JSJ 27-3 9/28/06 11:19 AM Page 248

THE WASHINGTON STATE ACCESS TO JUSTICE TECHNOLOGY PRINCIPLES: A PERSPECTIVE FOR JUSTICE SYSTEM PROFESSIONALS

RICHARD ZORZA AND DONALD J HOROWITZ

This article, based in part on prior articles by the authors in Symposium: Technology, Values, and the Justice System (2004), discusses the need for, potential, development process, and early implementation stages of the Washington State Access to Justice Technology Principles, which were adopted by order of the Washington State Supreme Court and which now guide the use of technology in the Washington State justice system. The purpose of the Principles is to ensure that "[u]se of technology in the justice system . . . serve[s] to promote equal access to justice and to promote the opportunity for equal participation in the justice system for all." This article discusses the specifics of the Principles and their implications, the problems and issues that emerged during the drafting and adoption process, and the current state of implementation. The article is written with a particular focus on the needs and perspectives of justice system professionals and emphasizes the values of and need for cooperation and collaboration in the adoption and implementation process.

On December 3, 2004, the Washington State Supreme Court entered an order adopting the Washington State Access to Justice Principles (http://www.lawhelp.org/documents/273851English.pdf?stateabbrev=/WA/). The Principles were the product of more than three years of consultation, analysis, research, deliberation, and negotiation. They represent the first time that a written set of principles governing the relationship between technology use, development and innovation, and access to justice has been given judicial authority by a state's highest court.

This article discusses the history and substance of these Principles and discusses the value of the Access to Justice (ATJ) Technology Principles approach for justice system professionals (for other perspectives on the Principles, see Symposium, 2004). The Principles permit the balancing of competing demands from those who advocate open access to the courts with those who demand cost-effective administration. They provide an analytic structure and political consensus about the fundamental and applicable values regarding technology and courts to help guide decision making.

BACKGROUND AND HISTORY OF THE PRINCIPLES

There is now consensus about the important impact of technology on the legal system's accessibility, operations, budgeting, and management (Katsh, 1995, 1989). Over the last forty years, the use of certain technologies within the justice system has become routine and required. Case tracking, electronic billing, telephone hearings, video depositions, courtroom reconstructions, and similar innovations have become

JSJ 27-3 9/28/06 11:19 AM Page 249

accepted practices, and the system would grind far more slowly without them (Webster, 1996).

However, in the last few years the Internet and other new information and communication technologies have resulted in a far more radical increase in the pace of innovation. New tools, including informational Web pages, online document assembly, electronic filing, interactive interviews and forms, live video arraignments, courthouse security systems, public access to court records, and public broadcast of court proceedings, have transformed traditional court practices. Such innovations offer an opportunity for the justice system and its users to better communicate. They provide a richer decision-making environment and offer greater access to the system.

Technological innovations also present the risk of reducing effective access for some or all. Innovations may require a capacity to access the system that some do not have—whether the capacity is financial, educational, technological, physical or mental, or geographical. When these access limitations outweigh the benefits of the technology, it defeats the goal of creating greater access to courts through the use of technology. Examples are deploying required interfaces or software in justice institutions that cannot be used by certain individuals because of a lack of capability or technical capacity; using communications systems that inhibit comprehensive gathering of information by the judicial or other decision maker; and using technologies that another party is unable to employ. More generally, there is a risk that the overall system will become skewed in the direction of certain kinds of information and that the apparent "certainty" of technologically provided information will inappropriately drive results.

The innovations described above are already being deployed, or their penetration into the system is unstoppable. The judicial system needs a way to balance the benefits of these technologies with any effect they may have on access to courts. That is the purpose of the Principles as they have been adopted by the Washington State Supreme Court.

Process and History. The concept behind the Access to Justice Technology Principles was first expressed by King County, Washington, law librarian Jean Holcomb in the *Washington State Bar News*. She proposed an "Access to Justice Technology Bill of Rights," and her idea became a project of the Washington State Access to Justice Board, an organization created by Order of the Washington State Supreme Court in 1994. Responsibility for this particular effort—The Access to Justice Technology Bill of Rights (ATJTBoR) Committee—was assigned to former superior court judge Donald J Horowitz. The committee developed processes and products to maintain a focus on the overall goals.

