the commissioner's delegated authority and instructions, is as effective as an original signature.

Electronic approval could be used for supervisory review of purchase orders, personnel transactions, travel vouchers, etc. This approach seems better suited to electronic intergovernmental transactions, or other applications within large organizations, rather than in adversarial court proceedings.

### *Electronic signatures*

Electronic signature refers to the electronic transmission of an image of a signature. A document is signed in the traditional way, then is sent by facsimile to the court. Or, an image of a person's signature is stored as a computer file and affixed to a word processing document that is attached to an electronic mail message. The following statutes from Nevada<sup>28</sup> and Virginia<sup>29</sup> illustrate requirements for electronic signatures.

#### **62.206 Electronic filing of certain documents.**

2. Any document that is filed electronically pursuant to this section must contain an image of the signature of the person who is filing the document.

#### **Section 17-83.1:4 (Effective until July 1, 1998) Signature; when effective as originals.**

If the sender of an electronically filed document files an affidavit of authenticity along with the electronic filing and the electronic transmission bears a facsimile or printing of the required signature, any statutory requirement for an original signature shall be deemed to be satisfied. Any reproduction of the electronically filed document must bear a copy of the signature. The electronically reproduced document shall be accepted as the signature document for all court-related purposes unless the original with the original signature affixed is requested

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<sup>28</sup> Nevada Revised Statutes, 62.206.

<sup>29</sup> Code of Virginia, 17-83.1:4.

by motion of one or more parties to a pending action or is otherwise required by law. If the court grants the motion of a party, the order shall provide that the original be filed with the court.

The terms *electronic signature* and *digital signature* are often confused or used vaguely in statutes and court rules, sometimes in the same sentences, so some care must be exercised in the application of these definitions. This example is from the state of Indiana and could apply to any form of electronic authentication technology.<sup>30</sup>

**5-24-2-2 “Electronic signature”**

Sec. 2. “Electronic signature” means an electronic identifier, created by computer, executed or adopted by the party using it with the intent to authenticate a writing.

***Signature dynamics***

The final draft of regulations prepared by the California Secretary of State defines two acceptable forms of digital signature, the first of which, based on asymmetric cryptosystem technology, is used by many other states and is discussed throughout this monograph. The second, which is unique to the California regulations, is signature dynamics. Since the regulations explain the technology in detail, they are included here in their entirety.<sup>31</sup>

**22003. List of Acceptable Technologies**

b. The technology known as “Signature Dynamics” is an acceptable technology for use by public entities in California, provided that the signature is created consistent with the provisions in Section 22003(b)(1)-(5).

1. Definitions—For the purposes of Section 22003(b), and unless the context expressly indicates otherwise:

A. “Handwriting Measurements” means the metrics of the shapes, speeds and /or other distinguishing features of a signature as the person writes it by hand with a pen or stylus on a flat surface.

B. “Signature Digest” is the resulting bit-string produced when a signature is tied to a document using Signature Dynamics.

<sup>30</sup> Indiana Code, 5-24-2-2.

<sup>31</sup> Final Draft of Proposed Digital Signature Regulations, California Administrative Code, Title 2, Division 7, Chapter 10, Section 22003, as found at <http://www.ss.ca.gov/digsig/finalregs.htm>

C. “Expert” means a person with demonstrable skill and knowledge based on training and experience who would qualify as an expert pursuant to California Evidence Code section 720.

D. “Signature Dynamics” means measuring the way a person writes his or her signature by hand on a flat surface and binding the measurements to a message through the use of cryptographic techniques.

2. California Government Code section 16.5 requires that a digital signature be ‘unique to a person using it.’ A signature digest produced by Signature Dynamics technology may be considered unique to the person using it, if:

A. the signature digest records the handwriting measurements of the person signing the document using signature dynamics technology, and

B. the signature digest is cryptographically bound to the handwriting measurements, and

C. after the signature digest has been bound to the handwriting measurements, it is computationally infeasible to separate the handwriting measurements and bind them to a different signature digest.

3. California Government Code section 16.5 requires that a digital signature be capable of verification. A signature digest produced by signature dynamics technology is capable of verification if:

A. the acceptor of the digitally signed message obtains the handwriting measurements for purposes of comparison, and

B. if signature verification is a required component of a transaction with a public entity, the handwriting measurements can allow an expert handwriting and document examiner to assess the authenticity of a signature.

4. California Government Code section 16.5 requires that a digital signature remain ‘under the sole control of the person using it.’ A signature digest is under the sole control of the person using it if:

A. the signature digest captures the handwriting measurements and cryptographically binds them to the message directed by the signer and to no other message, and

B. the signature digest makes it computationally infeasible for the handwriting measurements to be bound to any other message.

5. The signature digest produced by signature dynamics technology must be linked to the message in such a way that if the data in the message are changed, the signature digest is invalidated.

### ***Digital signature***

Digital signature combines a hashing function and public key encryption to produce the highest level of assurance that the document was submitted by the party to whom the filing is attributed, and that it has not been changed during transmission from the sender to the court. Lengthy legislative enactments in many states have enabled the use of

digital signature technology. The next subsection of this chapter explores rules concerning digital signatures more completely.

### ***Recommendations***

Authentication of electronic documents is an important and serious issue. Like paper submissions, pleadings filed electronically normally will be considered legitimate. If controversy erupts, it is essential that the court be able to verify the origin of documents and to determine if they have been modified since transmission.

Courts should adopt rules that reflect their policy decisions on authentication. References to specific technologies should not be adopted in statutory language since the software and hardware to support these activities change rapidly. Statutes should delineate the principles with which any electronic authentication technology should comply.

### **Digital Signature**

A signature is a distinctive mark, attributable to the signer, that authenticates a writing. On paper, the signature provides evidence that the signer authorized or approved the transaction contained in the signed document. It also provides a measure of certainty that the document has not been altered or falsely submitted.<sup>32</sup>

A digital signature is not an image of a manually signed name; it is a method of digital file encryption that facilitates verification of the integrity and authenticity of an electronic message.<sup>33</sup> A digital signature, properly used, assures the receiver that the

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<sup>32</sup> Information Security Committee, Section of Science and Technology, American Bar Association, *Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Electronic Commerce* (1996) [hereinafter *Digital Signature Guidelines*]. A copy of the *Digital Signature Guidelines* may be downloaded free from <<http://www.abanet.org/scitech/ec/isc/dsgfree.html>>.

<sup>33</sup> C. Bradford Biddle, *Misplaced Priorities: The Utah Digital Signature Act and Liability Allocation in a Public Key Infrastructure* (33 San Diego Law Review 1143, Summer 1996).

document came from the purported sender and that the document has not been modified in the transmission process. These concepts are known as *data origin authentication* and *message integrity*. In addition, where the procedures practiced by a trusted third-party in binding the public key of a unique key pair to an actual person can be trusted, the signer cannot deny having signed a digitally signed document with a valid digital signature; this is the principle of *non-repudiation*. The same assumptions of approval or authorization that apply to signatures on paper can be extended to electronic documents accompanied by digital signatures.

Digital signatures are created using asymmetric cryptography. Asymmetric cryptography uses a unique pair of very long numbers, called keys, that have a special relationship to one another. The private key is held by the owner and is used to encrypt messages for the purpose of digitally signing, or authenticating, messages as having been originated by the holder of the private key associated with the public key of the key pair. The private key is also used to decrypt incoming confidential messages encrypted with the associated public key of this key pair and intended only for the holder of this private key. The public key is available to anyone and is used to verify digital signatures and to encrypt confidential messages intended only for the holder of the associated private key. Because of the complex mathematical algorithms employed in public key cryptography, only the associated private key of the unique key pair can make sense of messages encrypted with the associated public key. Similarly, only the public key can verify digital signatures made with the associated private key. Therefore, if the holder of the private

key keeps it secure and safe from compromise, and follows the procedure described below, it is computationally infeasible<sup>34</sup> to forge or alter a message without detection.

To create a digital signature, the person sending the document completes several steps. First, a message digest is created. A mathematical formula, known as a hash function, is applied to the binary data that make up the message. The hash value, or message digest, that results is encrypted with the private key. The encrypted message digest is the digital signature. The signer transmits the original message and the digital signature.

Digital signatures are verified using a similar process. The receiver applies the same hash function to the message. Using the public key of the sender, the receiver decrypts the signature and compares it to the message digest just produced. If a single electronic bit of the original message has been altered, the message digests will not match. If both are the same, the receiver can be assured that the document is authentic and was transmitted by the purported sender.

The Information Security Committee of the Section of Science and Technology of the American Bar Association developed guidelines for implementing digital signature programs,<sup>35</sup> though their work was never formally approved by the Council of the Section of Science and Technology, the House of Delegates, or the Board of Governors of the ABA. Many states enacted digital signature legislation based on the work of this committee.

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<sup>34</sup> *Digital Signature Guidelines*, 9.

<sup>35</sup> *Digital Signature Guidelines*.

Utah was the first state to pass digital signature legislation.<sup>36</sup> Minnesota<sup>37</sup> and Washington<sup>38</sup> followed with very similar laws. The Los Angeles County Superior Court<sup>39</sup> enacted a related program by local court rule; Florida,<sup>40</sup> Oregon,<sup>41</sup> and Mississippi<sup>42</sup> passed condensed versions of the Utah legislation. Much of the language of these enactments is directed at the creation of an infrastructure to distribute, certify, and manage the public and private keys needed to make digital signatures reliable.

California<sup>43</sup> passed a much more limited law that merely authorizes the use of digital signatures if they meet certain conditions, directs the Secretary of State to develop regulations to govern this process, and ensures that the use of digital signatures shall be at the option of the parties to the transaction. Illinois,<sup>44</sup> Indiana,<sup>45</sup> New Mexico,<sup>46</sup> Texas,<sup>47</sup> and Virginia<sup>48</sup> passed similar laws, and Kansas<sup>49</sup> enacted nearly identical language in its rules of civil procedure.

