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TECHNOLOGY AND THE WASHINGTON STATE ADMINISTRATIVE PROCESS—SOME PRELIMINARY NOTES

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I. INTRODUCTION

In today's world, government regulation and the provision of governmental services require a complex system of administrative agencies. The procedures these agencies follow—cumulatively called “the administrative process”—have been greatly affected by technology as the promise of faster, cheaper, and better ways of managing the process have become apparent. Obvious cost savings can accompany the introduction of technology, such as the massive savings in printing and mailing costs that are possible when material is made available online. Partly, the push for technology has been aided by the perception that the administrative process can be improved in efficiency, comprehensiveness, speed, and transparency. Finally, the expansion of technology in the administrative process is seen by some as enhancing public participation in government through wider and cheaper access to the governmental processes.

This brief report summarizes information obtained by a preliminary survey in the spring of 2003 of what some Washington state agencies are doing with technology. The agencies surveyed included the Utilities and Transportation Commission and the Departments of Ecology, Revenue, Social and Health Services, and Labor and Industries. To keep the subject within bounds—and within the central focus of the Access to Justice Technology Bill of Rights project—the survey inquired into the use of technology in those parts of the administrative process that are similar to legal process generally—i.e., those components of the administrative process through which binding general principles are formulated (rulemaking) and those processes by which individual disputes are resolved (adjudication, licensing, etc.). The survey did not

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consider the many other uses of technology in internal agency management, records control, benefit administration, etc.

A special concern of the survey was the impact of technology on public access to the process. Such impact can be both positive (increasing and broadening the ways members of the public can participate in the process) and negative (limiting the access of some to that process). If significant numbers of an agency's public are without full access to technology, great care must be taken in adopting new technology. We know from recent studies that while forty percent of low-income Washingtonians have Internet access, the percentage varies around the state from a high in southwestern Washington of fifty-five percent to a low in southeastern Washington of twenty percent. We also know that only about half of those surveyed have home access to the Internet.¹ Obviously, there are many for whom these concerns and issues are real.

Washington state agencies have been among the leaders nationally in the deployment of technology, and much has been done to expand public access to the process. A look at the web sites of the agencies surveyed will demonstrate how far we have come.² All of these sites (and those of many other Washington agencies) show that substantial effort has been expended to make access "user friendly." In Washington, steps have been taken to facilitate access to online material, including guidelines for making web pages accessible to those with physical and visual limitations.³ Examples of the success of this design include the Department of Revenue's quick online access to important publications;⁴ the Department of Social and Health Services' Rules and Policies Assistance Unit, which helps interested persons learn about rulemaking

1. WASH. STATE SUPREME COURT TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 51-53 (Sept. 2003), *available at* <http://www.courts.wa.gov/newsinfo/civillegalneeds%20093003.pdf>.

2. *See* Wash. State Dep't of Ecology (2003), *at* <http://www.ecy.wa.gov>; Wash. State Dep't of Labor & Indus. (2003), *at* <http://www.lni.wa.gov>; Wash. State Dep't of Licensing (2003), *at* <http://www.dol.wa.gov>; Wash. State Dep't of Revenue, *at* <http://dor.wa.gov> (last visited Dec. 3, 2003); Wash. State Dep't of Soc. & Health Servs., *at* <http://www.wa.gov/dshs> (last modified Nov. 18, 2003); Wash. Utils. & Transp. Comm'n, *at* <http://www.wute.wa.gov> (last visited Dec. 3, 2003).

3. *See* INTERACTIVE TECHS., WASH. STATE DEP'T OF INFO. SERVS. & AGING AND ADULT SERVS., WASH. STATE DEP'T OF SOC. & HEALTH SERVS., ACCESS WASHINGTON STYLEGUIDE FOR ACCESSIBILITY (2001) [hereinafter STYLEGUIDE], *available at* <http://www.wa.gov/dis/tools/awstyleguide/accessibility.htm>.

4. *See* Wash. State Dep't of Revenue, *Publications*, *at* http://dor.wa.gov/content/pubs/pubs_main.asp (last visited Dec. 3, 2003).

