

AMERICAN BAR ASSOCIATION

JUDICIAL DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 **RESOLVED**, That the American Bar Association adopts the black letter of the Standard 1.65
- 2 Court Use of Electronic Filing Processes as an amendment to the Standards Relating to Court
- 3 Organization, dated February 2004.
- 4

REPORT

The Judicial Division proposes the promulgation of an ABA Standard on Electronic Filing Processes. The Standard has been drafted by Judges and Administrators experienced with electronic filing. It is consistent with the April 2003 standards on electronic filing approved by the Conference of State Court Administrators and the National Association for Court Management.

Electronic filing constitutes a critically important development for the legal system; consequently, the Standards Relating to Court Organization are incomplete without coverage of this area of court administration and its impact on legal practice.

This Standard was developed by the Electronic Filing Process Standards ("EFPS") Committee within the National Conference of State Trial Judges. As reported in the commentary, this Standard is consistent with the standards approved by the Conference of State Court Administrators and the National Association for Court Management. The EFPS Committee had the benefit of technical assistance from one of the Reporters for the COSCA/NACM committee in drafting this proposed ABA Standard.

The promulgation of this Standard marks the transition of electronic filing from an experimental process to an operational reality for America's state and federal courts. The guidance for court policies and rules contained within this Standard are based on the experience of hundreds of state and federal courts – and their local and state bars -- that have been using electronic records since the first project began in Delaware in 1991.

This Standard fills a gap that has developed since the last amendment of the ABA Standards Relating to Court Organization and the Standards Relating to Trial Courts. The principles approved by those Standards were written such that they were sufficiently global and general as not to become obsolete overnight. However, those Standards are now dated because of tremendous advancements in technology over the last ten years. For instance, there is no meaningful reference to the Internet in either of those Standards.

The COSCA/NACM standards contain guidance for court policies and rules, a conceptual model of a common technological approach, and functional standards for courts and vendors to follow in designing and building automated applications to support electronic filing. The proposed ABA Standard deals only with the court policies and rules portion of the COSCA/NACM standards – the portion of greatest interest to lawyers and judges. Adoption of a Standard that is consistent with the COSCA/NACM standards would reinforce the validity of both sets of Standards for the benefit of the bench and bar.

Richard N. Bien, Esq.
Chair, Judicial Division

February 2004

**STANDARDS RELATING TO COURT ORGANIZATION
(February 2004)**

Proposed Standard 1.65
Court Use of Electronic Filing Processes

Standard 1.65 Court Use of Electronic Filing Processes. Because of the benefits accruing to the courts, the bar and the public from the use of electronic records, courts should implement electronic filing processes. In doing so, they should follow certain general principles, adopt rules and implement electronic filing processes as follows:

(a) General principles

- (i) Official Court Record.** The electronic document should be the official court record. Paper records, if maintained, should be considered a copy of the official court record.
- (ii) Electronic Viewing.** Electronic filing processes should presume that all users will view documents on their computer screens. Paper copies should be available on demand, but their production should be exceptional, not routine.
- (iii) Technical Requirements.** Courts should use Internet browser, eXtensible Markup Language, web services¹ and World Wide Web Consortium recommended standards for electronic filing processes.

¹ "Web service" is used in its most generic sense – software components that employ one or more of the following to perform distributed computing: UDDI, WSDL, SOAP or ebXML. The term is not used in this document to describe a specific architecture.

(iv) Document Format. Courts should require electronic documents to be submitted in a format that can be rendered with high fidelity to originals, and, when possible, is searchable and tagged. Courts should only require formats for which software to read and write documents is available free for viewing and is available free or at a reasonable cost for writing and printing.

(v) Self-Contained Documents. Each filed document should be self-contained, with links only to other documents submitted simultaneously or already in the court record.

(vi) Data Accompanying Submitted Documents. Courts should require filers to transmit data identifying a submitted document, the filing party, and sufficient other information for the entry in the court's docket or register of actions. In the case of a document initiating a new case, sufficient other information should be included to create a new case in the court's case management information system. This data should be specified with particularity by the court.

(vii) Identity of the Sender. Courts should use some means to identify persons interacting with its electronic filing system.

(viii) Integrity of Transmitted and Filed Documents and Data. Courts should maintain the integrity of transmitted documents and data, and documents and data contained in official court files, by complying with current Federal Information Processing Standard 180.2 or its successor.

(ix) Electronic Acceptance of Payments. Courts should establish a means to accept payments of fees, fines, surcharges and other financial obligations electronically, including the processing of applications to waive fees.