In 2002 the judiciary subcommittee of the ATJTBoR Committee, which included judges, clerks, and other workers from all levels of courts from around the state, launched a survey of court administrators, clerks, and judges to assess the actual and planned deployment of technologies in the state's justice system. In addition, a group of legal, technology, and academic experts worked together on a study of an "ideal"

JSJ 27-3 9/28/06 11:19 AM Page 250

high-tech justice system and examined potential risks that would stem from the deployment of such a system (Small, Boiko, and Zorza, 2004). An outreach subcommittee conducted extensive focus-group sessions about technology and access to courts with a wide variety of constituencies, ranging from judges and attorneys to probationers and prisoners, farmworkers, recent immigrants, homeless persons, domestic-violence victims, and welfare recipients. Information from the focus groups was instrumental in developing the principles.

Early in the process, it became clear that the Principles would require the development of best practices templates, materials, and resources, which would be readily available to guide and assist the actual day-to-day planning, design, development, deployment, and use of technology. A group was formed to develop such best practices and is now launching some of them, with more to come, on a highly interactive Web site and software tool (NPower's TechAtlas, specifically customized for access to justice, http://www.techatlas.org/atj) that is itself a model use of technology.

To avoid the risk of overgenerality, it was important to test the viability of the Principles in real-world situations. Those engaged in the drafting process found one of the most useful techniques to be a "testing" of a hypothetical against the then-draft Principles of the ATJTBoR. In early 2002, the group designed an electronic filing hypothetical, envisioned a lawsuit to stop its deployment brought against this planned project, and recruited advocates to argue for and against the plan. The oral arguments focused the committee members' attention on the mandatory or advisory nature of the Principles, the flexibility or inflexibility of certain language, and the relationship to local and general court rules, resulting in highly useful insights for the drafting team.

A consultant engaged by the committee offered it a series of generalizations about the topics he believed the Principles should address and the approach that should be taken. Following several meetings at which feedback was given and adjustments made, the committee appointed a drafting team consisting of this article's authors, along with Patrick McIntyre, director of the Northwest Justice Project; Nancy Talner, a private attorney active with the state American Civil Liberties Union; and Judge Anne Ellington, currently a member of the Washington State Court of Appeals and a former trial court judge.

This group worked for over a year to transform into a workable draft of the Principles the initial thoughts, the additional information and ideas derived from the focus groups and other persons and organizations, and various comments, criticisms, and suggestions received as a result of circulation of a dozen successive preliminary drafts seeking comment from larger and larger audiences. In particular, the group focused on issues of enforcement and mandate.

In a multiple-approval process, this draft of the Principles was approved first by the full ATJTBoR Committee, next by the Access to Justice Board, and then by the Board of Governors of the Washington State Bar Association and many other organizations. Discussions during these approvals required many clarifications and minor adjustments to the Principles.

JSJ 27-3 9/28/06 11:19 AM Page 251

In autumn 2004, in a joint submission by the Access to Justice Board and two key allies, the State Administrative Office of the Courts and the Washington State Bar Association, the Access to Justice Technology Principles were submitted to the Washington State Supreme Court with a proposed court order stating the premises of the court action and adopting the Principles. After due consideration, the court signed the order and adopted the Principles on December 3, 2004.

Anxieties and Concerns Raised by the Proposal for Guiding Principles. When the Access to Justice Technology Principles process began, it engendered anxieties among many segments of the justice system. Anxieties are natural in any new process, particularly when one is dealing with unknown complexities. Recognizing this from the beginning allowed the committee and those managing the process to try and avoid or alleviate such concerns. We now examine the most important concerns.

Loss of administrative flexibility: Some feared that the adoption of authoritative principles would reduce administrative flexibility. In this regard, justice system agencies reported that they needed flexibility in the use of technology and could not function well with what could become an additional layer of constraint.