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and the means to participate in it;⁵ the Utilities and Transportation Commission's primer on agency rulemaking;⁶ the Department of Labor and Industries' Easy Access page that facilitates doing business online;⁷ and the Department of Ecology's capacity to translate its text into several foreign languages.⁸

Work is continuing daily and one hopes it will continue to emphasize simple, comprehensive, and inexpensive access by the public.

II. RULEMAKING

Rulemaking is an obvious place for the extensive use of information technology because of its dependence on widespread exchange of written material. When rulemaking material is put into electronic form, it is capable of almost instantaneous exchange to and from vast numbers of individuals and groups. Included in the written material that may accompany a major rulemaking effort are the internal studies and documents that shaped the proposed rule, the text of the proposed rule along with any explanatory information, rulemaking dockets, calendars and other information about the process, written comments on the draft by possibly thousands of interested persons, and the text of the final rule itself along with a statement of the agency's supporting reasons and its analysis of public comments on the rule. Where rules are made under procedures that allow hearings and personal appearance of interested parties, there are further opportunities to use information technology in creating and sharing hearing transcripts, and, of course, the hearing process itself may be affected by tele- and video-conferencing technology.

After rules are officially promulgated, agency web sites and e-mail communications can support enforcement and administration of the rules by speeding up access to the text of rules, to interpretive documents and guidelines, and to advisory information to those affected by the rule. Several agencies have taken the advent of the web page as an

5. See Wash. State Dep't of Soc. & Health Servs. Rules & Policies Assistance Unit, at <http://www.dshs.wa.gov/msa/rpau> (last modified Oct. 10, 2003).

6. See Wash. Utils. & Transp. Comm'n, *Rulemaking Process at the WUTC*, at <http://www.wutc.wa.gov/webdocs.nsf/2c13b4641c0061f288256680006640c0/b8725d230b5f07fc88256cc4007a9049!OpenDocument> (last modified Feb. 5, 2003).

7. See Wash. State Dep't of Labor & Indus., E-Access to L&I: Conducting Business over the Internet (2003), at <http://www.lni.wa.gov/home/access.htm>.

8. See Wash. State Dep't of Ecology (2003), at <http://www.ecy.wa.gov> (providing translations in Spanish, Chinese, Korean, Vietnamese, Hmong, and Russian).

opportunity to further efforts at plain language rule writing and user-friendly presentations. One especially good example is the safety and health rules published under the Washington Industrial Safety and Health Act⁹ by the Department of Labor and Industries.¹⁰ These user-tested texts and formats show what can be done when accessibility and usability are placed high on the rulemaking priority list. Incidentally, this study did not explore the role of the Code Reviser—the official keeper of rules format standards. One hopes that office is active in (or at least permissive of) these efforts to increase public access to rules.

The survey showed that virtually all of these rulemaking techniques are in use today by Washington state agencies. Some agencies are farther along than others, but all seem to be adapting the rulemaking process to new technology at a rapid rate and responding to targets of opportunity special to the agency and within available agency resources.

There seems to be no centralized direction to this process. The Department of Information Services is in general support of agency efforts but does not have the resources (or has not been given the mission) to be itself an aggressive force for expanding or unifying technology across the system. This bears watching, as will be noted in the final section.

The future will no doubt show more technology-based improvement in agency rulemaking.¹¹ A number of federal agencies are exploring further rulemaking enhancements, including electronic docket rooms in which all potential commentators—not just those with access to capitol-city paper docket rooms—can learn of the developing discussions about a proposed rule, including what other comments have been filed and sometimes an opportunity to modify one's own comments in light of other comments filed. Further, there have been calls for fully interactive web-based discussion forums on pending rules, which could greatly enrich the quality of the discussion and even explore areas of agreement,

9. WASH. REV. CODE §§ 49.17.010–.910 (2002).

10. See Wash. State Dep't of Labor & Indus., *Workplace Safety & Health Rules*, available at <http://www.lni.wa.gov/wisha/rules/default.htm> (last visited Dec. 3, 2003).

11. For a good review of rulemaking technologies likely to be available soon, see Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda* (Mar. 2002) (Harv. U., John F. Kennedy Sch. of Gov't, Ctr. for Bus. & Gov't, Regulatory Policy Program Working Paper RPP-2002-04), available at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf>. See also U.S. Nat'l Archives and Records Admin., Federal Register, Public Participation in Rulemaking (2003), at http://www.archives.gov/federal_register/public_participation/rulemaking_sites.html (listing current federal agency sites relating to what is coming to be called electronic rulemaking or e-rulemaking).

