A legal note from Marshal Willick about the wrong turns being taken in the automation of the courts, as to e-filing and video records.

The medical maxim "The first thing is, do no harm" applies in many contexts. It should, for example, guide every step of the automation and running of our courts – but to date has not been the top priority. And it is about time that changed.

I. WHAT IS GOING ON, AND WHY THERE IS A PROBLEM

Multiple initiatives have sought to increase the efficiency and improve the operations of the courts. Unfortunately, many of those efforts have not been conceived and executed with the intent and effect of assisting the attorneys and public accessing the court. Instead, by design, or by happenstance, they have been turned to ease the tasks of those working inside the court, while maintaining (or greatly ***increasing***) costs and inconvenience to the Bar and the public.

II. SPECIFIC EXAMPLE: VIDEO RECORD OF COURT PROCEEDINGS

When the Nevada Family Courts were introduced in 1993, they were designed to operate in "Courtrooms of the Future." The kludgy practice of having no record unless a party incurred the expense of hiring a court reporter to transcribe the hearing was to be done away with. In its place – videotape!

The equipment was set up so that counsel could provide a tape at the beginning of the hearing, and walk out of the hearing with an exact record of what went on, free of charge. For those who forgot to bring a tape, one could be purchased on site. And for those not thinking they needed it until later, a copy could be ordered after the fact, made from the court's copy.

Flash forward to 2008. The Bar was told that the outdated videotape system would be replaced with digital records, to be instantly and freely available. But that is not what happened.

It is now impossible to get a real-time copy of proceedings, because the promise to substitute digital for VCR ports in the courtrooms was not kept. Instead, a machine was made available to make copies in the Clerk's office. But it is not possible (as the Bar was told would be the case), to leave a hearing and pick up a copy on the way out of the building. The digital copies are not available until at least the next day – and only on court-provided memory sticks at a cost of $5.00 per hearing (or on a CD at the jaw-dropping cost of $25 per hearing) – after standing in a long and slow-moving line (this is addressed further below), taking a number, and filling out a request form.

In other words, getting copies of court hearings now takes longer, consumes more effort, and costs more than it did ten years ago. This is not "progress," even if the current process makes it easier for the court clerks (who no longer have to handle videotapes) and ensures the County a few more dollars from every attorney trying to do a competent job. When it was suggested at a Bench/Bar

meeting on the subject that every technological advance should be implemented to make the process easier and cheaper ***for the public***, the court administrators present reacted as if that concept had never occurred to them.

What should be done: Within the next 12 months, either one-way digital image writers (so that no one can access the system) should be installed in the courtrooms, or the court automation contractors should be charged with implementing "push" technology so that the Bar Number of each lawyer appearing would receive by e-mail the digital copy of the hearing, right after it was completed. In the alternative, lawyers should be able to download the video record of their hearings from Odyssey.

Either of those processes would actually save the Bar and public money, and lead to faster production of orders. Of course, as detailed in legal note # 20 (archived at http://www.willicklawgroup.com/newsletters), court staff ***should*** be preparing orders directly, at a far greater savings of time and money to the Bar and public; implementing that change would eliminate much of the cost and hassle discussed here.

III. SPECIFIC EXAMPLE: E-FILING – COSTS AND SPEED

The Bar was told that the push for paperless systems would make the court system more efficient. But the system as implemented has made it ***harder*** – and more expensive – for everyone actually trying to use the courts.

In prior practice, there was often a line at the Clerk's office to file documents; intermittently, there was an "attorney's window" for slightly faster service for those billing clients on the clock. Once one got to the front of the line, the documents were handled, file-stamped, conformed, and one walked away with a file-stamped order.

In concept, the process of e-filing was to eliminate the step of turning paper documents into electronic documents – with no scanning and indexing, the idea was that the now-electronic documents could be manipulated, routed, and made available instantly with less manpower, lower costs, and greater efficiency.

The court has indeed axed about 20-25 clerk's positions; the new system has allowed the County to stop paying a bunch of salaries. Chief Judge Ritchie's recap printed in the May, 2010 Communique noted some "growing pains" but concluded that they were largely resolved and would "improve court management and delivery of justice to our community."