A complete analysis of the legislation needed to create a digital signature infrastructure is beyond the scope of this document.<sup>50</sup> It is questionable if a court could or should attempt to build this type of infrastructure solely for its electronic filing project. This would be akin to creating a new telephone system, with all the wiring, switches, and

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<sup>36</sup> Utah Code Annotated, 46-3-101 to 46-3-504. Utah Digital Signature Act.

<sup>37</sup> Minnesota Statutes Annotated, 325K.01 to 325K.24. Electronic Authentication Act.

<sup>38</sup> Revised Code of Washington Annotated, 19.34.101 to 19.34.503. Washington Electronic Authentication Act.

<sup>39</sup> California Rules of Court, Los Angeles County Superior Court Rule 18.01 to 18.02.

<sup>40</sup> Florida Statutes Annotated, Title XIX 282.72 to 282.745.

<sup>41</sup> 1996 Oregon Revised Statutes, 192.825 through 192.855, Electronic Signatures Act.

<sup>42</sup> Mississippi Code 1972 Annotated, 25-63-1 to 25-63-11. Digital Signature Act.

<sup>43</sup> California Government Code, section 16.5.

<sup>44</sup> Illinois Compiled Statutes Annotated, 405/14.01.

<sup>45</sup> Annotated Indiana Code, 5-24-2-1 to 5-24-2-6. Electronic Digital Signature Act.

<sup>46</sup> New Mexico Statutes 1978, 14-15-1 through 14-15-6, Electronic Authentication Act.

<sup>47</sup> Texas Statutes and Codes Annotated, 10B-2054.060 and 6A-201.931 to 201.933.

<sup>48</sup> Code of Virginia, 59.1-467 to 59.1-469.

<sup>49</sup> Kansas Court Rules and Procedures, 26-60-2616.

telephones just for court-related conversations. To justify the administrative overhead of a digital signature system built just for courts would require a tremendous amount of filing activity. Only if a state has already commenced the process of building this infrastructure, is the court in a good position to use it in a cost-effective way.

Issues that will not be addressed are the definition of all the digital signature technology terms that have been included in the various legislative enactments, the licensing, regulation, and/or accreditation of certification authority organizations, duties and obligations of certification authorities and subscribers, certificate repositories, and reliance on certificates and digital signatures. Issues of allocation of legal liability also will not be covered.

Two issues relating to digital signatures that are appropriate for court adoption will be covered. The first shows two approaches to authorizing the use of digital signatures, one from Kansas<sup>51</sup> and the other from Virginia court rules.<sup>52</sup> The second is a definition of digital signature enacted by local court rule in the Superior Court of Santa Clara County, California.<sup>53</sup>

#### **Section 60-2616. Digital Signature**

- (a) This act may be cited as the Kansas digital signature act.
- (b) As used in this act, "digital signature" means a computer-created electronic identifier that is:
  - (1) Intended by the person using it to have the force and effect of a signature;
  - (2) unique to the person using it;
  - (3) capable of verification;
  - (4) under the sole control of the person using it; and
  - (5) linked to data in such a manner that it is invalidated if the data are changed.

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<sup>50</sup> But see, [http://www.mbc.com/ds\\_sum.html](http://www.mbc.com/ds_sum.html), a web site hosted by the law firm of McBride Baker & Coles out of Chicago, and dedicated to maintaining a current review of digital signature and electronic commerce legislation in the states and internationally.

<sup>51</sup> Kansas Court Rules and Procedures, 26-60-2616.

<sup>52</sup> Code of Virginia, 59.1-467 to 59.1-469.

<sup>53</sup> Santa Clara County Superior Court Rules, 1.7.1, Definitions.

(c) A digital signature may be accepted as a substitute for, and, if accepted, shall have the same force and effect as any other form of signature.

**Section 59.1-469 State agencies' use of digital signatures.**

Every agency, department, board, commission, authority, political subdivision or other instrumentality of the Commonwealth may receive digital signatures in lieu of manual signatures, provided such digital signatures meet the standards established by the Council on Information Management. The use or acceptance of a digital signature shall be at the option of the parties. Nothing in this chapter shall require a public entity to use or permit the use of a digital signature.

**Section 1.7.1 Definitions**

C. Digital Signature. "Digital Signature" means a sequence of bits derived from an electronic document by an algorithm using a digital key assigned to a subscriber by a Certification Authority with the property that the integrity, origin and authenticity of the document to which it is applied can be validated.

"Digitally Signed" means the application of a Digital Signature to a document.

Digital signature legislation provides examples of problems that can be encountered in the rulemaking process. The first instance illustrates statutory language that is too complicated to be useful to one who is not familiar with digital signature terminology.<sup>54</sup>

**325K.19. Satisfaction of signature requirements**

(a) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule is satisfied by a digital signature, if:

(1) no party affected by a digital signature objects to the use of digital signatures in lieu of a signature, and the objection may be evidenced by refusal to provide or accept a digital signature;

(2) that digital signature is verified by reference to the public key listed in a valid certificate issued by a licensed certification authority;

(3) that digital signature was affixed by the signer with the intention of signing the message and after the signer has had an opportunity to review items being signed; and

(4) the recipient has no knowledge or notice that the signer either:  
(i) breached a duty as a subscriber; or  
(ii) does not rightfully hold the private key used to affix the digital signature.

(b) However, nothing in this chapter precludes a mark from being valid as a signature under other applicable law.

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<sup>54</sup> Minnesota Statutes Annotated, 325K.19.

The second example appears to inappropriately assign the risk of reliance on a digital signature to the receiver of the document.<sup>55</sup> This may be inconsistent with current practice for paper pleadings.

### **325K.20. Unreliable digital signatures**

Unless otherwise provided by law or contract, the recipient of a digital signature assumes the risk that a digital signature is forged, if reliance on the digital signature is not reasonable under the circumstances. If the recipient determines not to rely on a digital signature under this section, the recipient must promptly notify the signer of any determination not to rely on a digital signature and the grounds for that determination. Nothing in this chapter shall be construed to obligate a person to accept a digital signature or to respond to an electronic message containing a digital signature.

This section provides an example of an enactment that may be overly technical.<sup>56</sup>

Difficulty of understanding meaning is not the only risk in using this type of language; rapidly changing technology and standards may render these types of statutes inaccurate.

### **19.34.010. Purpose and construction**

This chapter shall be construed consistently with what is commercially reasonable under the circumstances and to effectuate the following purposes:

- (1) To facilitate commerce by means of reliable electronic messages;
- (2) To minimize the incidence of forged digital signatures and fraud in electronic commerce;
- (3) To implement legally the general import of relevant standards, such as X.509 of the international telecommunication union, formerly known as the international telegraph and telephone consultative committee; and
- (4) To establish, in coordination with multiple states, uniform rules regarding the authentication and reliability of electronic messages.

At the other extreme is language that is too vague.<sup>57</sup>

### **19.34.305. Acceptance of digital signature in reasonable manner**

Acceptance of a digital signature may be made in any manner reasonable in the circumstances.

<sup>55</sup> Minnesota Statutes Annotated, 325K.20.

<sup>56</sup> Revised Code of Washington Annotated, 19.34.010.

<sup>57</sup> Revised Code of Washington Annotated, 19.34.305.

### ***Recommendations***

First, be sure that digital signature is the right authentication approach. Other less costly and complex alternatives are available, though they do not provide the same level of protection and confidence. Like EDI,<sup>58</sup> a digital signature infrastructure that is appropriate for large commercial applications may be overkill for the rest of the world. It may not make sense to invest tens of thousands of dollars in a technology that will save a few hundred dollars in postage stamps. In large, high-volume courts with real security risks, digital signature may be a cost-effective strategy.

Second, participate in broader digital signature efforts rather than undertaking independent action. Digital signature technology will only become part of the technology infrastructure if it is widely used.

Third, keep legislative enactments focused on broad policy issues, like authorization to accept digitally signed pleadings and general requirements of the technology. Specific implementation issues and technology requirements should be established in local rules or operational procedures to ensure flexibility.

Finally, avoid hiding subtle yet significant policy changes in implementing language, unless they are truly necessary for the technology to succeed. This will help ensure the adoption of the new technology and ease the transition from the old. At the same time, beware of unnecessarily vague language that can lead to incompatible approaches to implementation.

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<sup>58</sup> Electronic data interchange, a method of electronically exchanging standard business forms.

## Requirements Concerning Passwords

Several courts have adopted rules or operating procedures that delineate password requirements. The issues covered include procedures for issuance; fees assessed for passwords; the use of funds collected; differentiation between passwords for bar members, used to file papers, and passwords for the public, used to view records; requirements to protect passwords; and the use of the password as a signature.

The following examples illustrate rules and procedures created by courts.

### **INTERIM RULE 79.1 COMPLEX LITIGATION AUTOMATED DOCKET**<sup>59</sup>

6. The Prothonotary shall establish a procedure for the distribution of passwords to permit access to CLAD. The passwords shall be issued as follows:

(a) Upon request, any member of the Delaware Bar who enters an appearance on behalf of a party shall be issued a password for that specific case for a registration charge of \$20.00;

(b) Upon request, any member of the public shall be issued a general non-case-specific password with a registration charge of \$50.00 annually.

7. The Prothonotary shall expend the funds solely for the purpose of operating and maintaining CLAD.

8a. No Delaware lawyer shall knowingly permit or cause to permit his/her password to be utilized by anyone other than an employee of his/her law firm.