In response, the Principles themselves were carefully crafted to minimize any substantive burden on administering agencies; they are drafted specifically to avoid the creation of new causes of action or new third-party legal rights, and they rely heavily on the desire to do the right thing and on the initiative and responsibility of administering agencies. As a result, they have achieved almost unanimous support from Washington State agencies.

Cost and unfunded mandates: A more specific fear was that the Principles would result in massive costs, which would have to be shouldered by the courts and other agencies. There is no question that technology can be expensive, and often good technology is more expensive than bad, at least in the short term. The Principles avoided conflict over this point by not mandating the adoption of certain technology.

Impossible tasks: A similar fear was that the Principles would result in impossible tasks being required of agencies. Would the Principles, for example, require a new, highly expensive public-access network? The language of general principles rather than mandates made such a conclusion far less likely.

Just outcomes versus process orientation: A very different concern throughout was the worry by some that the Principles had adopted a substantive-justice approach—that they were "result oriented" in the sense that they focused the legal system on results rather than processes. To those concerned about this orientation, any reference in the Principles to "just results" would be inconsistent with the functioning of the legal system. The wording of the Principles was changed to emphasize that "just results" were themselves produced by fair and informed processes, mitigating this concern.

Specificity/generality: Some advocates resisted reliance on general principles. They urged a far more specific set of rules to govern technology in the justice system. While obtaining adoption of specific rules dealing with such a broad range of issues would itself have been highly unlikely, it is in any event far from clear that such rules

JSJ 27-3 9/28/06 11:19 AM Page 252

would have sufficient utility. In the long term, it is general principles that best apply to varied situations as they evolve. The committee hoped that the Principles as drafted represented a sufficient step back from specific competing concerns of different constituencies to enable or provide agreement about the relationship between courts, technology, and access to justice.

In addition, the "Best Practices" Principle offered a mechanism for the development of far more detailed, but also flexible, guidelines that can be used to address specific situations, for example, the appropriateness of a particular electronic filing technique.

Inclusion of constituencies: The decision was made early in the process that the Principles should not be drafted in a "top-down" process but should reflect the concerns, viewpoints, perspectives, and needs of the relevant constituencies. Multiple methodologies (e.g., focus groups and surveys) were used throughout the process to collect information that would provide the foundation for the Principles.

THE ORDER AND PRINCIPLES AS THEY EMERGED

The principles, as adopted by the Washington State Supreme Court, are set forth and discussed here, beginning with the Preamble. The Preamble, Principles, and a statement on the Scope (which is not addressed here, but designed to maximize the reach of the Principles) were adopted by court order. The Preamble reads:

> *The use of technologies in the Washington State justice system must protect and advance the fundamental right of equal access to justice. There is a particular need to avoid creating or increasing barriers to access and to reduce or remove existing barriers for those who are or may be excluded or underserved, including those not represented by counsel.*

The final version of the Principles included formally adopted comments. One portion of the official Comment to the Preamble is particularly noteworthy:

> These Principles do not mandate new expenditures, create new causes of action, or repeal or modify any rule. Rather, they require that justice system decision makers consider access to justice, take certain steps whenever technology that may affect access to justice is planned or implemented, avoid reducing access, and, whenever possible, use technology to enhance access to justice.

The first Principle, "Requirement of Access to Justice," reads:

> *Access to a just result requires access to the justice system. Use of technology in the justice system should serve to promote equal access to justice and to promote the opportunity for equal participation in the justice system for all. Introduction of technology or changes in the use of technology must not reduce access or participation and, whenever possible, shall advance such access and participation.*

JSJ 27-3 9/28/06 11:19 AM Page 253

As the official Comments to this first and defining Principle explain, the first Principle "combines promotion of access to justice through technology with a recognition of the 'first, do no harm' precept. The intent is to promote the use of technology to advance access whenever possible, to maintain a focus on the feasible while protecting against derogation of access, and to encourage progress, innovation, and experimentation." In other words, the Principle establishes the general goal of increasing access, but tries to be practical and do so without imposing impossible constraints or burdens on decision makers.