(x) Surcharges for Electronic Filing. Courts should avoid surcharges for filing of or access to electronic documents if they are able to obtain public funding of their electronic filing processes. Courts may impose such surcharges or use a private vendor that imposes surcharges when public funding is not available. Such surcharges should be limited to recouping the marginal costs of supporting electronic filing processes if collected by the court or to a reasonable level if imposed by a private vendor.

(xi) Court Control over Court Documents. Whenever a court's electronic documents reside on hardware owned or controlled by an entity other than the court, the court should ensure by contract or other agreement that ownership of the documents remains with the court or clerk of court. All inquiries for court documents and information should be made against the current, complete, accurate court record.

(xii) Addressing the Special Needs of Users. In developing and implementing electronic filing, courts should consider the needs of indigent, self-represented,

non-English speaking, or illiterate persons and the challenges facing persons lacking access to or skills in the use of computers.

(b) Court Rules

(i) Service of Filings on Opposing Parties. Court rules may provide that electronic transmission of a document through the electronic filing process to opposing counsel or parties who participate in the electronic filing process will satisfy the service requirements of court procedural rules. Such electronic filing processes should automatically create and docket a certificate of service for documents served electronically through the electronic filing process. Court rules need not provide additional time for responding to documents served in this fashion.

(ii) Use of Unique Identifier. Court rules should provide that a lawyer or other person provided with a unique identifier for purposes of filing documents electronically will be deemed to have filed any document submitted using that identifier.

(iii) Determining when a Document is Filed. Court rules should articulate the criteria by which an electronic document is deemed “received”, “filed,” “served,” and “entered on the docket or register of actions.” Courts should record the date and time of filing and inform the filer of them or of rejection of the document and the reasons for rejection.

(iv) Availability of Electronic Filing Process. Courts should accept electronic documents 24 hours per day, 7 days per week, except when the system is down for maintenance. The date on which documents be deemed filed should be in accordance with the court’s definition of “filed” pursuant to subsection (b)(iii), whether or not the clerk’s office was open for business at the time the document was submitted electronically.

(v) Remedy for Failure of Electronic Processes. Court rules should create procedures and standards for resolving controversies arising from the electronic filing process.

(c) Implementing Electronic Filing Systems

(i) Universal Electronic Filing Processes. Courts should ultimately include all documents in all case types in electronic filing processes although they may implement electronic filing incrementally.

(ii) Mandatory Electronic Filing Processes. Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees in appropriate circumstances, the court allows for the exceptions needed to ensure access to justice for indigent,

disabled or self-represented litigants, the court provides adequate advanced notice of the mandatory participation requirement, and the court (or its representative) provides training for filers in the use of the process.

(iii) Judicial Discretion to Require Electronic Filing in Specific Cases. Judges should have the authority to require participation in the electronic filing system in appropriate cases until such participation becomes mandatory for all cases.

(iv) Maintaining Supplementary Scanning Capability. Courts should ensure that all documents in electronic cases are maintained in electronic form. Consequently, in voluntary electronic filing processes, courts should scan paper documents and file them electronically.

(v) Quality Control Procedures. Courts should institute a combination of automated and human quality control procedures sufficient to ensure the accuracy and reliability of their electronic records system.

(vi) Eliminating Unnecessary Paper Processes. Courts should eliminate paper processes that are obsolete or redundant in an electronic environment.

(vii) Integration with Case Management and Document Management Systems. Electronic documents should be accessed through a court's case management information system. Courts should mandate that case management information systems provide an application programming interface capable of accommodating any electronic filing application that complies with these standards. Courts using electronic filing processes should require automated workflow support.

(viii) Archiving Electronic Documents. Courts should maintain forward migration processes to guarantee future access to electronic court documents.

Commentary

The Conference of State Court Administrators (COSCA) and National Association for Court Management (NACM) adopted Standards for Electronic Filing Processes (Technical and Business Approaches) in April 2003. These standards track the COSCA/NACM standards verbatim.² As the COSCA/NACM standards evolve to reflect changes in the underlying

² The COSCA/NACM standards include additional items not within these standards: a conceptual model of a common technological approach needed to achieve the goal of a nationally interoperable electronic records process, and functional standards for courts and vendors to follow in designing and building automated applications to support electronic filing.

Neither the COSCA/NACM standards nor these standards address the issues associated with making court records available on the Internet for viewing by the general public. The balance of public access to court records and the privacy rights of individual court users are explored in Public

technology supporting electronic filing or in the national consensus concerning the best policies and practices for its use by courts, practitioners, other governmental entities, and commercial service providers, these standards will also require updating. The COSCA/NACM standards are available at the Technology Standards link from “Popular Links” on the website of the National Center for State Courts (www.ncsconline.org).