But the costs to the public? The attorney's line has been eliminated. The process has become so much slower that they have installed a "call-the-next-number" system much like the DMV. Waits are longer – ***much*** longer – than they ever have been. How much longer? Suffice it to say that the County has installed several rows of seats throughout the lobby for those unable to stand long enough to get to the front.

Meanwhile, attorneys are not receiving file-stamped documents for days – or weeks – after they are

filed, snarling the entire litigation process. It often takes more than a week even to get a case number assigned for a newly-filed case. Recently, the Clerk's office took ***three weeks*** to process a default judgment and get a copy back to us.

And to use this slower and more aggravating service, the County charges money – lots of money. Attorneys must pay $90 per month for ***access*** to the Wiznet electronic file service. Plus $6 ***for every document*** filed ($10 for filing plus "service," meaning a zero-cost [to them] electronic copy being sent to the other side). That's $6 for every motion, affidavit, order, notice of entry of order, etc., etc. In a typical medium-size divorce case, there are dozens to hundreds of documents filed. So every divorce case now costs every single litigant some $1,000 more to complete than it did two years ago.

Somehow, in Washoe County, they installed a substantively-similar e-filing system at the cost of ***one*** dollar per document. The request for an explanation of the six-to-one disparity at the Ely conference was met with silence.

The response from the court will probably be "But you can e-file for free from the court kiosk!" Making the Hobson's choice handed to counsel either to pay $6 for every document, or stand in line consuming much ***more*** money to avoid it. Or (as this and other firms have chosen to do) pay someone else to do so. On top of the runner's costs we already had, we are paying about $12 a day just to get documents ***filed***. It would be financially irresponsible for attorneys to stand in that line, on the clock, rather than paying someone else to do it for them.

And where is all the money collected by the County for e-filing going? My inquiries were met with some variety of "I'm not sure" and "I'm not authorized to discuss it." Why the economics of e-filing are being treated as a State Secret are unclear. But apparently, the bulk of funds are being funneled to the coffers of an out-of-state automation company. Presumably, the County is keeping the rest.

Attorney Elizabeth A. Sadowski of Texas, decrying a similar set of developments there, wrote:

> When the county makes it mandatory, it in effect sets up a toll booth at the courthouse door. E-filing programs are optional until the county/court gets greedy and decides to make it the only way to file. Don't be fooled by the excuse that it's done to save on salaries for court workers; it's done to increase the coffers of the counties and their mini-me's, the courts. They make a lot more on filing fees than they save on salaries. Our county invested $97,000 for the program's interface and has taken in $142,000 in e-filing revenues in one year.

How big a deal is this? It depends on one's perspective. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the U.S. Supreme Court ruled that a state statute that required the payment of court fees and costs for service of process as a condition precedent to access to the courts denied due process of law to an indigent person seeking a divorce. The Court confined its ruling to the facts of that case: "we do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual."

The bottom line in Clark County is that litigation is slower, less efficient, and much more expensive for those accessing the courts than it used to be. But the court bureaucracy is saving some salaries. This is not "progress," either, and the Catch-22 of ridiculously-long waits in line versus high per-document fees to avoid those lines is creeping toward constitutional concerns.

What should be done: Within the next 90 days, the Court should assign a person or persons to compare the costs of actually litigating a case, from the ***consumer's*** point of view, before and after e-filing was instituted, and put into place a series of steps to – at ***minimum*** – reduce the cost of actual access to the courts to what it was ***before*** e-filing, to be accomplished within the next 12 months.

IV. CONCLUSIONS

ALL changes in court procedures, systems, staffing, and processes should be designed and implemented to make the litigation process faster, cheaper, and easier for attorneys and litigants – or they should not be implemented at all. There is no legitimate excuse for "improvements" that result in higher costs, slower processes, and increased problems.

In large part, what is necessary is a reorientation on the part of those giving directions – and that means the judges – toward looking out for the welfare of the general public, and attorneys accessing the courts, ***before*** looking at how to improve their budgets or make their staffs have to perform fewer functions. That is the minimum we have a right to expect from those giving directions, making decisions, and receiving public salaries.

A good start would be ameliorating – or undoing – the economic and time-wasting damage done by the video and e-filing initiatives detailed above, and making doing so a top priority ahead of whatever else might be on the list of things to "improve."

V. QUOTE OF THE ISSUE

"I believe in getting into hot water; it keeps you clean."
– G.K. Chesterton (1874-1936)

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.