At a minimum, this Principle should be read as imposing an obligation that access to the courts by any one group not be diminished as a result of changes to or the introduction of technology. That is to say that a technology or its deployment should not mean that any group is more disadvantaged than they were before, either relative to other groups or in their absolute ability to access and use the system. Having said that, the encouragement of innovation and experimentation does recognize the possibility that well-intentioned experiments can fail, and that the lessening of access by such an effort is briefly tolerated.

This Principle also recognizes that technology deployments can have impacts beyond the immediate ability of a user to get to court. Thus, the Principle might be brought to the attention of a county who provides a particular version of an electronic filing system that gives an advantage in access to those who already possess expensive technology, provides no effective alternative for those without the technology, and is difficult if not impossible for the technologically inexperienced to use. The Principle might similarly be applied to an RFP for electronic filing to require the inclusion of user-friendly front ends, so that nonlawyers can prepare their court documents online before filing them.

The second Principle, "Technology and Just Results," reads:

> *The overriding objective of the justice system is a just result achieved through a just process by impartial and well-informed decision makers. The justice system shall use and advance technology to achieve that objective and shall reject, minimize, or modify any use that reduces the likelihood of achieving that objective.*

This was a controversial principle, as some of participants in the overall process were committed to a pure process view of justice and feared that any focus on the substantive justice of the results would inappropriately expand the judicial role. The final language reflects a compromise and includes specific references to a just process.

The statement in the Principles itself is general and simple. Technology should to be deployed in support of just results. Decisions about standards of justice are made by society as a whole through the constitutional, legislative, and judicial processes, and nothing in these Principles disturbs that framework. The Principles do, however, recognize that technology can provide powerful tools to find, provide, and analyze relevant, sufficient, quality information the better to determine what justice is or

JSJ 27-3 9/28/06 11:19 AM Page 254

might be in a given case or cases. They envision the use of technology tools by decision makers ranging from judges and clerks to lawyers to social-service workers and beyond. When technology provides better information with greater access, just decisions are more likely.

Thus, the authors believe it should be unacceptable when inequity in access to or ability to use a technology leads to an unjust result. For example, such a result could occur if one party in a case has dominant or exclusive access to accident-recreation technology in the courtroom, while the other party does not. The risk of such unjust results might be substantially reduced or eliminated by means such as a) requiring the party in possession of a technological tool it is planning to use to make that tool available to the other parties, b) establishing a technology fund to pay for equalizing technology resources when required in the interest of justice, or c) sometimes prohibiting the use of particular technology on the grounds that it may distort the decision-making process.

The second Principle might also be applied to guide the design of court information-gathering and display systems to make sure that they serve the interests of justice. These systems must ensure that the broadest range of information is gathered and presented to the public in ways the public can reasonably access and understand.

The third Principle relates to "Openness and Privacy" and reads:

> *The justice system has the dual responsibility of being open to the public and protecting personal privacy. Its technology should be designed and used to meet both responsibilities.*
>
> *Technology use may create or magnify conflict between values of openness and personal privacy. In such circumstances, decision makers must engage in a careful balancing process, considering both values and their underlying purposes, and should maximize beneficial effects while minimizing detrimental effects.*

The official Comments to this Principle emphasize that this "Principle underlines that the values of openness and privacy are not necessarily in conflict, particularly when technology is designed and used in a way that is crafted to best protect and, whenever possible, enhance each value." This position contrasts markedly with much of the current public debate, where openness and privacy are seen as competitors.

As a general matter, technology is regarded as a threat to privacy. It is a truism that technologies such as the Internet provide many ways of obtaining access. It provides new ways of accessing, searching, gathering, integrating, analyzing, organizing, evaluating, using, and disseminating information. It also is a truism that the use of the generally benign word "access" may give the false impression that the privacy violation ends at the point of access. However, the reality is that anytime there is access to information, there is a significant potential for dissemination of all or part of such information. Moreover, combining or aggregating information from different sources in one place can lead to, when accessed, a more destructive violation of privacy.

