

Selling Out the Data in the Judicial System – a Shameful Legacy

by

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What is it about the judicial system that they are intent on leaving a legacy of precluding access or selling the public judicial data they create? First, we see it with their judicial opinions where the only way to access them is through a proprietary citation system that the judicial system is reluctant to change. Now we see it through the wholesale selling of court docket data and we probably will see it again with the electronic filing of documents. The issue boils down to whether the judicial branch is willing to do more than pay lip service to the concept of affordable access to the justice system.

If a person does not have access to the justice system in a timely, affordable and efficient manner is that a threat to our society? Does it affect the resolution of disputes if there are high legal research costs, high court docket access fees, long trial delays, high filing fees and complex pleading requirements? Don't we in fact threaten equal justice under the law if we do not have equal access to the law? There are constant reminders that justice is not equally nor timely accessible to all. In fact "about half of all low- and moderate- income families in America have a legal need . . . but never turn to the justice system . . ." "A Shunned Justice System, ABA Journal, April 1994

One in a Lifetime Opportunity – Using Technology to Increase Access to the Justice System

Just think about it! The justice system requires up to date and accurate access to legal and non-legal public information in order for the system to be accessible and used by judges, lawyers and citizens. Whether a lawyer is preparing corporate papers, a judge is deciding a domestic relations case or a citizen is filing a small claims case one continually uses caselaw, statutes, regulations, court information and other types of public data. Access to this public information is from legal publishers, courts, government agencies and others who distribute the information.

The public information one uses is obtained by purchasing books and newspapers, placing telephone calls, person to person meetings, and more recently by accessing the information over the Internet in an *electronic digital format*. Now for the first time, with the aid of the Internet, anyone anywhere in the world can instantly access the electronic "digital" court information, *if permitted by the public provider of the digital information*.

What is an electronic digital format? If government agency personnel use a word processor to type in data such as statutes, regulations, case opinions, dockets or other court information then the public information is in an electronic digital format. Electronic digital information can include text, sound, graphics and video. Once in this digital format the information can be duplicated, copied, searched, accessed and placed on the Internet for a minimal cost and accessed from anywhere in the world. There is no need to print, bind and distribute information in a printed format since the information is available electronically. This availability of information in a digital format overshadows the invention of the 15th century printing press that changed public access to printed material or even to the copier that provided the capability to rapidly copy printed material. Now for the first time, with the aid of the Internet, anyone anywhere in the world can instantly access the 'digital' word for a minimal cost if permitted by the public provider of the digital information.

The Internet has minimized the underlying telecommunication charges to access information on computers. The Internet enables users to share and access legal and other information using a computer, modem, software (freeware or low cost software) and an Internet access provider (ISP). Prior to the Internet the underlying communication charges and non-uniform communication software and protocols discouraged widespread use. Now with Netscape and other Internet standard software access to web pages, file transfer, databases and other data is commonplace.

Today we have the technological capability to access public data, anytime, anywhere for no cost or at a very low cost. Accessing judicial information and processes in electronic digital format opens a wider door to the justice system for citizens but only if we lay a proper foundation in our electronic world. The foundation has already been laid, thanks to the Internet, for a low cost means to access the public data – however the courts are intent on charging for this access to the public’s data.

Court Revenue Producer

Some governmental bodies are treating electronic access to public data as a revenue producer. For example in 1994 the judicial conference of the United States provided for a fee of up to \$.60 per minute, down from \$1.00, for access to the dockets of federal cases that has resulted in millions of dollars of net revenue since the cost of providing this information over the Internet is minimal.

Take for example, the scenario of charging \$1.00 per minute for a court docket system and an average user stays on the line for 14 minutes.

Court Revenue Produced			
# of users per day	100	200	500
# of users per year(200 days)	20,000	40,000	100,000
Access Charge per call - \$1.00 per minute for an average of 14 minutes.	\$14.00	\$14.00	\$14.00
Yearly Revenue	\$280,000	\$560,000	\$1,400,000

These are minimum revenue projections for a limited number of users. One can easily see why the court system is so anxious to sell their critical justice data.