8b. No person shall knowingly utilize or cause another person to utilize the password of another (1) without permission of the holder of the password, or (2) in violation of this Rule.

9. The utilization of a password for the purposes of filing a pleading shall constitute a signature of the registrant of that password under Superior Court Civil Rule 11.

### **RULE 9011-1. SIGNING OF PAPERS**<sup>60</sup>

(c) Any password required for electronic filing shall be used only by the attorney to whom the password is assigned and authorized members and employees of such attorney's firm.

<sup>59</sup> Delaware Superior Court Rules of Civil Procedure, Interim Rule 79.1, Complex Litigation Automated Docket.

<sup>60</sup> Bankruptcy Rules of the U.S. District Courts for the Southern District of New York 9011-1.

### **CLAD ADMINISTRATIVE PROCEDURES**<sup>61</sup>

B. Passwords. Access to the CLAD BBS or the CLAD Private Database requires a password, which may be obtained as follows:

1. Each party entitled to participate in CLAD BBS cases for the electronic retrieval and filing of pleadings and other documents in accordance with an order of the Court shall be entitled to one CLAD BBS password for each attorney in each such case and each adversary proceeding in such case. The CLAD BBS password will permit the attorney to file pleadings and other documents with, and retrieve pleadings and other documents from, the CLAD BBS.

2. Any person or organization, other than those referred to in paragraph I.B.1., above, may apply to the Office of the Clerk, United States Bankruptcy Court for the Southern District of New York for registered access to the CLAD Private Database. Registration under this subparagraph will entitle the registrant to retrieval, but not filing, privileges for CLAD cases subject to the limitations and fees imposed by the vendor.

### ***Recommendations***

It is most appropriate for courts to define procedures for issuing, using, protecting, and maintaining passwords by court rule or operational procedure. The language used should be clear and concise, so court employees, system users, and the public can understand their responsibilities. While it is preferable for courts to provide free access to the public records they maintain, circumstances may require the imposition of fees to cover the cost of providing service.

The wide acceptance of the Internet is driving most courts to web-based systems for accepting electronic documents and providing access to court information, in the place of dial-up terminal configurations. Password protection is easy to implement in this environment and most of the headaches associated with supporting users are eliminated, since they use the same hardware and software to access other sites on the World Wide Web. Since much of the incremental cost of providing filing and access services is

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<sup>61</sup> Bankruptcy Rules of the U.S. District Courts for the Southern and Eastern Districts of New York, Appendix G.

eliminated, courts that have charged fees in the past may find it possible to provide access as a free public service.

### **Provisions Concerning Paper Records**

One state found it necessary to ensure that legislation enabling electronic filing not invalidate previous statutory language concerning maintenance of paper records in those courts not implementing the technology.<sup>62</sup>

#### **Section 9-1-53. Authority to electronically file and store court documents.**

The provisions of Sections 9-1-51 through 9-1-57 shall not be construed to amend or repeal any other provision of existing state law which requires or provides for the maintenance of official written documents, records, dockets, books, ledgers or proceedings by a court or clerk of court in those courts which do not elect to exercise the discretion granted by this section.

#### ***Recommendations***

Whether or not a state chooses to include this type of language in statutes authorizing electronic filing depends on the nature of current laws. If the statutes give specific instructions on maintenance of paper records, and if there might be confusion as to which requirements are binding for a particular court, then a section similar to the one above should be enacted. Many states have simply eliminated the detailed instructions to clerical staff from state law and have allowed courts to develop more modern and flexible operational procedures.

### **Retention Schedule for Electronic Records**

The State of Mississippi has the most extensive statutory language adapting rules for paper records to electronic documents. The first deals with records retention.

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<sup>62</sup> Mississippi Code 1972 Annotated, 9-1-53.

**Section 9-1-57. Plan for electronic storage system.**<sup>63</sup>

(e) The plan shall provide for retention of the court records consistent with other law and in conformity with rules and regulations prescribed by the Administrative Office of Courts and adopted by the Mississippi Supreme Court and shall provide security provisions to guard against physical loss, alterations and deterioration; and

**Section 9-5-171. Destruction of records**<sup>64</sup>

(3) Records may be filed and retained by electronic means as provided in Sections 9-1-51 through 9-1-57, whether the record is to be destroyed or not; provided, however, that destruction of such records shall be carried out in accordance with Sections 25-59-21 and 25-59-27, Mississippi Code of 1972.

(4) Any of the records referred to in this section may be preserved by means of electronic storage as provided in Sections 9-1-51 through 9-1-57, whether the record is to be destroyed or not.

***Recommendations***

Management of information storage resources is just as important with electronic media as it is with paper. Court leaders often want to keep everything online forever. Only when limitations on disk space start to impede system performance, is the problem usually addressed. Initially, retention schedules that apply to paper can be applied to electronic documents. Experience and evaluation will, at some point, lead to refinement of retention schedules to match court needs and system capabilities.

**Exemptions from Public Disclosure Laws**

Both Mississippi<sup>65</sup> and Utah have exempted records containing private keys and encryption information from public disclosure laws, using nearly identical language. The example below is from the Utah Digital Signature Act.<sup>66</sup>

**46-3-504 Exemptions.**

(1) The following governmental entity records are exempt from Title 63, Chapter 2, Government Records Access and Management Act:

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<sup>63</sup> Mississippi Code 1972 Annotated, 9-1-57.

<sup>64</sup> Mississippi Code 1972 Annotated, 9-5-171.

<sup>65</sup> Mississippi Code 1972 Annotated, 25-63-11.

<sup>66</sup> Utah Code Annotated, 46-3-504.

(a) records containing information that would disclose, or might lead to the disclosure of private keys, asymmetric cryptosystems, or algorithms; or

(b) records, the disclosure of which might jeopardize the security of an issued certificate or a certificate to be issued.

(2) For purposes of this section, "record" has the meaning described in Section 63-2-103.

### ***Recommendations***

For the protection of the private key infrastructure, courts should adopt language protecting any documents relevant to the security of the electronic filing system from public disclosure.

### **Public Access to Electronic Records**

Only three courts have realized the need to ensure continued public access to records when they are moved to an electronic format. Oregon's statute requires the same access to electronic complaints as to their paper equivalent, while the bankruptcy court for the Southern District of New York provides specific information to the public about how to access court information.

#### **153.770. Electronic filing of complaint for offenses subject to citation by uniform citation.**<sup>67</sup>

(c) Members of the public can obtain copies of and review complaints that are electronically filed and maintained under this section in the same manner as for complaints filed on paper.

#### **CLAD ADMINISTRATIVE PROCEDURES**<sup>68</sup>

##### **VI. Public Access to the CLAD Docket.**

A. The public will have electronic access to the documents filed in CLAD and the CLAD docket in the Office of the Clerk during the hours of 10 a.m. to 12 noon and 2 p.m. to 4 p.m., Monday through Thursday.

B. Copies of the documents will be available at the copy service in Room 505, Alexander Hamilton Custom House, One Bowling Green, New York, NY during business hours Monday through Friday. The fee for such copy will be made directly to the copy service.

<sup>67</sup> 1996 Oregon Revised Statutes, 153.770.

<sup>68</sup> Bankruptcy Rules of the United States District Courts for the Southern and Eastern Districts of New York, Appendix G.

The United States District Court for the Northern District of California has directed by local rule that documents in securities fraud litigation be made available to the public at designated sites on the World Wide Web. Portions of their rule are shown below.<sup>69</sup>

**23-2. Electronic Posting of Certain Documents Filed in Private Securities Actions.**

(Adopted effective March 25, 1997)

**(a) Electronic Posting.** All postable documents, as defined in subsection (b) of this rule, required to be filed pursuant to Civil L.R. 5-1 in any private civil action containing a claim governed by the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), shall be timely posted at a Designated Internet Site. The party or other person filing such document shall be responsible for timely posting.

**(d) Designated Internet Site.** "Designated Internet Site" for purposes of this rule shall mean an Internet site that:

- (1) Is accessible at no cost to all members of the public who are otherwise able to access the Internet through commonly used web browsers;
- (2) Charges no fee to any party, intervenor, amicus or other person subject to the provisions of this rule;
- (3) Places no restrictions on any person's ability to copy or to download, free of charge, any materials posted on the site pursuant to the requirements of this rule;
- (4) Maintains and responsibly operates a notification feature whereby any member of the public can request to receive e-mail notification, at no charge, of any posting of materials to the Designated Internet Site;
- (5) Undertakes to post on its site within two days of receipt of the electronic copy described in Civil L.R. 26-2(c)(1) of this rule all filings forwarded to it in compliance with the provisions of Civil L.R. 26-2(a);
- (6) Undertakes to provide e-mail notification within one day of receipt of the electronic copy described in Civil L.R. 26-2(c)(1) of this rule to all other Designated Internet Sites informing them of the posting of any materials related to securities class action litigation;
- (7) Maintains and publicizes a physical address to which the United States Postal Service or other commonly used delivery services can make physical delivery of documents, and/or diskettes, an Internet address in the form of an operational Uniform Resource Location ("URL"), and an e-mail address to which persons subject to paragraph (a) of this rule can transmit electronic copies of documents subject to the posting requirement of this rule;
- (8) Undertakes to disclose prominently the URLs, physical addresses, and facsimile numbers of all other Designated Internet Sites known to it; and
- (9) Submits to the Secretary of the Securities and Exchange Commission (the "Secretary") a statement, signed by a member of the bar that: identifies the

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<sup>69</sup> Local Rules for the United States District Court for the Northern District of California, at [http://ndcal.stanford.edu/docs/rules/Civil\\_L.R.shtml#23-2/](http://ndcal.stanford.edu/docs/rules/Civil_L.R.shtml#23-2/)

Designated Internet Site through its URL; provides the name, address, telephone number, facsimile number and e-mail address of one or more persons responsible for operation of the site; and attests that the site satisfies the requirements of the rule and that it will promptly notify the Secretary should it cease to be a Designated Internet Site.