JSJ 27-3 9/28/06 11:19 AM Page 255

While technology may create opportunities for violations of privacy it also provides ways of protecting it. Information is labeled and its access can be identified; therefore, it is possible to build systems that provide greater protection of privacy. Technology permits the holders of information to build more sophisticated systems for controlling or limiting access to all or portions of that information.

It is therefore particularly important that such a general principle be the basis for the crafting of appropriate, often detailed rules and sub-principles that should govern the intertwined issues of access and privacy, and that the Principle be both flexible enough to govern a wide range of circumstances and strong enough to protect crucial fundamental values that are often in competition.

Among the factors that influence the working out of such a balance are the types of information and users. Information that most closely relates to personhood requires the greatest protection. Personal information should be entitled to greater protection than the corporate or institutional users because our society understands that the core values of privacy are designed to protect individual autonomy, even though there may be certain, carefully defined and balanced exceptions to this general rule, such as trade secrets and patents.

Other factors that may affect the balance include:

- *Possible harm resulting from the revelation of the information.* When the risk of harm to the individual or society is particularly great, the need for protection from access is higher (e.g., information about health or victims of domestic violence).
- *Risk of aggregation of data.* When there is a particularly high risk that aggregation of data will lead to violations, even if release of the individual data is not particularly problematic, the need for protection is greater.
- *Social value of access to the particular information.* Where there is greater need for access to the data, then the balance shifts in favor of access. Examples of such information might include preventing wrongdoing, protecting the public safety or public health, or increasing public oversight of government.
- *Risk of hiding of wrongdoing.* A particular danger arises when the justice system's acceptance of secrecy adds to the risk of continuing wrongdoing.
- *Purposes to which information is to be put.* As a general matter, the purposes to which information is to be put should play a major role in determining the appropriateness of access.
- *Context.* The general interests served by privacy and access in a particular situation must be considered.

It is essential to recognize that fears of personal information being made public by electronic access to court records are real and that such fear may deter people from seeking access to justice. The fundamental right of access to justice may be discouraged and chilled unless there is confidence that privacy and safety are given appropri-

JSJ 27-3 9/28/06 11:19 AM Page 256

ate weight. Further, given the considerable dangers associated with aggregation of information, consideration should be given to particular protections against inappropriate aggregation, including conditions placed on the aggregation of information by those who have access to justice system information.

Because so much of technology happens "behind the scenes," buried in software and hardware, technology presents particular risks of nontransparency. For example, if recommendations for court outcomes are based on statistical predictions, then the algorithm for that prediction becomes a critical part of the system, and its transparency crucial. Similarly, if the most important information is color coded red, then the programming decision about what information is so coded, and when, becomes important and should be made explicit and public.

Conversely, well-thought-out technology increases the potential to build a far more transparent judicial system. The simple fact that the rules by which a tech-driven system operate are enshrined in the computer code means they are written down—which is precisely the goal of consistency and transparency for which the system aims. Whereas in nontechnology systems, in which decisions are made and tracked without technology, the real reasons for results may be buried in individual bias or ignorance. Technology provides opportunities to obtain information on what is really happening in the system, whereas in nontechnology systems such patterns and impacts are often quite difficult to see.

The fourth Principle, "Assuring a Neutral Forum," reads:

> *The existence of a neutral, accessible, and transparent forum for dispute resolution is fundamental to the Washington State justice system. Developments in technology may generate alternative dispute resolution systems that do not have these characteristics, but which, nevertheless, attract users who seek the advantages of available technology. Participants and actors in the Washington State justice system shall use all appropriate means to ensure the existence of neutral, accessible, and transparent forums which are compatible with new technologies and to discourage and reduce the demand for the use of forums which do not meet the basic requirements of neutrality, accessibility, and transparency.*

As a general matter, technology is changing transaction patterns. The use of technology to manage day-to-day court transactions creates the risk of removing these transactions from effective supervision. For example, many online transactions now require users to "agree" to waive their rights to the open and visible court-based dispute-resolution mechanisms traditionally available to protect their rights. Such actions may threaten the integrity of and trust in the legal system, because absent sufficient transparency, meaningful oversight by courts is difficult.

