

LIFE AS A WIRED JUDGE: REFLECTIONS ON THE USE OF TECHNOLOGY BY COURTS

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With the use of technology on the rise, what should a judge do who wants to be part of the brave new world but also preserve the dignity of the court? This article examines the thoughts of a judge about embracing technology. The focus is not on technology specifications or standards but on using technology as a tool to do the job as a judge better or at least faster. The article discusses various technologies available to a judge, such as e-mail, digital recording, videoconferencing, and e-filing, in terms of both their beneficial use and their potential impact on how a court does business. The article also examines the use of an oversight commission on technology for a state and its importance in establishing policy for the use of technology in the courts. The key focus of the article is to embrace technology and then manage and use the technology intelligently.

I have heard it said that if a time traveler were to come forward from the sixteenth century, there are only two places that he or she would find comfortable and familiar—the church and the courtroom. But a lot has changed in courtrooms over the last decade, and we now have scenarios where the wired judge, the judge of the future, is quite literally a robot—a judge of nothing but wires. There are computer programs being developed where facts and law can be fed into a machine and results generated. But many judges continue to practice their craft as judges have for hundreds of years. The reality is that most of us find ourselves somewhere along this continuum. Raised on precedent and preserving the dignity of the law but inundated with technological possibilities, we are trying to find the right balance to take advantage of the new world. But many questions remain. Will someone still respect the judge and the court's decisions if they never even see the inside of a courtroom? Can we truly understand a brief if we have only read it off of a computer screen? How do we know the signature on the fax is real? What if someone can look at our court record online without us knowing it? Many of the questions are no longer if, but when. New judges coming on the bench attended law school with a laptop in hand and never ever spent hours in a library checking every red Shepherd's book. Change is here and the technology is advancing rapidly.

EMBRACING A "WIRED" LIFE

I like to think of myself as a judge who has embraced technology. I have been a member of the Arizona Supreme Court's Commission on Technology since its inception in 1990, including serving as its chair from 1997 to 2000 (www.supreme.state.az.us/cot/). My court is now developing the Court Management System that will be used as the template for all the limited jurisdiction courts in Arizona. We were chosen because of

our long history of commitment to technology and because of the outstanding functionality of the current system that we developed, even though its underlying technology is on its way to being outdated. I was the first judge in my previous court to have a desktop computer, the first to use e-mail, and the first to access the Internet. I started traveling with a laptop computer long before you had to take it out of the case at security—in fact, I don't think we even had security checks. I share my bedroom with a fax machine so that I can receive search warrants in the dark hours of the night. And, naturally, I had to have the first Blackberry so that I never, ever would be out of touch.

REFLECTIONS ON HOW “WIRES” AFFECT JUDGING

Often, technology articles focus on presentation hardware and software for use in the courtroom. There are numerous articles that will tell you about the latest possibilities in remote communications, whether it is simple, such as the motion argument by conference call, or more complex, such as the live video testimony of a witness, most often an expert, who is in a different location. And, of course, the groundswell of e-filing and integrating those records into a case management system is a topic of discussion throughout the country. There are many technical articles that can give you the latest and greatest options and arguments for or against these various options. I would rather have you pause and think about how these various technologies affect you if you are going to be a “wired” judge. Remember technology is a tool, not an end in itself. It should give us the ability to do our same job, only better or at least faster. Our job is still managing and adjudicating cases. You should not lose track of the fact that it is still the same issues being presented whether in a simple oral argument or via a glitzy PowerPoint. The same objections can be made; the same rules of evidence apply. I would urge you to reflect on what this technology means for how we function in our judicial roles.

Let's take e-mail, for example. Because my jurisdiction publishes the e-mail addresses of all executive employees (and they would not be that hard to find anyhow) anyone can e-mail me directly at anytime. But our judicial code of conduct prohibits ex parte contact with parties or attorneys except for administrative matters. While attorneys respect this in terms of e-mail, pro se defendants often do not. This means not only receiving material directed exclusively to you but also facing the possibility of seeing material that is forbidden. One must be very conscientious in sharing all of this communication with any parties not originally included in the e-mail. Concurrently, just as you do not want the parties to have inappropriate contact with you, you must not take advantage of technology to have inappropriate access to information. This is the age when Google has become a verb and the ease of doing an independent investigation of any alleged piece of information is just a keystroke away. But just because you are at your desk and not out investigating at the scene does not change the long-accepted standard that a judge should not independently investigate the facts of a case.

Since for the last almost twelve years I have sat as the presiding judge, e-mail access means that complaints about the court, the judges, the staff, the conditions of the restrooms, you name it, are easily directed to me as well. And, of course, with the ease of the cc button these e-mails are often copied to the world starting with our governor, my mayor and council, and the press. I suppose the good news is that it also provides a quick and easy means for the response to be shared with all of these individuals as well. The cautionary note: remember your responses can just as easily be forwarded and shared. You may find your philosophy of openness and accountability being severely tested. Consider whether you want to use secure, encrypted e-mail if you are going to be communicating sensitive or confidential information via e-mail.