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compromise, and consensus.¹² Such improvements in discussion could also increase the sensitivity of judicial review of rules as judges can proceed with more certainty about how a rule will actually work in practice. And ex parte contacts, always a problem of perceived fairness in rulemaking, could be reported and opportunity for answering comment made available.¹³

III. ADJUDICATION

It is harder to generalize about adjudications because of the enormous variety of proceedings that falls within that classification—from the handful of highly complex, formal hearings an agency like the Washington Utilities and Transportation Commission may conduct in a year to the 40,000 relatively informal unemployment cases the Office of Administrative Hearings judges may conduct in that same time span.

All Washington state agencies make heavy use of technology for internal management of the adjudication process, including research and report writing. Especially in complex cases, the time and money savings can be substantial—as those involved in private litigation have discovered.

With respect to dealings with persons outside the agency, the picture is more complex. For the general public, e-mail is widely used to provide information concerning issues involving adjudicated cases. An agency's web site may include pleadings, testimony, and other non-confidential material generated by adjudications. Additionally, an agency site that makes available the text of decisions in significant prior cases, digests, and indices permits interested members of the public to discern more quickly the agency's adjudicating policies.

Of course, in on-the-record adjudications, not all contact with members of the public is proper. Forbidden ex parte communications from outside persons to adjudicating officers have been a problem in more than one agency, and systems should be in place to prevent its

12. Harvard University and Massachusetts Institute of Technology have established a discussion listserv to link researchers and professionals working on issues related to information technology and the rulemaking process. Harvard-MIT Data Ctr. Hosted Mailing List (2002), at <http://lists.hmdc.harvard.edu/?info=e-rulemaking-l>.

13. For a review of some rulemaking technology proposals, see generally Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421 (2002).

happening or to ensure that should it happen, the improper communication is promptly made public.¹⁴

With respect to parties in pending adjudications, the use of e-mail and the web will provide some opportunity to share information, briefs, pleadings, and other documents. However, for a variety of security, technical, and confidentiality reasons, there are limitations on the use of electronic transmissions for formal notices, official filings, and service. Even here, the agencies are working toward the day when most, if not all, of these official actions can be conducted electronically, and this seems an important area to emphasize.

As could have been expected, technology has affected the conduct of the hearing itself, probably more so than in the judicial realm. Beyond the increasingly common laptop computer at the bench and at counsel table, some hearings are supplemented by or conducted entirely through electronic media. Thus, formal hearings at agencies such as the Washington Utilities and Transportation Commission may be supplemented by teleconference, permitting some parties and some witnesses to participate from a distance. Additionally, thousands of the informal unemployment compensation appeals conducted by judges in the Office of Administrative Hearings are conducted entirely by telephone. In hearings where exchanges among the parties and witnesses are important, multi-party teleconference technology is being explored by some agencies.

The use of telephone and video hearings as substitutes for in-person proceedings is becoming as popular as it is controversial. The benefits can be enormous, saving agencies and parties considerable travel time and expense. At the same time, the “virtual” hearings have been criticized as limiting the ability of a hearing officer to control the hearing process (especially when there are numerous parties and witnesses), limiting the ability of parties and witnesses (especially those with little or no English language skills) to understand fully what is happening, and limiting the ability of the factfinder to determine witness veracity.

Incidentally, while video conferences would seem to be better replicas of in-person hearings than are teleconferences, parties and witnesses today seem clearly to prefer the telephone to video as the vehicle for electronic hearings. Agency officials surmise that compared to a video

14. *Cf.* WASH. REV. CODE § 34.05.455(5) (2002) (requiring presiding officer who receives ex parte communication to place such communication and responses made, along with other relevant information, on the record of the proceeding).

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camera, the telephone is a familiar and non-threatening instrument. The telephone also can be used in the convenience of the witness's home and, carrying no video information, it does not let personal appearance, dress, or environment become factors in the case. It may be that as video cameras become more common and less threatening, the video hearing will grow in popularity. But from talking to Washington state agencies today, there does not seem to be much enthusiasm for aggressive movement in that direction.