**(e) Suspension of Posting Requirements.** Compliance with this rule shall not be required for any document filed at any time during which no Designated Internet Site is operational.

### *Recommendations*

States should adopt statutory language that requires that access to electronic court records be at least as easy and inexpensive as access to paper records, even for those who do not have access to computer systems. Rules and operational procedures should provide details about how public access is to be administered and how individuals can view documents and other court records. Courts just beginning to create electronic filing systems should consider using the Internet as a vehicle for public access to documents.

### **Sealing and Expungement of Records**

Procedures exist to limit access, seal, or expunge court records in most states. As more and more information is stored in electronic form and transmitted between agencies and organizations, enforcement of these orders is becoming more difficult. As documents are filed, accessed, and stored electronically, it will become impossible to identify the location of all the copies. Existing procedures to secure these documents will be rendered completely ineffective. Courts have not yet developed a way to solve this problem.

### *Recommendations*

Courts and legislatures must develop policy in this area and implement it by statute or by rule. There are three options that will be discussed in the next chapter: abandoning attempts to seal or limit access to court records; entering these orders at the beginning of

the case, rather than at the end; or finding a way to track the distribution of documents over the Internet so they can be retrieved or removed.

### **Collection of Filing Fees**

One of the first questions typically raised by courts when the subject of electronic filing is introduced is collection of filing fees. Although this appears to be an important issue, only one state has addressed it. Florida's rules of judicial administration provides for local flexibility by allowing parties and the court clerk to make acceptable arrangements for payment of filing fees.

**Rule 2.090. Electronic Filing of Matters in all Proceedings within the State Courts System<sup>70</sup>**

(2) All attorneys, parties, or other persons using this rule to file documents are required to make arrangements with the court or clerk of the court for the payment of any charges authorized by general law or the Supreme Court of Florida before filing any document by electronic transmission.

(4) Any court or clerk of the court may extend the hours of access or increase the page limitations set forth in this subdivision.

### ***Recommendations***

Payment of filing fees is easily accommodated through establishment of attorney accounts or acceptance of credit cards. Court rules should describe how the system selected by the court is to be used.

### **Fees for Electronic Filing Service**

Often courts have created electronic access or filing systems without sufficient appropriated funds to cover costs. The authorization to provide the service often includes permission to collect fees to be applied to purchase equipment and to cover other operational expenses. These fees are assessed as a subscription (one-time, annual, or per case), connect time, or per page downloading or uploading documents. Rules sometimes

indicate authorized or preferred methods of payment and how fees are to be deposited or used. Shown below are samples of some of the language implemented by statute, court rule, or administrative procedure.

**Local Rule 5.7 Electronic Filing—Applicable in the Western District of Kentucky Only When Authorized by the Court<sup>71</sup>**

**(a) Electronic Filing Permitted.** When authorized by the Court, any pleading, motion or other paper permitted or required to be filed by the Federal Rules of Civil Procedure or these rules may be filed electronically.

**(b) Procedure for Electronic Filing.** To file a pleading, motion or other paper electronically, a person must:

(1) Establish an account for payment of filing and administrative fees under procedures promulgated by the Clerk. This account must be established prior to any electronic transmission;

**12-119.02. Electronic filing and access; fee<sup>72</sup>**

B. The court may impose a fee of not more than one hundred dollars per year for an annual on-line access subscription plus a fee of not more than two dollars per minute for on-line access to court records.

C. All monies collected pursuant to subsection B of this section shall be transmitted to the state treasurer for deposit in the judicial collection enhancement fund established by s 12-113.

D. All filings made electronically pursuant to this section are subject to the fees established pursuant to s 12-119.01.

**INTERIM RULE 79.1 COMPLEX LITIGATION AUTOMATED DOCKET<sup>73</sup>**

3. Each party in each of the above cases is directed to pay a one-time assessment in the amount of \$200.00 for each of the cases in which that party is named for the purposes of establishing the fund necessary to operate CLAD.

**CLAD ADMINISTRATIVE PROCEDURES<sup>74</sup>**

D. Fees.

1. Fees Payable to CLAD. A twenty dollar (\$20.00) filing fee shall be payable to CLAD for each docket number obtained in connection with an electronic filing on the CLAD BBS. In addition, a twenty cents per page (20 cents/page) fee (the "Downloading Fee") shall be payable to CLAD for each

<sup>70</sup> Florida Statutes Annotated Rules of Judicial Administration, 2.090.

<sup>71</sup> Bankruptcy Rules of the United States District Courts for the Western and Eastern Districts of Kentucky, Rule 5.7.

<sup>72</sup> Arizona Revised Statutes Annotated, 12-119.02.

<sup>73</sup> Delaware Superior Court Rules of Civil Procedure, Interim Rule 79.1, Complex Litigation Automated Docket.

<sup>74</sup> Bankruptcy Rules of the U.S. District Courts for the Southern and Eastern Districts of New York, Appendix G.

document retrieved from CLAD; provided, however, that the Downloading Fee shall be waived for the first retrieval of a pleading or other document from the CLAD BBS by any party entitled to notice and service of such pleading or other document in accordance with the Federal Rules of Bankruptcy Procedure or as otherwise provided by order of the Court.

2. Fees Payable to the Clerk. For filings that require a fee to be paid to the Office of the Clerk, authorization for credit card payment may be made with the financial officer of the Office of the Clerk.

#### **APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS<sup>75</sup>**

User Fees. A fee structure may be implemented in order to recover any increased personnel, equipment and telephone line costs that are incurred by the Court. Users will be advised at least 60 days in advance of the implementation of any fee system. At that point users will have the options of either agreeing to pay the established fees or of having their electronic filing access services discontinued.

#### ***Recommendations***

Subscriptions are relatively easy to administer, but discourage infrequent or casual users because they must pay the same amount as those who use the system much more. Fees based on connect time, processing time, disk or other resources used, pages downloaded or uploaded, etc., are difficult and costly to administer. Tasks include billing, monitoring usage, and collecting overdue or delinquent accounts. Fees based on service offer the advantage of assessing the highest costs to those who use the system the most. Most preferred is a system that allows free access, one that is funded by appropriation.

#### **Electronic Filing System Constitutes Docket and Other Records**

A number of statutes and rules provide for the replacement of traditional books, files, and other records by their electronic equivalent. While each instance will not be listed, here are some samples.

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<sup>75</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

**9-1-53. Authority to electronically file and store court documents.**<sup>76</sup>

It is hereby declared to be the intent of the Legislature that official written documents, records, dockets, books, ledgers or proceedings may be filed, stored, maintained, reproduced and recorded in the manner authorized by Sections 9-1-51 through 9-1-57 or as otherwise provided by law, in the discretion of the clerk.

**9-7-171. General docket.**<sup>77</sup>

(2) The general docket required to be kept by this section and all other dockets or records required by law to be kept by the circuit clerk may be kept on computer in lieu of any other physical docket, record or well-bound book if all such dockets and records are kept by computer in accordance with regulations prescribed by the Administrative Office of Courts.

**9-5-135. Clerk to attend court and keep minutes.**<sup>78</sup>

(2) The clerk, at his option, may elect to keep the minute books by means of electronic filing or storage or both, as provided in Sections 9-1-51 through 9-1-57 in lieu of or in addition to any paper records.

**9-7-131. Jury fee book.**<sup>79</sup>

The clerk of the circuit court shall keep a book to be called the "jury book," in which he shall enter the time of issuing all certificates to jurors, the amount thereof, and to whom issued. Such book may be kept by means of electronic filing or storage or both as provided in Sections 9-1-51 through 9-1-57, or otherwise, as the clerk may elect.

**RULE 9021-1. ENTRY OF ORDERS, JUDGMENTS, AND DECREES**<sup>80</sup>

The Clerk shall enter all orders, decrees, and judgments of the Court in the electronic filing system, which shall constitute docketing of the order, decree, or judgment for all purposes. The Clerk's notation in the appropriate docket of an order, judgment, or decree shall constitute the entry of the order, judgment, or decree.

**CLAD ADMINISTRATIVE PROCEDURES**<sup>81</sup>

7. The electronic filing of a pleading or other document in accordance with CLAD Procedures shall constitute docketing of that pleading or other document.

<sup>76</sup> Mississippi Code 1972 Annotated, 9-1-53.

<sup>77</sup> Mississippi Code 1972 Annotated, 9-7-171.

<sup>78</sup> Mississippi Code 1972 Annotated, 9-5-135.

<sup>79</sup> Mississippi Code 1972 Annotated, 9-7-131.

<sup>80</sup> Bankruptcy Rules of the United States District Courts for the Southern District of New York 9021-1.

<sup>81</sup> Bankruptcy Rules of the United States District Courts for the Southern and Eastern Districts of New York, Appendix G.

### ***Recommendations***

It should not be necessary to replace obsolete references to paper records in state statutes with similar entries for electronic systems that also will become obsolete very quickly. Nor should it be necessary to establish an equivalent of each record series and manual function in the computer. Statutes should provide general, policy-level statements about procedures. Court rules and operational procedures should be much more explicit and detailed, but should not be tied to old ways of doing business.

### **Electronic Document is Written**

It is necessary to equate electronic documents to paper-based writings. Indiana<sup>82</sup> begins with a legal definition that requires electronic information be capable of being displayed in a perceivable form.