Electronic filing constitutes a critically important development for the legal system; consequently, the Standards Relating to Court Organization are incomplete without coverage of this area of court administration and its impact on legal practice.

The promulgation of these standards marks the transition of electronic filing from an experimental process to an operational reality for America’s state and federal courts. The standards are based on the experience of hundreds of state and federal courts – and their local and state bars -- that have been using electronic records since the first project began in Delaware in 1991.

The standards contain guidance for court policies and rules, a conceptual model of a common technological approach, and functional standards for courts and vendors to follow in designing and building automated applications to support electronic filing. They are intended to provide a common model for state and federal trial and appellate court electronic filing processes in order to achieve six purposes:

- to endorse a “full service” model of electronic filing including not only the transmission of electronic documents into the courts, but also the routine use of electronic documents and the electronic record for case processing, for service on other parties, and for access and use by everyone involved in, or interested in, the case;
- to endorse an electronic filing process containing maximum incentives for use and acceptance by courts and lawyers, so as to increase the success rate of electronic filing projects;
- to provide a “road map” for vendors to use when developing their electronic filing, case management, and document management products;
- to provide guidance to court systems that wish to move into electronic filing but have hesitated to do so because they lack experience or expertise;

Access to Court Records: Guidelines for Policy Development by State Courts, developed by a Conference of Chief Justices/Conference of State Court Administrators committee supported by the Justice Management Institute and the National Center for State Courts. Those guidelines can be located at www.courtaccess.org/modelpolicy .

- to encourage all state and federal trial and appellate courts and administrative law tribunals to make the most complete transition possible from paper records storage to electronic records storage through the implementation of electronic filing; and
- to establish the standards needed to ensure that electronic filing applications developed by the federal courts, state court systems and individual courts are interoperable.

Experience has shown the following benefits for courts, court users, and the public arising from the use of electronic court files:

- Speedier processes by eliminating the time required for mailing or personal delivery of pleadings and other documents
- Greater efficiency from the instantaneous, simultaneous access to filed court documents for participants in the case, for judges and court staff, and members of the public (to publicly available court documents) wherever participants may be located throughout the world
- Fewer delays caused by lost or misplaced paper files
- Increased efficiency and reduced cost from the ultimate reduction or elimination of handling and storing paper case files in courts, lawyers' offices, and official archives
- Increased security of court records arising from more reliable electronic backup copies of records, increased ability to detect any alteration to an electronic document, and easier enforcement of limitations on access to documents
- Improved legal processes, as judges and lawyers learn to take advantage of the universal availability and ease of sharing of electronic documents
- Enhanced public safety arising from electronic service of and instantaneous access to court orders (e.g., domestic violence orders of protection) and warrants

The standards address most aspects of the use of electronic documents in the courts.

(a)(i) In an electronic filing environment, the electronic document is the official court record; a printed version of the document is considered a copy of the original. With an official electronic record, courts will not, and lawyers need not, routinely maintain paper case files; that would eliminate the principal economies of electronic records systems. Some courts will choose to make a small number of exceptions to this rule; they may designate some paper documents, such as original wills, documents containing classified or other sensitive information (which for security purposes are not entered into an electronic records system), and documents whose authenticity is raised as an issue prior to or during a trial, as the official record of those specific documents. These exceptions should be noted in court rules or in court orders in specific cases.

(a)(ii) Judges, lawyers and other users of electronic records will always have the capability to produce and use paper copies of the official electronic record. However, electronic filing systems should be designed with the expectation that most documents will be viewed and used in their electronic form.

(a)(iii) Fully interoperable³ electronic filing systems – in which the same basic process is usable in every court and in every law office – require the use of standard technologies. Use of the Internet, eXtensible Markup Language, and web services are the accepted technologies as of the adoption of these standards.

(a)(iv) It is impossible for a court to support all versions of all word processing programs. The court must choose a single format in which all documents are to be submitted, maintained and viewed. Although “portable document format” is the de facto standard for shared electronic documents as of the date of adoption of these standards, the standard does not specify a particular format because technology will inevitably change.

(a)(v) If a court were to accept as a filing an electronic link to a document residing on a website somewhere else, or to allow such references within a document, the court would have no ability to monitor or prevent modifications in the referenced document or website. This is an unacceptable risk, one that would compromise the integrity of court records. It might also subject the court to fees charged by the website hosting the document (such as a computer assisted legal research vendor). Courts should allow links to other documents already or contemporaneously filed with the court and may choose to allow electronic links to websites of other courts, for instance, allowing citations to opinions of a state’s highest court through links to that court’s website opinion repository.