The issue is whether users should be charged by public agencies to access public data that the agencies collect in their official capacities even if there is only a minimal cost to provide this digital public information to the users. One of the easy explanations is that the legislature does not give the courts enough money to run their operation and therefore they have to charge user fees or, in effect, taxes.

Taxes are paid to government agencies to provide the facilities, communication structure and other resources in order to serve the public. When a citizen telephones the clerk’s office to check on the status of a child support payment or court case the clerk’s office does not charge a “user telephone fee” for this service. When a citizen walks into the clerk’s office to ask a question of a clerk about a child support payment or about a court case the citizen is not charged a “user walk in fee”. These services are provided by the annual budget of the agency. Then why is the citizen being charged to access this same information using a computer electronically over a telephone line? Doesn’t it seem logical that free access through the Internet would reduce the number of telephone calls and walk-in traffic requiring a clerk’s time and therefore would reduce the clerk’s expenses? Then why are per minute charges being pursued or implemented by the courts?

The huge revenue payoff for sellers of public data is driving this disturbing trend.

Some public agencies argue that in order to provide access to the electronic data that a technology infrastructure must be provided and that this hardware, software and communications structure cost money so the users should pay for the additional service. Before discussing this infrastructure cost did the same agency charge a user fee when telephones were first introduced or when they opened an office for walk-in traffic? No, access through the Internet is merely another way to access the same data that was once on paper. Excellent articles on this subject can be reviewed in the following publications. Henry H. Perritt, Jr. Should Local Governments Sell Local Spatial Databases Though State Monopolies?, 35 JURIMETRICS J. 449-469 1995; Anne Wells Branscomb, Lessons From the Past: Legal and Medical Databases, 35 JURIMETRICS J. 417-448.

A Model Court Example - Accessing Court Digital Information through the Internet

Some in the legal profession have recognized this threat to accessing the justice system and have stepped forward and implemented significant reforms including free access to court docket information. In an unprecedented move the Maricopa County Superior Court in Arizona is providing free Internet access to its over 30,000,000 record court docket.

The docket contains the docket entries on all cases from 1987 forward. The easy to use interface allows you to locate a case by case number or by the name of one of the parties. The case history provides information from the court docket as to when the case was filed, actions taken in the case, judge assigned, hearing dates scheduled, etc. Of special use for attorneys is a compilation of all cases of a particular attorney providing hearing dates and times for a specified period of time – 30, 60, 90 or 120 days. You simply enter your name, bar number and password and a list of cases and hearing dates appears on the screen.

In a time when public servants are often criticized for lack of initiative, innovation or low cost solutions to problems, the Maricopa County Superior Court and in particular Judge Robert Myers, Gordan Griller, Marcus Reinskeymeyer, Michael O'Hara and his band of programmers, should stand up and take a bow. For approximately \$10,000 Michael O'Hara and his programmers, using Java, connected a legacy mainframe computer to the Internet. Now anyone in the world who has access to the Internet can access the database. Visit the site at www.maricopa.gov/supcrt/supcrt.html for a link to the court docket database.

Opposition to Confiscatory Taxes - User Fees

In response to the disturbing trend of charging users the American Bar Association House of Delegates, approved the following resolution at its August, 1995 annual meeting,

BE IT RESOLVED, that the American Bar Association urges federal, state and local courts to provide computer on-line access to court and docket information to members of the profession and to the general public *at no direct cost to the user*.
(Emphasis added).

All courts are not in favor of charging users for access to their docket databases. Even though in 1994 the federal judicial conference of the United States provided for a fee for access to the dockets of federal cases all of the circuits did not impose the per minute charges.

On January 3, 1995 by Administrative Order the Seventh Circuit Court of Appeals recognized the value to the judiciary of providing access to their court data and the confiscatory nature of user fees by mandating free access to court data. Materials available include the court's open dockets, closed dockets, slip opinions since 1990, the Federal and Circuit Rules, the Practitioner's handbook and special announcements including job vacancies.