#### **5-24-2-6 "Writing"**

Section 6. "Writing" means the following:

- (1) Handwriting.
- (2) Printing.
- (3) Typewriting.
- (4) Information that is created or stored in any electronic medium and is retrievable in a perceivable form.
- (5) All other methods and means of forming letters and characters upon paper or other materials.

While no statutes or court rules addressing electronic filing cover the legal definition of writing, several states have nearly identical code sections relating to digital signature.<sup>83</sup>

The following sample is from the Minnesota Statutes Annotated.

#### **325K.21. Digitally signed document is written**

- (a) A message is as valid, enforceable, and effective as if it had been written on paper, if it:
- (1) bears in its entirety a digital signature; and
  - (2) that digital signature is verified by the public key listed in a certificate
- that:

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<sup>82</sup> Indiana Code, 5-24-2-6.

<sup>83</sup> Utah, Minnesota, and Washington.

- (i) was issued by a licensed certification authority; and
  - (ii) was valid at the time the digital signature was created.
- (b) Nothing in this chapter shall be construed to eliminate, modify, or condition any other requirements for a contract to be valid, enforceable, and effective. No digital message shall be deemed to be an instrument under the provisions of section 336.3-104 unless all parties to the transaction agree.

### ***Recommendations***

Because there are both similarities and differences between paper and electronic documents, courts should include language that defines computerized pleadings as legal writing. In the future, electronic documents will be nonsequential, nonlinear, nonstatic, and nonadjacent, which will greatly complicate traditional terminology and legal concepts.

### **Electronic Document is Usually Deemed to be an Original**

Mississippi defines any paper reproduction of a record to be a certified copy. Other states define electronic reproductions as originals, as shown in the examples that follow.

#### **9-1-57. Plan for electronic storage system.**<sup>84</sup>

(f) All transcripts, exemplifications, copies or reproductions on paper or on film of an image or images of any microfilmed or otherwise duplicated record shall be deemed to be certified copies of the original for all purposes.

#### **46-3-404 Digitally signed originals.**<sup>85</sup>

A copy of a digitally signed message is as effective, valid, and enforceable as the original of the message, unless it is evident that the signer designated an instance of the digitally signed message to be a unique original, in which case only that instance constitutes the valid, effective, and enforceable message.

#### **Section 1.7.2 Standards**<sup>86</sup>

F. Original Document. A Digitally Signed electronically filed document as it resides on the Court's computer, and print-outs of said document, shall be considered originals satisfying the best evidence rule (Cal.Ev.Code s 1500). The Court may require the party to produce the original of an exhibit that has been filed electronically.

<sup>84</sup> Mississippi Code 1972 Annotated, 9-1-57.

<sup>85</sup> Utah Code Annotated, 46-3-404.

<sup>86</sup> Santa Clara County Superior Court Local Rule 1.7.2.

### ***Recommendations***

As computer display technology improves, paper will cease to be the primary medium for exchanging information. Our legal system must begin to adapt to this change by granting full legal status to electronic information. Documents created, transmitted, stored, and displayed electronically must be considered to be originals. This will open many other issues, as documents become dynamic more complex, hyperlinked to pages all over the world. Because these links change, it will be necessary to define a document at a particular point in time. Defining an electronic document as an original is only the first of many steps in adapting our legal system to changing technology.

### **Electronic Document is Conditionally Deemed to be Signed**

A signature on a document once carried certain representations to the court under an old version of Rule 11(a) of the federal rules of civil procedure. The federal rule has been changed, but many courts still use it in their state rules. While the need for original signatures on documents has been relaxed somewhat, tradition is not easily abandoned. Early word processing systems could not incorporate signatures, only ASCII text. Courts around the country came up with original and creative ways to reconcile the desire to use new technology with the need to preserve tradition.

Rhode Island's bankruptcy court equates an electronic signature to an original signature on a document.

#### **Rule 5081-1. Signatures--Judges<sup>87</sup>**

**Use of Judge's Endorsement Stamp or Electronic Signature.** The Clerk, and/or his/her designees, are authorized to use the Bankruptcy Judge's endorsement stamp, or a computer generated or electronic signature, which shall serve as the original signature of the Court, on orders entered in accordance with the July 12, 1996 Order Delegating Authority to Clerk to Act on Court's Behalf in

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<sup>87</sup> Bankruptcy Rules of the United States District Courts for the District of Rhode Island, Rule 5081-1.

Matters Specifically Delineated, or any subsequent amendments/modifications/additions thereto, and as further authorized in R.I. LBR 5075-1.

Ohio's rules assume a signature on an electronic document to be authentic.

**Civil Rule 5 Service and Filing of Pleadings and Other Papers Subsequent to the Original Complaint**<sup>88</sup>

(E) Filing with the court defined

The filing of pleadings and other papers with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note the filing date on the papers and forthwith transmit them to the office of the clerk. Local rules may provide for the filing of pleadings and other papers by electronic means. Any signature on electronically transmitted pleadings or papers shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the pleadings or papers were transmitted without authority, the court shall order the filing stricken.

This Oregon statute simply eliminates the requirement for a signature but indicates that law enforcement officers have the same responsibilities as if they had signed the complaint.

**153.770. Electronic filing of complaint for offenses subject to citation by uniform citation.**<sup>89</sup>

(1) A law enforcement officer, following procedures established by court rule, may file a complaint with the court by electronic means, without an actual signature of the officer, in lieu of using a written uniform citation. Law enforcement officers who file complaints under this section will be deemed to certify to the complaint and will continue to have the same rights, responsibilities and liabilities in relation to those complaints as to complaints that are certified by an actual signature.

In this instance, attorneys are required to keep a signed copy of the document on file in their offices; ASCII word processing documents indicate who signed the paper version.

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<sup>88</sup> Ohio Rules of Civil Procedure, Rule 5.

<sup>89</sup> 1996 Oregon Revised Statutes, 153.770.

**CLAD ADMINISTRATIVE PROCEDURES**<sup>90</sup>

C. Signatures; Affidavits of Service.

1. Original signatures on pleadings, affidavits, and other documents filed electronically shall not be filed with the Office of the Clerk. Each party electronically filing a pleading or other documents on the CLAD BBS (whether or not in conjunction with a conventional filing of a document related thereto) shall maintain in his or her files the original signature on the original paper copy of said pleading or other document. However, the pleading or other document electronically filed shall indicate a conformed signature, e.g., "s/Jane Doe".

2. Affidavits of service shall no longer be filed with the Office of the Clerk and shall not be filed with the CLAD BBS. Each party electronically filing a pleading or other document on the CLAD BBS (whether or not in conjunction with a conventional filing of a document related thereto) shall maintain such affidavits of service in his or her files.

Delaware allows use of a password to substitute for signing the document.

**INTERIM RULE 79.1 COMPLEX LITIGATION AUTOMATED DOCKET**<sup>91</sup>

9. The utilization of a password for the purposes of filing a pleading shall constitute a signature of the registrant of that password under Superior Court Civil Rule 11.

In this New York bankruptcy court, the initials of the filing party, with the last four digits of his or her social security number concatenated to it, constitutes the signature on the electronic document. The original signed document must be kept in the attorney's file.

**APPENDIX G. IN RE: PILOT PROGRAM FOR COMPLEX LITIGATION AUTOMATED DOCKET, GENERAL ORDER M-134**<sup>92</sup>

3. With respect to the electronic filing of pleadings and other documents on CLAD BBS, the filing party shall identify the initials and last four digits of the social security number of the attorney signing such pleading or other document, which shall constitute a signature of the responsible attorney under Rule 9011 of the Federal Rules of Bankruptcy Procedure; and the original signature of the attorney approving said pleading or other document shall be maintained in that attorney's files.

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<sup>90</sup> Bankruptcy Rules of the United States District Courts for the Southern and Eastern Districts of New York, Appendix G.

<sup>91</sup> Delaware Superior Court Rules of Civil Procedure, Interim Rule 79.1, Complex Litigation Automated Docket.

<sup>92</sup> Bankruptcy Rules of the United States District Courts for the Southern and Eastern Districts of New York.

Nevada law requires the image of a signature on any electronically filed document.

**62.206 Electronic filing of certain documents.**<sup>93</sup>

2. Any document that is filed electronically pursuant to this section must contain an image of the signature of the person who is filing the document.

New Mexico takes a flexible approach, delegating authority to deal with authentication to a commission. Texas uses a similar approach.

**14-3-15.2 Electronic authentication; substitution for signature.**<sup>94</sup>

Whenever there is a requirement for a signature on any document, electronic authentication that meets the standards promulgated by the commission may be substituted.

**403.027. Digital Signatures**<sup>95</sup>

(a) The comptroller may establish a procedure for a person to provide a digital signature for any document or data submitted to the comptroller if the comptroller determines the procedure will provide a degree of security and authenticity at least equal to that provided by a manual signature.

Several states allow the digital signature to substitute for the manual signature on paper. This example is from Texas.

**2.108. Digital Signature**<sup>96</sup>

(a) A written electronic communication sent from within or received in this state in connection with a transaction governed by this chapter is considered signed if a digital signature is transmitted with the communication.

(b) This section does not preclude any symbol from being valid as a signature under other applicable law, including Section 1.201(39).

(c) The use of a digital signature under this section is subject to criminal laws pertaining to fraud and computer crimes, including Chapters 32 and 33, Penal Code.

(d) In this section "digital signature" means an electronic identifier intended by the person using it to have the same force and effect as the use of a manual signature.

Virginia satisfies the signature requirement by having an attorney submit a facsimile of the signature on a separate document.

<sup>93</sup> Nevada Revised Statutes, 62.206.

<sup>94</sup> New Mexico Statutes 1978, 14-3-15.2.

<sup>95</sup> Texas Statutes and Codes Annotated, 4A-403.027.