(a)(vi) One of the benefits of electronic filing is the elimination of much redundant data entry. A filer will provide an electronic “cover sheet” that will create the entry in the court’s docket or register of actions.

(a)(vii) In the paper filing world, the court makes no effort to identify who actually brings a document to the court. In the electronic world, it is possible for courts to identify who files the document and it is desirable from the standpoint of system security and integrity to do so. Most courts require a filer to register with the court and agree formally with the rules governing

³ When systems are interoperable, they are able to share data with no changes within the application code that resides at each end of the sharing “pipe.” Each may use different computer platforms and different databases, but they are able to transmit their data and receive data in standard data formats, classifications, and types. Validation and transformation of data occurs prior to acceptance into the application or database and prior to sending the data to an outside entity. With interoperable systems, each law office and court can follow its own procedures and processes, as long as it transmits data to others in a standard manner. This eliminates the need for building separate “interfaces” to each system with which a law office wishes to communicate.

participation in the electronic filing system before being issued an electronic identifier that will authorize him or her to access the system. The standard does not require this process; it merely requires that a court employ some means to identify persons filing or viewing electronic documents.

(a)(viii) An electronic filing system must contain security features that can guarantee for judges and lawyers the integrity of a court's electronic records. The FIPS 180.2 process creates an electronic "fingerprint" for a document. Should the document be altered in any manner, the electronic "fingerprint" will be different. Courts may adopt even more secure technologies, such as digital signatures.

(a)(ix) An electronic filing process should include a fully integrated electronic payment process, so that filers can pay filing fees as a part of the same transaction that submits the electronic document for filing.

(a)(x) Many current electronic filing systems have been built for courts by private sector vendors who provide the capital necessary to develop a system in return for the right to charge system users a fee for every filing or viewing of a document. In accordance with previously adopted ABA policy, the standards favor free electronic filing processes built and maintained by the courts themselves. If public resources are not available to develop and support free systems, the standards authorize courts to enter into fee-supported contracts with vendors or to charge fees to support systems that the courts develop and operate.

(a)(xi) A court's electronic documents may reside on a computer owned by a private sector service provider or an executive branch agency. In those instances, the court must ensure that it owns its own official records. Some private sector service providers retain copies of documents they transmit to the court. Any single private service provider may have only a subset of the full documents for a case because multiple service providers may provide filing services to other parties in the case. Therefore, if a private service provider is providing access to case documents to third parties from their own databases, this section of the standard requires that they augment their data base to ensure that they transmit the complete and current electronic record of the court.

(a)(xii) Courts must ensure that their electronic records processes are as easy to access as possible and that non-electronic filing and access remains available for those who do not own, have access to, or know how to use computers.

(b)(i) Electronic filing systems provide the court with the capability automatically to serve all parties participating electronically in the case with all documents filed in the case. There is, therefore, no reason to continue to require the parties or their counsel to serve those pleadings by mail, or even by email. Elimination of the need for traditional service of papers, at least for those parties who participate in the electronic process, is a major efficiency for the entire legal process.

(b)(ii) A lawyer or party issued a unique identifier for accessing the electronic system will be responsible for restricting access to that identifier and will be deemed to have filed any document submitted using it.

(b)(iii) The bar's confidence in an electronic filing system is dependent on the predictability of the process. A court must ensure that lawyers understand the court's standards for deeming a document "received," "filed," "served," and "entered on the docket or register of actions."

(b)(iv) Electronic filing gives courts the option to allow 24 hour a day, 365 days per year filing. Courts should give lawyers and other filers the maximum flexibility that the system will afford. Most courts have some process for accepting the filing of paper documents after the clerk's office closes; there is no reason to restrict electronic filing to the hours during which the clerk's office is open for business.

(b)(v) Lawyers are concerned about the possibility of failure of an electronic filing process – their own computers might fail, their private sector service provider's equipment might fail, the Internet service provider might fail, or the court's equipment might fail. Courts should ensure that there is a procedure available by which a lawyer or party can seek relief from the consequences of such failures.

(c)(i) Courts typically implement electronic filing processes gradually, choosing a limited subset of cases for their pilot efforts. However, the goal should be to include all documents in all cases. This requirement may create special problems for jurisdictions using a private sector service provider charging fees for filings and/or access to electronic records when they begin to accept criminal and juvenile cases electronically because of the burden on public sector agencies arising from transmission fees to use the system.

(c)(ii) Electronic filing systems will become most efficient and effective when they are universally used by lawyers and other court users. This section sets forth the conditions under which a court may mandate that all documents be submitted in electronic form.