One more twist has been recently added. Now my voice mail automatically becomes an e-mail that I can access as a written document from either my desktop computer or my Blackberry. (Conversely, I can also call my voice mail and have my e-mails “read” to me.) Suddenly, what was an easily deleted and thus virtually nonexistent or discoverable message is now a part of the written records on our server. Callers must now be advised that any message they leave will be part of the public record.

One interesting tool I now have available to me is the result of our digital-recording program, CourtChat. We primarily use this to record all of our courtroom proceedings. However, as I noted earlier, I am also the presiding judge, so complaints about the judges and hearing officers in my court are directed to me. Almost always it is directed at some event in the courtroom. As I carry a calendar of my own, I do not spend my time sitting in the courtroom observing my colleagues—and even if I did the chances are I would never observe the referred-to event. In fact, I think it is safe to speculate that many alleged behaviors would never occur if I was sitting in the back of the courtroom at the time. With this program, I can simply call up the date, time, and courtroom on my own computer and in seconds I am listening to the event as it took place. One could argue that I am the new “Big Brother.” You may feel that this is inappropriate eavesdropping. However, the immediacy and accuracy of this allows me to be very responsive to concerns that have been raised. Again, these are philosophical considerations brought to a head by technological capabilities.

Having all of the case records online can certainly make it convenient to access case information without pulling paper files. But you must become comfortable with reading information on the screen. Printing everything to read it is hardly efficient. Paperless records of the case also have given us the ability to reconstruct an individual case when a file is lost. On at least one occasion it was much to the surprise of a defendant whom we suspected had stolen the file from the courtroom. Although not able to be proven, this disappearance did not have its desired effect of having the case also disappear. It is not a perfect record, but you must be willing to accept this as the record. While fortunately so far we have only had to apply this to individual files, it does also give us the ability to recover from a much larger disaster since we could literally reproduce every case in our system.

Don't be intimidated into thinking that technology is just for the rich and famous. Technology tools are not just tools for the big, complex cases. In fact, they may be even more valuable in smaller cases. Petitions for orders of protection, as well as small-claims and landlord-tenant cases, can be filed online. This increases efficiencies, provides customer service, and requires fewer court staff for processing. There are many, many more of these cases than the big cases, and the use of technology will have the most impact here. Why not use the telephone or video conferencing more frequently for meetings, depositions, and court appearances? Why not also consider the use of technology for all testimony of experts from their medical offices or hospitals or other places of work?

It is important to remember that if a court is going to encourage the use of technology, it should not impose counterproductive requirements. If electronic filing is permitted, you should not also require that a paper copy be filed. Even something as simple as a fax can result in unnecessary duplication. We do not want a follow-up hard copy of a faxed motion to continue. It has already been ruled on, and a hard copy just means another pulling of the file. The level of service offered in this era of technology must exceed the service offered in the paper world. That is why the use of technology sells itself, and we embrace it and use it more and more. Your goal should be to eliminate, not duplicate.

THE "WIRED" JUDGE OF THE FUTURE

In considering your philosophy about technology I would encourage you to have your state establish an oversight commission such as our Commission on Technology. Interestingly enough, when we started out in 1990 way too much time was spent focusing on standards for individual computers and word processors; standards that became very quickly outdated. We realized that we needed to broaden our perspective and look at the real policy questions behind automation decisions. For example, Arizona, no doubt like many other states, has had to deal with the wide variety of volume in our courts from very heavily populated urban areas with multijudge courts to very remote, sparsely populated rural areas with one-judge courts. Was there really going to be one system that would work in all of these courts? Our limited jurisdiction courts deal with very different types of cases and issues from our general jurisdiction courts. Would one system work for both levels of court? Funding is shared by the state, the counties, and the municipalities. Who was going to be responsible for funding a statewide system? Clearly we could not spend our time deciding what speed the processors should be. The issues had become much broader and were critical to the effective functioning of the entire court system. Several years into the process a change was finally made in the make-up and mission of the group in recognition of the need to focus on policies for the development and use of automation. In fact, our commission itself has become essentially a policy-making body with members from all parts of the court system, as well as legislative appointments and public members. We direct the strategic information technology plan as well as the funding for statewide

technology projects. We have advisory councils to advise us. One focuses on the technical aspects of a particular proposed project or standard (a home for all those techies), and another advises us about the impact of proposals on the court processes. Thus, when we make those policy decisions, we are confident that they will actually be capable of being implemented—and that it will be a good thing for the courts when they are!

Technology and the changes it brings are here to stay. But it is not an end in itself; it must be a solution or provide help, or it does not need to be used. The key is to embrace technology, and then manage and use the technology intelligently. Enjoy your new capabilities—but also remember to turn that Blackberry off once in a while! **jsj**