This Principle establishes the view that the justice system must be proactive, continuing to play its historically important protective role in the new high-tech era, and that the justice system must find ways to respond to the changing patterns of transactions and of relationships between parties.

JSJ 27-3 9/28/06 11:19 AM Page 257

The Comment to this Principle makes clear that it does not change governing law:

> This Principle is not intended in any way to discourage the accessibility and use of mediation, in which the confidentiality of the proceeding and statements and discussions may assist the parties in reaching a settlement; provided that the parties maintain access to a neutral and transparent forum in the event a settlement is not reached.

The justice system might respond in a variety of ways to protect individuals as patterns of transactions change. Among the possible responses are:

- creating online dispute mechanisms that are court based, yet meet the needs of electronic institutions;
- modifying current systems to meet the needs of electronic transaction regulation; or
- refusing to enforce decisions made within systems that do not meet fundamental standards of fairness.

Principle Five, which was not anticipated at the beginning but which emerged from the outreach process, is "Maximizing Public Awareness and Use." Largely self-explanatory, it reads:

> *Access to justice requires that the public have available understandable information about the justice system, its resources, and means of access. The justice system should promote ongoing public knowledge and understanding of the tools afforded by technology to access justice by developing and disseminating information and materials as broadly as possible in forms and by means that can reach the largest possible number and variety of people.*

To this language, which was not initially anticipated but which emerged from the outreach process, the official Comment added:

> Communicating the tools of access to the public should be done by whatever means is effective. For example, information about kiosks where domestic violence protection forms can be filled out and filed electronically could be described on radio or television public service announcements. . . . The means may be as many and varied as people's imaginations and the characteristics of the broad population to be reached.

The fifth Principle highlights the responsibility of the justice system, and indeed all its players, to use all means reasonably available to promote and publicize available access tools. All too often, institutions make significant investments in access innovations but then fail to take the relatively low-cost steps of making sure that everyone knows about the access innovations. How many courts hand out book-

JSJ 27-3 9/28/06 11:19 AM Page 258

marks or pens promoting their Web sites? How many courts, as California does, require Web site information on court summonses?

The sixth Principle, "Best Practices," reads:

> *To ensure implementation of the Access to Justice Technology Principles, those governed by these principles shall utilize "best practices" procedures or standards. Other actors in the justice system are encouraged to utilize or be guided by such best practices procedures or standards.*
>
> *The best practices shall guide the use of technology so as to protect and enhance access to justice and promote equality of access and fairness. Best practices shall also provide for an effective, regular means of evaluation of the use of technology in light of all the values and objectives of these Principles.*

The central point of the sixth Principle is that "Best Practices" can give concreteness to the general Principles, making implementation easier and helping to build consensus around their implementation. Best practices can be very specific, dealing with design principles for Web sites, security procedures for electronic filing, forms design, or the distribution of kiosks. They can be updated regularly, and they are most effective when generated through a consultative process involving those who must implement them daily. We have found that the most effective process for the development of best practices is to ask, for each type of technology (such as Web sites), what needs to be done in the building and deploying of that technology for its use to be fully consistent with each of the Principles. We found such an intellectual process led naturally to very specific best practices that were fully expressive of, and highly protective of, the Principles. As such, this provided independent proof of the validity and value of the Principles.

IMPLICATIONS AND CONCLUSIONS FOR JUSTICE SYSTEM PROFESSIONALS

In this section, we offer some observations from our experience with the development and implementation of the Principles that may help justice system professionals as they consider the relevance, appropriateness, and potential best ways for moving forward in their own jurisdictions.

General Principles. Perhaps the most important part of the process was an early decision to focus on general principles. The benefit of generality was that it facilitated agreement on the fundamental essence of the Principles even among those who may have disagreed strongly about their details and implications. As it turns out, it was much easier during the drafting and internal comment process to get agreement about general principles than it would have been to get agreement on specifics.

