

STATUS REPORT:

ELECTRONIC FILING IN THE FEDERAL COURTS: 2004

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A well deserved drum roll please! Without any fanfare, the Administrative Office of the U.S. Courts is quietly changing the way federal courts do business, court by court. When the AO first announced that it would have its case management/electronic case filing system (CM/ECF) operational in all federal courts by 2005, the pronouncement was greeted skeptically. After all, state e-filing projects were bogged down, the economy wasn't cooperating, and the whole project seemed extraordinarily massive. This is now the third report the authors have compiled on the status of electronic filing in the federal courts, and it looks as though next year's report will announce the completion of the AO's mission, on time and on budget.

Here are the very impressive statistics: As of June 2004, CM/ECF was fully operational in 123 courts, including 75 bankruptcy courts and 48 district courts. Another 16 bankruptcy courts and 29 district courts are in the process of rolling out the system. CM/ECF is rolled out in waves, with nine courts being rolled out every two months. Remarkably, the timeline adopted at the initiation of this project in 1995 has remained largely in place. Also, remarkably, the cost of instituting the system has dropped, to about \$50,000 per court, while the speed of the system has more than doubled. This is partly due to reduced equipment cost and the conversion to a Linux operating system.

Gary Bockweg, the AO's Project Director for CM/ECF, reports that the AO has encountered only one significant delay, with respect to electronic filing in the appellate courts. Because the appellate court functionality differs greatly from district court functionality, the appellate courts defined substantially different requirements for their case management system. Rather than merely modifying existing district court software, as had been planned, the developers had to create a wholly new system for the appellate courts. It is also true that the appellate courts have not shown the depth of interest in electronic filing manifested by the bankruptcy and district courts. This may have to do with the fact that appellate courts tend to be more traditional or that due to the differences in their processes, appellate courts may not expect the same benefits that the district and bankruptcy courts are seeing.

The e-filing statistics for May 2004 are really striking. Some fourteen million cases were being handled by the CM/ECF system. A total of 88,000 attorneys were using the system, and 127,000 new cases were opened. Some 3,300,000 docket entries were made in May. On a humorous note, in this increasingly complex world, the AO found itself tagged by blacklists as a spammer when it sent out thousands of copies of the same e-mail notification in the Enron case. The AO spent some time trying to unravel the mess. But as is clearly evident from the stats, this is a well-oiled machine in constant use.

As the economy floundered, the federal courts continued to have funding available for their CM/ECF implementation through revenue generated by the judiciary's "PACER" (Public Access to Court Electronic Records) program, which generated approximately \$27,000,000 in revenue last year. Where does all the money come from? Many people are surprised to find that court data is invaluable to many industries, including credit card companies, banks, realtors, marketing companies – the list goes on and on. While there are no added fees for those filing electronically or receiving their one free access to any new filing in their own case, the court information is also made available electronically to the public for a fee of seven cents per page. Understandably, the AO is pro-PACER and its revenue generation. This may well stir a privacy concern for those whose data is being sold, but at the moment, the public seems largely unaware that court data has become electronic gold. As Bockweg noted cheerfully, "We are pleased to have access to this money. Congress has authorized the judiciary to assess reasonable user fees for its electronic public access program, and this has enabled us to keep the service going." In fact, much of this data gathering is automated, and has become so intense that it has occasionally threatened to bog the system down. In response, the AO has asked some of the most active data gatherers to adjust their procedures so that the activity is done at night, when normal system access is low. It remains to be seen whether privacy advocates will cry "foul" at this source of revenue.

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Some elements of the federal e-filing system remain unchanged. The AO's philosophy has been to make e-filing permissive rather than mandatory. While that once seemed worrisome, and skeptics fretted that participation would lag, this train is now moving so fast that everyone seems eager to jump on board.

Just as reported in previous installments, the AO is struggling mightily to stay current with the latest web browsers and doing a credible job, lagging only slightly behind the most up-to-date versions.

As also reported previously, the AO is playing a waiting game with XML and continuing to monitor its progress elsewhere. One element of the CM/ECF system that surprises some observers is that it still uses a user ID and password rather than digital signatures. As Bockweb notes, this simple system has been working just fine and has not thus far presented any security issues. Though he expects digital signatures to be adopted at some point in the future, there are no immediate plans for their adoption.