<sup>96</sup> Texas Statutes and Codes Annotated, 1A-2.108.

**17-83.1:4 Signature; when effective as originals.**<sup>97</sup>

If the sender of an electronically filed document files an affidavit of authenticity along with the electronic filing and the electronic transmission bears a facsimile or printing of the required signature, any statutory requirement for an original signature shall be deemed to be satisfied. Any reproduction of the electronically filed document must bear a copy of the signature. The electronically reproduced document shall be accepted as the signature document for all court-related purposes unless the original with the original signature affixed is requested by motion of one or more parties to a pending action or is otherwise required by law. If the court grants the motion of a party, the order shall provide that the original be filed with the court.

In what is perhaps the most unusual approach, a Pennsylvania federal court requires each attorney to submit a signature document to the court, then include an authorization statement with any document filed electronically.

**XLI. ELECTRONIC FILING AND RETRIEVAL OF DOCUMENTS**<sup>98</sup>

A. Signature Documents. Each attorney with an electronic filing account must submit one original signature document to the Clerk of Court to be appended to each electronic submission. Any electronic document that does not have a signature document on file will be returned to the attorney. In addition, the attorney must submit a Signature Document Authorization Statement with each electronic submission.

The Signature Document Authorization Statement will authorize the Clerk to append the signature document. The Authorization Statement should state: I hereby authorize the Clerk of Court to append my signature document, on file in the Clerk's Office, to this electronic submission.

New Hampshire makes an emphatic statement concerning its feelings about electronic documents and electronic signatures.

**Local Bankruptcy Rule 9004-1. Papers—Requirements of Form**<sup>99</sup>

(h) Electronic Filing. Electronically transmitted facsimiles or other substitute copies of documents shall not be construed to be signed original pleading documents.

Michigan allows the use of an electronic citation, unless someone notices that there is no signature on it.

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<sup>97</sup> Code of Virginia, 17-83.1:4.

<sup>98</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

<sup>99</sup> Bankruptcy Rules for United States District Court for the District of New Hampshire, Rule 9004-1.

**Rule 6.615 Misdemeanor Traffic Cases<sup>100</sup>****(D) Contested Cases.**

(1) A contested case may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the citation is signed by the officer or official who issued it, and is filed on paper. A citation that is not signed and filed on paper, when required by the court, will be dismissed with prejudice.

***Recommendations***

The legal definition of a signature and requirements for proving the authenticity of documents will undergo significant changes in coming years as new technologies are introduced. Courts must decide how much they are willing to invest in ensuring the integrity of electronic documents. Any decision that is made today certainly will be remade every few years. For now, find a method that works and be prepared to adopt better approaches as they become available.

**Paper Original, or Follow Up Filing, is Not Required**

Three interesting facts are noted in statutes, rules, and procedures concerning submission and retention of paper documents in addition to the electronic filing. Montana requires the original paper records to be retained by the court. Florida requires the submission of paper copies of documents filed electronically, with a procedure to discontinue this practice if the Supreme Court is convinced that paper copies are no longer needed. A federal court in Pennsylvania does not allow paper copies to be filed if a pleading is submitted electronically. This is because they print a security copy as soon as they receive the transmission.

**3-1-115. Electronic filing and storage of documents -- rules<sup>101</sup>**

(4) The procedures for electronic storage of documents may require but are not limited to the following:

<sup>100</sup> Michigan Court Rules of 1985, Criminal Procedure in District Court, Rule 6.600.

<sup>101</sup> Montana Code Annotated, 3-1-115.

(d) retention of the original documents consistent with other law and security provisions to guard against physical loss, alterations, and deterioration.

**Rule 2.090. Electronic Filing of Matters in all Proceedings within the State Courts System**<sup>102</sup>

(C) the Supreme Court of Florida has entered an order granting permission to the clerk of court to accept documents filed by electronic transmission. Any attorney, party, or other person who file a document by electronic transmission shall immediately thereafter, file the identical document in paper form, with an original signature of the attorney, party, or other person if a signature is otherwise required by these rules (hereinafter called the follow-up filing).

(2) The follow-up filing of any document that has previously been filed by electronic transmission may be discontinued if:

(A) after a 90-day period of accepting electronically filed documents, the clerk of court or the chief judge of the circuit certifies to the Supreme Court of Florida that the electronic filing system is efficient, reliable and meets the demands of all parties;

(B) the clerk of court or the chief judge of the circuit requests permission to discontinue that portion of the rule requiring a follow-up filing of documents in paper form, except as otherwise required by general law, statute, or court rule; and

(C) the Supreme Court of Florida enters an order directing the clerk of court to discontinue accepting the follow-up filing.

**XLI. ELECTRONIC FILING AND RETRIEVAL OF DOCUMENTS**<sup>103</sup>

The documents electronically transmitted are in lieu of paper submissions. The attorney making the electronic submission should not transmit a document electronically and also submit the same document in paper form.

**APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS**<sup>104</sup>

Files Lost Due to Hardware Malfunction. It is remotely possible that an electronically submitted document may be lost on rare occasions due to a malfunction of the court computer. This problem is only likely to occur if the hard disk on the computer should sustain some damage during the few seconds between the time that a user confirms acceptance of the document for submission and a security copy of the document is printed out in the court.

***Recommendations***

Courts are not, and should not be, risk takers when it comes to the preservation of court records. A redundancy requirement is essential during the testing phases of an

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<sup>102</sup> Florida Statutes Annotated Rules of Judicial Administration, 2.090.

<sup>103</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

electronic filing project, but it will be impossible for courts to realize the benefits of the technology as long as parallel paper systems are in use. Rules should define the period of transition and parallel operation during which paper will continue to be used, and the disposition of paper records received from individuals who lack the capability to submit them electronically.

### **Paper Copy of Electronic Original May be Used**

Courts in two states recognize that paper still may be used in proceedings, even after the implementation of electronic filing systems. The Mississippi statute<sup>105</sup> allows the use of paper in court, while the Los Angeles Superior Court<sup>106</sup> gives a detailed rendition of the various perceptible forms information may take.

#### **9-1-57. Plan for electronic storage system.**

(b) Original paper records may be used during the pendency of any legal proceeding;

#### **RULE 18.00 ELECTRONIC FILING AND SERVICE**

(f) Visible Renditions of Electronic Documents. A visible presentation of an electronic document is equivalent to the original of the document according to the following restrictions:

(1) A screen display of a document transmitted by facsimile transmission is equivalent to a paper print-out of the transmitted document, if the display of the document image is at a degree of resolution equal to the resolution at which the facsimile is stored in the records of the court.

(2) A screen display or paper print-out of an electronic document in image form is equivalent to the electronic original, if the display or print-out is at a degree of resolution equal to the resolution at which the document is stored in the records of the court.

(3) A screen display or paper print-out is equivalent to the original of a textual document.

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<sup>104</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

<sup>105</sup> Mississippi Code 1972 Annotated, 9-1-57.

<sup>106</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

### ***Recommendations***

Until the resolution and convenience of computer displays match paper, courts should continue to allow paper to be used when it is needed. Rules should not restrict the ability of the court to use any visible rendition of information it chooses in conducting its business.

### **Procedures for Submitting Electronic Documents**

It is not enough for a court merely to authorize the use of electronic filing; it must work with potential filers to develop comprehensive instructions. Numerous examples of procedures have been given in this chapter, but few courts have developed administrative manuals with sufficient detail.

### ***Recommendations***

The judiciary must consider not only the needs and limitations of court resources, but of law firms and others who will file documents electronically. It must make those procedures available to anyone with an interest in using the system, preferably through a web site that allows continual updates and instant distribution.

### **Page Limits on Electronic Filings**

Two interesting issues arise with respect to the size of electronic filings. First, since electronic documents are formatted differently than paper, how are court-imposed restrictions on document size enforced? The second issue relates to the capacity of the court to accept documents electronically. Should there be size limitations?

The Los Angeles Superior Court answered the first question by limiting the amount of text submitted in an electronic pleading as if it were submitted on paper. Of course,

when documents contain links to web-based materials and when footnotes connect to original references, enforcement of these restrictions will be impossible.

**RULE 18.00 ELECTRONIC FILING AND SERVICE<sup>107</sup>**

(3) The electronic document is received at an address specified. Rules governing the size of paper, margins, and other specifications based on characteristics peculiar to paper, whether in these or other court rules, shall not apply to electronic documents filed pursuant to this rule, except that such documents, when printed in accordance with the rules governing paper documents, may not exceed any limits on the number of pages that may be filed.

Florida implemented restrictions on the number of pages that could be filed electronically.

**Rule 2.090. Electronic Filing of Matters in all Proceedings within the State Courts System<sup>108</sup>**

(1) Any clerk of the court who, after obtaining Supreme Court of Florida approval, accepts for filing documents that have been electronically transmitted shall:

- (A) provide electronic or telephonic access to its equipment during regular business hours; and
- (B) accept electronic transmission of documents up to 10 pages in length.

It should be noted that the Florida rules allow the clerk of court to extend the ten-page limit on documents filed electronically.

***Recommendations***

Limitations on the number of pages submitted to the court will require parallel paper systems, inhibit the use of the technology, and prevent the court from realizing the full benefits of electronic filing. If needed, limitations should be removed as quickly as feasible. Limitations on the amount of material submitted in a single document will be more difficult to address. At present, we are submitting electronic documents that look like the current paper documents, so traditional page counts are acceptable. Courts

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<sup>107</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

<sup>108</sup> Florida Statutes Annotated Rules of Judicial Administration, 2.090.

should prepare to develop new methods of measuring submissions to account for the limitless capacity of Internet-based information as the nature of documents changes.