In a telephone hearing, does the physical absence of the witness affect the ability of the factfinder to determine the truth? According to the folklore of the legal profession—embodied in conventional rules of evidence such as the hearsay rule—the traditional answer has been “yes.” Actually seeing the witness has been thought a key element in determining veracity. And most experienced litigators have strong negative reactions to the virtual hearing. Cross examining an inert telephone receiver is just not the same, they assert.

But at least in relatively simple cases, many of Washington's agency hearing officers seem to be confident that they can judge veracity from telephonic testimony. These judges are, after all, trained factfinders, not common law juries. And they are usually specialists with considerable experience with the kinds of cases they are hearing. Further, it must be noted that the telephone does transmit information about the witness's tone, inflection, emphasis, and the like—considerably more information about the witness than is revealed by a written account or a third person's oral account of what a witness said, both of which might be rejected as hearsay in a jury trial. Finally, the telephone witness can be asked follow-up questions for clarification.

Of course, in relatively more complex hearings, in cases where critical testimony is conflicting, or in hearings where interpreters are necessary, electronic substitutes for the in-person hearing can still be troublesome. The Washington Administrative Procedure Act (WAPA)¹⁵ permits electronic hearings in the discretion of the presiding official but requires that no party be prejudiced thereby.¹⁶ The WAPA further requires that each party “have an opportunity to . . . hear, and, if technically and economically feasible, to see the entire proceeding”¹⁷ The policy reflected in the WAPA—which allows an electronic hearing over the

15. *Id.* §§ 34.05.410–494.

16. *Id.* § 34.05.449(3).

17. *Id.*

objection of the parties so long as the presiding official thinks it appropriate, and so long as no plausible showing of prejudice can be made—needs to be carefully reviewed as our experience grows. The time may come when allowing the electronic hearing only with the approval of the parties will state the safer policy.

Agency adjudicators can no doubt profit from other work going on under the general heading of online dispute resolution.¹⁸

IV. PERMITTING AND LICENSING

Daily, technology seems to be making the processes of getting permits and licenses more efficient. Washington state agencies now permit such things as online filing and payment of taxes, checking of contractor licensing and bonding, renewing contractor licenses, purchasing permits, handling some industrial insurance transactions, renewing car and boat tabs, and even taking a practice driver's license exam. Joint actions by related agencies are working toward common templates and master permitting systems.

V. COSTS AND BENEFITS OF THE NEW TECHNOLOGY

The benefits have been discussed earlier. They largely involve efficiencies (and lower costs) to the agency and conveniences to those affected in the form of simplicity and speed of access. To some, the benefits are even more than conveniences—not having to appear physically at a hearing may save expense and lost work time and also may be of special value to those with limited means or education.

Reported concerns and costs of implementing new technology (beyond hardware and software costs) involve questions of security and confidentiality, issues of document management, concerns about system failure and, of course, issues related to human adaptation (to screen rather than paper presentation, for example). The agencies are hard at work on security, management, and system reliability issues. How fast progress can be made on the human factors side is harder to predict. After all, both agency personnel and their clients or customers have long (and largely satisfactory) experience with paper technology that has not

18. See, e.g., Nova Forum, *The Electronic Courthouse* (2002), at <http://www.novaforum.com/main/index.html> (describing the so-called Electronic Courthouse for online dispute resolution process). See generally Eugene Clark & Arthur Hoyle, *On-Line Dispute Resolution: Present Realities and Future Prospects* (2002), at <http://www.leadr.com.au/HOYLE.PDF> (providing a general discussion of online dispute resolution).

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changed much since the days of Gutenberg, and this ballast may impede the rate of growth somewhat.

A special cost is borne by those without the equipment or the skills necessary to use the new technology. Government (especially the administrative process) deals with many “ordinary” people who may lack the ability, training, or equipment to permit full access to a system that is highly technologically oriented. Importantly, the number of agency clients and customers who do have access seems to be growing, though not in all cases by dramatic increments. Most of the agencies surveyed expressed concern about this problem. Some have affirmative public education programs such as the Environmental Hearings Office’s online handbook for pro se parties.¹⁹ Others judge that the vast majority of their clients or customers have access to the Internet, either by direct access or through public facilities such as library computers. The use of computers in public libraries, of course, presumes the affected persons have a library in some proximity and that they possess the skills necessary to communicate in this fashion. It seems that access is most likely when the party is a large business, less likely when the party is a very small business or individual, and especially unlikely when the party is an individual with limited means, education, or other limitations.