The court concluded that if the attorneys have to pay for access they will revert to calling or appearing in person for free information and that the user fee for this “previously free public information amounts to a confiscatory tax on public information.” Other issues such as staffing a new billing system, the need to manually assist the infrequent users of the system and the recent inquiry by the Antitrust Division of the Justice Department at the barriers to entry into the computer-assisted legal research market also factored into their decision.

Los Angeles’s decision to sell its computerized civil case records to private firms for 1.8 million dollars resulted in a lawsuit by the Los Angeles Times and the American Civil Liberties Union of Southern California. ABA Journal, January 1996, Pg. 30. The plaintiffs are arguing that the deal “restricts the paper’s First Amendment access to court records, is an illegal tax on the companies and violates state statutes restricting the ways counties may sell services and computerized data

Cost of Accessing Court data and Judicial Decisions

Some public agencies argue that in order to provide access to the electronic data that a technology infrastructure must be provided and that this hardware, software and communications structure cost money so the users should pay for the additional service. Just as a user pays for copying charges for a paper copy of accessible public documents users should pay electronic charges for copies of digital data. But, what are the costs of providing information to the public in an electronic format?

There are four primary areas of costs:

1. Data entry into the computer. A court or agency in the normal course of business does this. It is a task that is done for an agency’s own internal needs not for electronic users. For example, when a civil case is filed in the clerk’s office an electronic docket of the pleadings will be started to enable the clerk and the court track the pleadings and orders issued by the court. This is usually done in a chronological fashion. Since the data is already in a digital format usually into a database there is no additional cost to enter the information into the computer.
2. Hardware and database software - the cost of hardware and storage capacity has plummeted in the last several years. The cost of processors and storage is minimal compared to the revenue generating capability of per minute on-line access charges.
3. Telecommunications costs - includes the cost of connecting to the Internet. This usually is a monthly fee of \$500 to \$1000. However, remember that the user through the Internet absorbs the cost of dialing into an agency’s computer. Again, the telecommunication charges are minimal compared to the revenue produced by charging for public data.
4. Maintenance and administration charges - on software, hardware and data are minimal once the system is set up.

It would seem that the time saved by a clerk answering the phone and interacting with citizens on a walk in basis would offset the infrastructure access cost from the court. Remember that the Maricopa County Superior Court went on-line for approximately \$10,000.

Conclusion:

In an in-depth study on accessing justice the American Bar Association wrote: The “agenda for justice” reflects three overriding principles:

First, any change to the justice system should be based on a desire to protect and enhance the ability of all persons to use the justice system

Second, reform should be directed to building a justice system that is more efficient and more effective for members of the public who use it, not just for lawyers, judges and others who work in that system.

Third, the justice system must ensure equal justice under law for all. - An Agenda for Justice: ABA Perspectives on Criminal and Civil Justice Issues, July, 1996.

The question is whether the technological revolution will increase access to justice and public information or just be used as an opportunity to increase user taxes? Who will ultimately pay for the charges? The citizen and client! This coming at a time when the citizens are revolting over the increased taxes imposed upon them. It is not a time to call something a "user fee" when it is a tax and then spend it in addition to the normal funding for an agency. Yes, we request that government operate more like a business, but does that mean to make a profit on top of the taxes that are already paid to the government agency? No, it means that the citizens want a government agency to use the latest technological advances to provide service to the public. The user, commercial or citizen, argues that the government agency is being supported annually to provide a service to the public and why should they charge for a service which tax dollars are already supporting.

Generally, the well-educated citizenry and well-heeled law firms and commercial users or resellers of the public data will access the data but the vast majority of citizens and lawyers will be priced out of the marketplace. It will preclude and discourage access by the citizens and members of the legal profession. The integration of technology will take a slow and painful route and other "advances" will be met with skepticism. The foot traffic in the clerk's office and courthouse will not decrease.

As James Madison in 1822 wrote:

"A popular government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Are we going to provide access to judicial information or leave the populace in ignorance and unavailable access to our judicial system? The judicial system has an opportunity to leave a legacy that provides increased universal access to the judicial system – lets not lose that opportunity.

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