### **Attachments, Appendices, or Exhibits in Different Form**

One of the most significant problems for electronic filing pilot projects to date has been how to handle attachments, appendices, and exhibits. Early pilots relied on word processing formats that could only use typewriter characters; it was not possible for them to scan pages or pictures or handwriting. As lawyers create documents electronically, it is a simple matter to pass them along to the court. Often the other materials that are necessary to support the pleading are on paper, not in a computer system.

The Santa Clara County Superior Court<sup>109</sup> and the U.S. District Court for the Eastern District of Pennsylvania<sup>110</sup> require all attachments to be included with the electronic document. The Pennsylvania court also requires all materials to be in ASCII format; no graphics of any kind are allowed.

#### **Section 1.7.2 Standards**

A. Electronic Filing. A party may file an electronic pleading or other paper with the Court provided it has executed an agreement with a Service Provider and Digitally Signs the documents filed electronically. Any papers filed shall include exhibits attached.

#### **APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS**

Attachments, Appendices, Exhibits to Electronic Submissions. Documents with attachments, appendices or exhibits may only be submitted electronically if they may also be included in full as part of the submission document. This means that if a document is transmitted as an ascii file only attachments, appendices or exhibits that consist entirely of ascii text files may be submitted. No document may be electronically submitted that has attachments, appendices or exhibits that consist of graphs, drawings or pictures of any other non-ascii characters.

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<sup>109</sup> Santa Clara County Superior Court Local Rule 1.7.2.

<sup>110</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

### ***Recommendations***

Fortunately, technology has advanced to the point that images of paper documents can be processed nearly as quickly, inexpensively, and easily as word processing files. Because there are so many formats available, courts should define specific standards for attachments to pleadings. The lesson to be learned from earlier pilots is that these technologies will change rapidly, so courts should prepare to upgrade their standards periodically. Today HTML<sup>111</sup> may appear to be the format of choice. Within a year or two, XML<sup>112</sup> certainly will replace it. Who knows what will be the best choice in five years?

### **Filing Time**

Electronic filing of documents eliminates barriers of time in accessing the court. No longer are parties and attorneys limited to court staff work schedules in reviewing materials and submitting pleadings. An interesting question is raised concerning deadlines for filing. Several courts have developed similar rules concerning acceptance of documents.

#### **RULE 18.00 ELECTRONIC FILING AND SERVICE<sup>113</sup>**

(d) Time of Filing. An electronic document may be electronically submitted to the court at any time of the day, and shall be considered filed on the date and time that it is accepted. Acceptance shall be determined by the clerk, and shall be deemed to occur (i) on the date the filing was submitted if the submission began during normal business hours of the clerk's office, and (ii) on the next day the clerk's office is open for business if submission began after normal business hours of the clerk's office. Notwithstanding the foregoing, the court may authorize the electronic filing service to automatically accept certain electronic documents specified on a list provided by the court and published by the electronic filing service, in which case such filings shall be deemed accepted as of the date and

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<sup>111</sup> *Hypertext Markup Language*, the document format of the World Wide Web, based on an earlier publishing standard known as SGML (*Standard Generalized Markup Language*).

<sup>112</sup> *Extensible Markup Language*, a successor to HTML that incorporates many of the features of SGML and adds extensions to link documents with databases.

<sup>113</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

time the filing was submitted, regardless of whether the office of the clerk is open for business.

**Section 1.7.2 Standards**<sup>114</sup>

C. Return Notice of Filing. The Court shall return to the sender of an electronic filing a Digitally Signed confirmation of the acceptance or rejection of the filing. The confirmation shall include a notation of the date of filing.

D. Date of Filing. A filing accepted by the Court will be deemed filed on the date of transmission if received during normal business hours of the Court and on the next Court business day otherwise.

**Rule 2.090. Electronic Filing of Matters in all Proceedings within the State Courts System**<sup>115</sup>

(3) The filing date for an electronically transmitted document shall be the date the last page thereof is received by the court or clerk of the court.

**APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS**<sup>116</sup>

Effective Filing Date and Time for Electronically Submitted Documents. The date and time that the document is transmitted will be considered as the "Date Filed" for the document. In most cases, documents will be reviewed within a few hours after they are received on the Court machine. The only exceptions will be documents that are electronically submitted after normal office hours (8:30 am to 5:00 pm EST) Monday thru Friday, documents submitted on weekends and documents submitted on holidays. Documents submitted during the exception periods will be promptly reviewed on the next court business day.

One court indicates when documents filed electronically will be available for review by remote users. The delay is based on processing time needed by the court.

**CLAD ADMINISTRATIVE PROCEDURES**<sup>117</sup>

V. Availability of Documents Electronically Filed.

A. CLAD BBS. Documents filed electronically are immediately available for retrieval on the CLAD BBS.

B. CLAD Private Database. Documents filed electronically are also available for retrieval on the CLAD Private Database as follows:

1. Documents which are electronically filed by 7:30 a.m. will be available for viewing on CLAD by 11:00 a.m.;
2. Documents which are electronically filed by 11:00 a.m. will be available for viewing on CLAD by 3:00 p.m.;

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<sup>114</sup> Santa Clara County Superior Court Local Rule 1.7.2.

<sup>115</sup> Florida Statutes Annotated Rules of Judicial Administration, 2.090.

<sup>116</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

<sup>117</sup> Bankruptcy Rules of the United States District Courts for the Southern and Eastern Districts of New York.

3. Documents which are electronically filed by 3:00 p.m. will be available for viewing on CLAD by 5:00 p.m.;
4. Documents which are electronically filed by 5:00 p.m. will be available for viewing on CLAD by 7:00 p.m.;
5. Documents which are filed after 5:00 p.m. will be available for viewing on CLAD by 11:00 a.m. on the next business day.

### ***Recommendations***

Because filing deadlines can be a controversial issue, it is important that the court is clear on when a pleading is accepted. If there will be a processing delay for the filed paper, rules should specify when it will be available.

### **Standards for Organizing, Identifying, and Indexing Documents**

One state requires court leaders to develop a plan for managing electronic documents.

The Mississippi statute is shown below.

#### **9-1-57. Plan for electronic storage system.**

(c) The plan shall include setting standards for organizing, identifying, coding and indexing so that the image produced during the duplicating process can be certified as a true and correct copy of the original and may be retrieved rapidly...

### ***Recommendations***

While this is an important part of system planning and design, it seems odd to include this type of detail in state statutes. The only circumstance where it seems appropriate is if individual courts are developing their own systems independently and the state court administrator is attempting to coordinate and insure the compatibility of these efforts.

### **Acknowledgment of Receipt**

There are several methods of acknowledging receipt of electronically filed documents. In the first example, the court posts messages concerning pleadings that have been submitted and requires the parties to determine if their documents have been accepted.

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Filing Status Messages. Individual attorneys will be expected to access the electronic filing system periodically to check either private or public messages regarding the status of any electronic submissions. Both acceptance and rejection messages relative to an attorney's electronic submissions will appear under private messages. Information relative to submissions by any attorneys that are accepted for filing within the previous few days will appear under public messages.

Courts in Nevada,<sup>119</sup> Los Angeles,<sup>120</sup> Santa Clara,<sup>121</sup> and Virginia<sup>122</sup> have developed a variety of electronic acknowledgment processes.

**171.103 Court clerk may accept complaint filed electronically; procedure; service.**

2. If a court clerk accepts a complaint that is filed electronically pursuant to subsection 1, the court clerk shall acknowledge receipt of the complaint by an electronic time stamp and shall electronically return the complaint with the electronic time stamp to the prosecuting attorney. A complaint that is filed and time-stamped electronically pursuant to this section may be converted into a printed document and served upon a defendant in the same manner as a complaint that is not filed electronically.

**RULE 18.00 ELECTRONIC FILING AND SERVICE**

(c) Return Notice of Filing. Upon receiving an acceptable electronic document, the electronic filing system or clerk shall return to the sender a statement confirming acceptance of the filing. The confirmation shall include a notation of the date and time of filing. If an electronic document is received but unacceptable, the electronic filing system or a clerk shall also notify the sender of the document's rejection and the grounds for rejection. A copy of this confirmation or rejection will be retained in the permanent electronic case file maintained by the court.

**Section 1.7.2 Standards**

C. Return Notice of Filing. The Court shall return to the sender of an electronic filing a Digitally Signed confirmation of the acceptance or rejection of the filing. The confirmation shall include a notation of the date of filing.

**17-83.1:3 Completion of electronic filing; transmission and distribution of data.**

A. To complete an electronic filing:

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<sup>118</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

<sup>119</sup> Nevada Revised Statutes, 171.103.

<sup>120</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

<sup>121</sup> Santa Clara County Superior Court Local Rule 1.7.2.

<sup>122</sup> Code of Virginia, 17-83.1:3.

1. The person filing an instrument with the circuit court clerk must transmit the instrument electronically;
2. The receiving station must transmit acknowledgment to the sending party by encoding electronic receipt of the transmission;
3. The sending station must encode validation of the encoded receipt as correct; and
4. The receiving station must respond by encoded transcription into the computer system that validation has occurred and that the electronic transmission has been completed.

### ***Recommendations***

Courts should provide electronic acknowledgment of filing transactions. Unless there are high-security risks, these procedures should be as simple as possible. A computer-generated electronic mail message with a date and time stamp may be sufficient in most circumstances. Digitally signing the acknowledgment may be overkill, unless all the steps are built in to an electronic mail or similar program.

### **Electronic Issuance of Summons**

Two California courts have planned for the issuance of a summons electronically. Both local rules indicate that the electronic summons shall have the same effect as one issued on paper, but the Los Angeles rule requires that it be printed.