One major change is that electronic commerce has now been melded with the system, and more and more courts are permitting fees to be paid online.

The universality of the system seems to appeal to all the courts using it, so fairly minimal use has been made of their ability to modify the code. More frequently, courts have supplemented the core code with their own set of local instructions, news, and procedures. If the core code is touched, the court modifying it is also responsible for handling the replication and maintenance of the code in the event of a disaster recovery event.

The “Public Access v. Privacy Rights” debate continues and Bockweb notes wryly that the AO is prepared to “shift with the winds” as dictated by the changing methodologies of balancing both rights. In 2001, the Judicial Conference issues its rules in civil cases, requiring that “personal data identifiers” such as Social Security numbers, dates of birth, financial account numbers and names of minor children be modified or partially redacted. Social Security cases were excluded from the system entirely. At that time, criminal cases were also generally excluded, but that has now changed.

Public Access to Electronic Criminal Case Files

In March, 2002, the Judicial Conference approved the establishment of a pilot project that would allow 11 courts, ten district courts and one court of appeals, to provide remote electronic access to criminal case files. A study of these courts conducted by the Federal Judicial Center did not find any instances of harm due to remote access to criminal documents.

After further study and deliberation, the Judicial Conference adopted new policies with respect to remote access to criminal case files in September of 2003. In general, the policy states that documents which can be access at the courthouse should be accessible remotely. There are some restrictions. The policy states in part:

Upon the effective date of any change in policy regarding remote public access to electronic criminal case file documents, it is required that personal data identifiers be redacted by the filer of the document, whether document is filed electronically or in paper, as follows:

1. Social Security numbers to the last four digits;
2. Financial account numbers to the last four digits;
3. Names of minor children to the initials;
4. Dates of birth to the year; and
5. Home addresses to city and state.

The following documents are not to be included in the public case file and are not made available at the courthouse or via remote electronic access:

1. Unexecuted summonses or warrants of any kind;
2. Pretrial bail or presentence investigation reports;
3. Statements of reasons in the judgment of conviction;
4. Juvenile records;
5. Documents containing identifying information about jurors or potential jurors;
6. Financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
7. Ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
8. Sealed documents.

Courts maintain the discretion to seal any document or case file *sua sponte*.

Security remains a constant concern, exacerbated by the injection of terrorist activities as part of the daily culture. The AO works with the Department of Homeland Security and the National Security Agency to secure court records, and thus far, as been very successful. The federal system utilizes a “dirty” server accessible to the public with the court’s data residing on a “clean” server protected by a firewall. Thus far, the system has foiled hundreds of thousands of “rattlings at the doorknob” though the AO is anything but complacent. As part of the national infrastructure, court records are potentially a valuable target for terrorists and the AO remains alert to the ever-morphing potential security vulnerabilities. Currently, court databases are replicated in Virginia and Missouri, and further replications are anticipated. It may actually be safer to have data for the Eastern part of the U.S. replicated in the West, and vice versa, a concept that is presently being studied. With current software, only a single replication is possible, but that software will shortly be replaced and multiple replications will then be possible, thereby further reducing security risks.

At one point, the Western District of Kentucky helped test the system by losing their outside server, and then activating the replicated data server. Their system failure resulted in a test of the AO’s “failback” procedures, which raised concerns about the methodology used to return to a normal production environment following a failover. The AO continues to work to make such transitions as smooth as possible. The AO has also allowed controlled “white hacking,” in which security specialists attempted to hack into

the CM/ECF system. While the results mandated some minor fixes, the AO breathed a happy sigh of relief when the experts were unable to effect any major intrusions.

Asked to sum up the general reaction, Bockweb notes happily, “It is rare to hear anything negative. Most courts seem to really enjoy the benefits and those who have already implemented are looking forward to getting more and more ‘nice to have’ features.” Some states, stymied in their own e-filing efforts, have asked the AO for its CM/ECF system, but Bockweb notes that the AO can’t afford to devote staff resources to working with the states. Also, because the system hasn’t been packaged as an “off the shelf” system, it would be very hard for anyone else to bring it up state by state, or court by court, in accordance with local needs. Still, the AO is looking at the issues to see if it can ultimately assist the states. In the meantime, the “little engine that could” keeps chugging along, and it looks very much as though it will make it to the station on time.

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