For those without access, agencies continue to make available (or to receive) paper documents, which can be delivered by mail or obtained through visits to agency offices. Washington state agencies report that they are generous with free copies of paper materials. What remains is the question about the degree to which paper filing puts a claimant, a commentator, or an applicant at some disadvantage in time, in completeness, or even in appearance. More generally, we now and then see reports of states abandoning paper distributions to the public in favor of electronic transmissions, usually as a cost saving move.²⁰ These kinds of developments need to be carefully watched.

19. STATE OF WASH. ENVTL. HEARINGS OFFICE, THE ENVIRONMENTAL HEARINGS OFFICE HANDBOOK: AN INTRODUCTION TO THE HEARING PROCESS, *available at* <http://www.eho.wa.gov/handbook.htm> (last visited Dec. 3, 2003).

20. *See, e.g.*, David A. Lieb, *For Spending-Slashing States, Less Paper and More Internet*, THE DAILY TIMES, July 28, 2003 (reporting on Missouri agency that has stopped distributing a catalog for seniors, leaving some noncomputer-savvy seniors without needed information), *at* <http://www.thedailytimes.com/sited/story/html/138656>.

VI. CONCLUDING OBSERVATIONS

Not everyone is a fan of pushing technology further into the administrative process. In rulemaking, especially, which has become so burdensome and slow as to earn the adjective “ossified,”²¹ adding still further process steps and further opportunities for broad public involvement needs careful evaluation. Large federal agencies sometimes receive hundreds of thousands of comments on a proposed rule, and overwhelming agencies with voluminous and duplicative public commentary would not seem in anyone’s interest. Still, it is difficult to argue against wide participation if participation itself is thought valuable in drafting sound rules. We really need better techniques for dealing with redundancy in commentary.

A theoretical concern is the claim that at some point, widespread public commentary on pending rules blurs the important distinction between direct and representative democracy.²² Of course, a lot depends on the discipline of agency officials (and on judges permitting officials to exercise that discipline). Wisdom cannot depend alone on a show of hands, and most rulemaking statutes permit agencies to make judgments that do not depend solely on quantitative expressions of the public’s preference. If agencies continue to seek the public interest in qualitative terms—and if judges permit them to do this—technology should not unduly impact our representative democracy.

Note that on the question of accessibility, the problem has two aspects: impediments resulting from conventional physical handicaps, such as limited vision, hearing, dexterity, etc.; and impediments arising from lack of equipment or skills. Both are serious problems. On the first, consultants in the states are beginning to design more easily accessible sites.²³ In Washington, steps have been taken to facilitate access to online material, including guidelines for web page design.²⁴ On the second, the question is: Is enough being done to ease access for those who are not handicapped in the conventional sense but who have limited ability to use technology because of inadequate equipment or skill?

21. Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997).

22. Cokie Roberts & Steven Roberts, *Internet Could Become a Threat to Representative Government*, SALT LAKE TRIB., Apr. 5, 1997, at A11, available at <http://www.tribaccess.com>.

23. See Shane Peterson, *An Inclusive Internet*, GOV’T TECH. MAG., Dec. 2002, available at <http://www.govtech.net/magazine/story.php?id=31394&issue=12:2002>.

24. See STYLEGUIDE, *supra* note 3.

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Finally, the absence of a central agency for promoting and designing technology for Washington state agencies has plusses and minuses. On the plus side, lack of central control leaves agencies free to experiment. It also allows them to adjust the rate of their own technological progress to their own needs and resources and to the preferences of their constituents. On the minus side, lack of a more centralized effort means unevenness in agency exploration of technology. Further—and this is very important for some members of the public—lack of central design control will surely mean a different look and feel for technology interfaces across the agencies; this may steepen the on-ramp to the technology highway for those unfamiliar with technology generally.

It is hoped that directly or as a model for adaptation and use, the state's administrative agencies will consider the Access to Justice Technology Bill of Rights as one set of principles and techniques for dealing with problems of the kind addressed here.

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