#### **RULE 18.00 ELECTRONIC FILING AND SERVICE<sup>123</sup>**

(e) Electronic Issuance of Summons. On request, the electronic filing system may issue a digitally signed summons bearing a graphical image of the seal of the court. A printed version of such summons shall have the same force and effect as a summons issued by the clerk on paper and under the seal of the court.

#### **Section 1.7.2 Standards<sup>124</sup>**

E. Electronic Issuance of Summons. A Digitally Signed summons issued via the electronic filing system shall be as valid as a summons issued by the clerk on paper and under the seal of the Court.

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<sup>123</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

<sup>124</sup> Santa Clara County Superior Court Local Rule 1.7.2.

### ***Recommendations***

Electronic filing of documents by attorneys is only the first step in the move to conduct court business electronically. As courts are able to create, maintain, and distribute their work products in electronic form, greater benefits of speed, accuracy, efficiency, and effectiveness will be realized. The electronic summons is a good beginning.

### **Electronic Service**

Several different approaches are outlined for electronic service of process. The Pennsylvania<sup>125</sup> federal court requires traditional service of a paper document.

#### **APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS**

The attorney making the submission will still be required to serve other counsel in the case with paper copies of any electronically submitted document and take care to ensure that the informational content of the copies served on other counsel is exactly the same as that of the electronic submission.

Nevada<sup>126</sup> requires that the electronic document be printed and served.

#### **171.103 Court clerk may accept complaint filed electronically; procedure; service.**

2. If a court clerk accepts a complaint that is filed electronically pursuant to subsection 1, the court clerk shall acknowledge receipt of the complaint by an electronic time stamp and shall electronically return the complaint with the electronic time stamp to the prosecuting attorney. A complaint that is filed and time-stamped electronically pursuant to this section may be converted into a printed document and served upon a defendant in the same manner as a complaint that is not filed electronically.

Delaware's rules<sup>127</sup> equate electronic filing with service, but require that a notice of service be served by hand or facsimile. The New York bankruptcy court<sup>128</sup> has similar requirements.

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<sup>125</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

<sup>126</sup> Nevada Revised Statutes, 171.103.

**INTERIM RULE 79.1 COMPLEX LITIGATION AUTOMATED DOCKET**

12. The electronic filing of a pleading or paper will be considered service under Superior Court Civil Rule 5. However, counsel shall be required to serve by hand or fax, on all Delaware counsel appearing in that case and file with the Prothonotary, a notice of service under Rule 5 in the following form:

Please take notice that the following pleading has been electronically filed by (name of party) on the Complex Litigation Automated Docket for the Superior Court of the State of Delaware on \_\_\_\_\_, 1991: (name of pleading).

Signature of Delaware Counsel

Florida's rule<sup>129</sup> simply authorizes electronic service.

**Rule 2.090. Electronic Filing of Matters in all Proceedings within the State Courts System**

(d) Service.

(1) Electronic transmission may be used by a court for the service of all orders of whatever nature provided the clerk, together with input from the chief judge of the circuit, has obtained approval from the Supreme Court of Florida of the specific procedures and program to be used in transmitting the orders. All other requirements for the service of such an order shall be met.

(2) Any document electronically transmitted to a court or clerk of the court shall also be served on all parties and interested persons in accordance with the applicable rules of court.

The superior court in Santa Clara County, California, authorizes use of a service provider.<sup>130</sup>

**Section 1.7.2 Standards**

G. Electronic Service. In circumstances where a document may be served by paper mail or fax, a document may be served electronically via a Service Provider. Service is completed at the time of transmission, and service that occurs after 5 p.m. shall be deemed to have occurred on the next Court day.

Finally, Los Angeles<sup>131</sup> authorizes service to an electronic mail address.

**RULE 18.00 ELECTRONIC FILING AND SERVICE**

(g) Electronically Mailed Service. In circumstances where a document may be served by paper mail or fax on a person who has executed a contract with the court for electronic filings.

<sup>127</sup> Delaware Superior Court Rules of Civil Procedure, Interim Rule 79.1, Complex Litigation Automated Docket.

<sup>128</sup> Bankruptcy Rules of the United States District Courts for the Southern and Eastern Districts of New York.

<sup>129</sup> Florida Statutes Annotated Rules of Judicial Administration, 2.090.

<sup>130</sup> Santa Clara County Superior Court Local Rule 1.7.2.

<sup>131</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

(1) A textual document may be served on such person by electronic mail to the receiver's electronic mail address;

(2) A document in image form may be served on such person by electronic mail to the receiver's electronic mail address with the prior, written consent of the receiver.

An electronic mail address is refutably presumed valid for a particular receiver if the receiver files electronic documents in court from the address, and the sender has no notice that the address is invalid. If served pursuant to this rule, time is calculated as set forth in Code of Civil Procedure section 1013(e).

### ***Recommendations***

Court rules should authorize electronic service of process, allowing continued use of traditional methods for those who are not ready or able to use the new technology. The CLAD approach of posting pleadings and notifying parties of their availability for online viewing overcomes many of the problems of compatibility of documents and images, particularly if it is implemented using World Wide Web technology.

### **Private Service Providers**

As electronic commerce becomes more commonplace, private service providers may play a similar role as is played by the post office and telephone companies in moving documents to and from the court. Los Angeles<sup>132</sup> and Santa Clara<sup>133</sup> counties have adopted rules that allow the contractual use of these vendors.

#### **RULE 18.00 ELECTRONIC FILING AND SERVICE**

(b) Enhanced Service: Contractual Requirements. Filing documents electronically is an enhanced information service provided by arrangement with one or more private-sector firms under contract with the court. Such a firm may require payment of a fee and/or impose other reasonable requirements by contract with the filing litigant or the litigant's attorney as conditions for processing an electronic filing.

##### **Section 1.7.1 Definitions**

A. Service Provider. "Service Provider" means a private sector firm or other business entity authorized by the Court to provide electronic filing services. A Service Provider is contractually obligated to provide specified electronic services

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<sup>132</sup> Los Angeles County Superior Court Rule 18.00 Electronic Filing and Service.

<sup>133</sup> Santa Clara County Superior Court Local Rule 1.7.2.

to the Bar, the public and the Court, to transfer filings and messages to and from the Court, and to act as Certification Authority.

In addition, states that have adopted digital signature legislation have provided for independent, private sector certification authorities to ensure the integrity of the private and public key system. Florida's statute<sup>134</sup> is listed below as an example.

**282.745. Voluntary licensure**

(1) The Secretary of State may adopt, amend, or repeal any rules as necessary, pursuant to chapter 120, to implement, enforce, and interpret the voluntary licensure of private certification authorities. Such rules shall provide, at a minimum, for:

- (a) Licensing fees sufficient to support the licensing program.
- (b) Standards and requirements for voluntary licensure.
- (c) Audit procedures and requirements to assure program compliance.
- (d) Insurance reserve or bonding requirements.
- (e) Procedures for license revocation and suspension for failure to meet licensure requirements or for misconduct.

(2) No private certification authority shall be required to obtain a license from the Secretary of State pursuant to this section.

(3) The Secretary of State may also enter into reciprocity agreements with other jurisdictions on behalf of this state to allow for the fullest possible recognition of digital signatures executed under Florida law and the fullest possible recognition of certification authorities licensed under this section.

***Recommendations***

A more detailed discussion of policy issues related to private sector involvement in electronic filing projects is included in the next chapter. Most courts have not addressed the issue of using vendors to assist their efforts to implement electronic filing. If these companies are performing functions that have been or might be done by court staff, then rules governing how they operate seem appropriate.

Santa Clara County's requirement that electronic filing service providers also function as certification authorities seems at odds with attempts by other states to keep

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<sup>134</sup> Florida Statutes Annotated, 282.745.

these certification authorities in a more neutral position. Courts should consider the implications of this approach before adopting similar rules.

### **Assumption of Risk for System Failure**

Two courts address the issue of who is responsible for failure of the technology to deliver an electronic document. In the Eastern district of Pennsylvania,<sup>135</sup> users are required to resubmit a document if they do not receive a document review message. Florida rules<sup>136</sup> require the filer to assume all risks associated with interrupted service or system failure.

#### **APPENDIX V. APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS**

**Files Lost Due to Hardware Malfunction.** It is remotely possible that an electronically submitted document may be lost on rare occasions due to a malfunction of the court computer. This problem is only likely to occur if the hard disk on the computer should sustain some damage during the few seconds between the time that a user confirms acceptance of the document for submission and a security copy of the document is printed out in the court. In these instances, users will not receive a document review message and should contact the Electronic Filing System Administrator by calling 597-5860. Any lost documents will then have to be resubmitted. It must be emphasized that this type of problem is extremely rare and may never occur.

#### **Rule 2.090. Electronic Filing of Matters in all Proceedings within the State Courts System**

(e) **Transmission Difficulties.** Any attorney, party, or other person who elects to file any document by electronic transmission shall be responsible for any delay, disruption, interruption of the electronic signals, and readability of the document, and accepts the full risk that the document may not be properly filed with the clerk as a result.

In addition, many states have adopted extensive legislation concerning liability and assumptions of risk related to the use of digital signature.<sup>137</sup>

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<sup>135</sup> Clerk's Office Procedural Handbook U.S. District Court for the Eastern District of Pennsylvania.

<sup>136</sup> Florida Statutes Annotated Rules of Judicial Administration, 2.090.

<sup>137</sup> See, e.g., Utah Code Annotated, 46-3-402, Revised Code of Washington Annotated, 19.34.310, 19.34.350, and 19.34.410.

***Recommendations***

Although courts may gain comfort in assigning all of the risks of technology problems to users of the system, more helpful are instructions, adopted in operational procedures, that help litigants and attorneys understand how to know if a document has not been received successfully by the court, and how to remedy the situation.