(c)(iii) In courts with voluntary electronic filing processes, a judge should have the authority to designate a particular case as an electronic case and require all parties in the case to file all documents in electronic form.

(c)(iv) These standards advocate that courts not maintain "split" files, containing some electronic and some paper documents. Such a process squanders the efficiencies of electronic filing systems and creates the likelihood that paper or electronic documents will be overlooked in some cases. Instead, in cases in which not all parties are proceeding electronically, the court should scan all paper filings in the case to convert them to electronic form so that every document in the case is part of the electronic file.

(c)(v) A court must include within its process sufficient automated and human safeguards to guarantee the completeness and accuracy of electronic records.

(c)(vi) Courts need to guard against the tendency to retain vestiges of the paper world in an electronic environment, such as limiting the filing day to the hours that the clerk's office is open to accept paper filings or requiring that filed documents contain a replica of the court's inked

“FILED” stamp (when much easier and more reliable processes exist for linking a filing with an electronic record of the time it was received by the court).

(c)(vii) Electronic filing is most efficient when it is integrated with the court’s case management system, so that staff can access documents through the same system through which they access information about the case. To ensure this feature, courts should require that their automated case management information systems have the capability to interface in this fashion with electronic filing and document management applications. Finally, courts need to realize that the conversion to electronic documents will mean that they will need to have their computer system route electronic documents to the persons with responsibility for taking action on them in the same fashion that the court previously routed the paper document from one desk or office to another; these systems are called “workflow” applications.

(c)(viii) The challenge for archiving electronic documents is the predictable changes over time to the equipment and software needed to display the documents. This problem is resolved by requiring that all documents in a court’s archives be converted to new formats whenever a court’s database or computer system is upgraded. This process guarantees that the records remain readable on the equipment and software in use at any time by the court.

GENERAL INFORMATION FORM

Submitting Entity: Judicial Division

Submitted: By: Richard N. Bien, Esq., Chair

1. Summary of Recommendation.
The resolution urges the American Bar Association to amend the Standards Relating to Court Organization by adopting the proposed Standard 1.65 – Court Use of Electronic Filing Processes.
2. Approval by Submitting Entity.
The Judicial Division approved the adoption of the Standard at the ABA Annual Meeting on August 11, 2003.
3. Has this or a similar recommendation been submitted to the House or Board previously?
No.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption.
The ABA has adopted policies favoring state-of-the-art technology in the Courts. These policies would be furthered by the adoption of a Standard relating to electronic filing processes. Electronic filing allows for speedier processes, greater efficiency, reduced costs, improved legal procedures and convenient access to court documents.
5. What urgency exists which requires action at this meeting of the House?
Electronic filing is being established throughout the country and courts will benefit from the guidance the Standard will provide.
6. Status of Legislation.
None pending.
7. Cost to the Association (Both direct and indirect costs.)
\$3,000 for promotion, printing and distribution by JD.
8. Disclosure of Interest (If applicable.)
None.

9. Referrals.
Conference of Chief Justices
(Referred July, 2003)
Litigation Section
(Referred October 2, 2003)
Science & Technology Section
(Referred August, 2003)
Tort Trial & Insurance Practice Section
(Referred November, 2003)
ABA Standing Committee on Technology
All ABA Sections and Divisions

10. Contact Person(s) (Prior to the meeting.)
Richard N. Bien, Esq.
Chair, Judicial Division
Lathrop & Gage, LC
2345 Grand Boulevard, Suite 2800
Kansas City, MO 64108
(816) 460-5520

Hon. Henry duPont Ridgely
Chair, Judicial Division Technology Committee
Co-Chair, NCSTJ Electronic Filing Process Standard Committee
Superior Court
38 The Green
Dover, DE 19901
(302) 739-5331

Hon. Herbert Dixon
Co-Chair, NCSTJ Electronic Filing Process Standard Committee
Superior Court of D.C.
500 Indiana Avenue, NW
Washington, D.C. 20001
(202) 879-4808

11. Contact Person (Who will present the report to the House.)
Richard N. Bien, Esq.
Chair, Judicial Division
Lathrop & Gage, LC
2345 Grand Boulevard, Suite 2800
Kansas City, MO 64108
(816) 460-5520

Hon. Henry duPont Ridgely
Chair, Judicial Division Technology Committee
Co-Chair, NCSTJ Electronic Filing Process Standard Committee
Superior Court
38 The Green
Dover, DE 19901
(302) 739-5331

Hon. Herbert Dixon
Co-Chair, NCSTJ Electronic Filing Process Standard Committee
Superior Court of D.C.
500 Indiana Avenue, NW
Washington, D.C. 20001
(202) 879-4808