The Principles can now play at least three roles. First, they can be used to guide the bureaucratic and institutional processes inside and outside the court system

JSJ 27-3 9/28/06 11:19 AM Page 259

through which relevant actors must wrestle with issues relating to the use of technology. Second, they are guiding the more specific processes such as the development of promising practices, that is, justice system tools developed by the best practices committee. Finally, when there is a disagreement about specifics, the general principles can serve as the framework for an intellectually coherent analysis of these specifics. The true test of the general principles will be whether they have enough intellectual substance and power to guide these specific processes and resolve disputes in a workable and legitimate way.

Maximizing Participation and Legitimacy. Throughout the development of the Principles, attention was paid to maximizing participation with the goal of enhancing their legitimacy. The judiciary and court administration subcommittee conducted surveys of judges, administrators, clerks, and other court workers regarding the issues they faced, and these substantially informed the drafting of the Principles. Focus groups conducted by the outreach subcommittee informed and provided an important context for the Principles and for the issues faced by the later implementation subcommittee. A design process engaged by the opportunities, barriers, and technology subcommittee highlighted the possibilities and the risks of technology for the courts, further illuminating the drafting process. Finally, and very significantly, the promising practices subcommittee demonstrated the value of the intellectual structure established by the draft of the Principles as it used that structure to establish practices that gave concrete meaning to the Principles. This system of interlocking subcommittees meant that all participants contributed to the ultimate product and came to feel a sense of ownership.

Focus-Group Work. It is hard to overstate the value of the focus groups in facilitating the open process desired by the ATJTBoR Committee (Dale, 2003). Two different sets of focus groups were conducted. The first set of focus groups, conducted early in the process, was used to identify the needs and perceptions of a variety of primarily excluded and underserved groups in the justice system. Participants included recipients of Temporary Assistance to Needy Families (formerly a class of welfare recipients receiving Aid to Dependent Children benefits); men and women in the correctional system currently in work-release confinement; homeless veterans; survivors of domestic violence; and agricultural workers. These early focus groups told us something very significant that few had understood—that the problems of technology and access to justice are less problems of access to technology than of the underlying content; its location, relevance and understandability; and the form and media in which that content is made available.

The second set of focus groups, conducted near the end of the process, was used to identify the perceived impact and potential for those institutions most likely to be affected by the Principles, which were then in near final form. These focus groups included court clerks, administrators and other court workers, legal-aid workers, general librarians and law librarians, and law-school faculty and staff. These groups helped us to identify and to reduce or eliminate stereotypes and preconceived assump-

JSJ 27-3 9/28/06 11:19 AM Page 260

tions about technology and courts—and kept the process focused on the concrete needs of the users.

Best Practices. The best practices process was designed to generate products, such as promising practices, that would complement the general Principles and give practical meaning to those principles with concrete, specific, and situation-tailored recommendations and identify the resources needed to support the accomplishment of the recommendations.

Issues of Mandate, Guidelines, and Enforceability. By far the most significant problem in the entire process was the question of how to structure and position the document so that it would be legitimate and authoritative. The challenge was that without some legal authority, it was likely that the Access to Justice Technology Principles would accomplish little more than gather dust on a shelf. Yet it was recognized that the greater the proposed enforceability of the Principles, the more likely it would be that the stakeholders, whose cooperation was essential, would see them as an intrusion into their traditional areas of authority and discretion.

In addressing this challenge, the ATJTBoR Committee was guided by a number of core assumptions about the Principles. First, they should be given sufficient authority to affect real-world conditions. Second, they should be adopted by the state supreme court. Third, they should not be seen as changing existing substantive law or creating new causes of action. Finally, the impact of the Principles would be played out in a number of different ways, including how the complex administrative structures of the justice system would deal with the use of technology, how the decision-making processes of the justice system would deal with these issues, and how the day-to-day business of the courts would change.

The solution, which may be termed "mandated consideration," was to require that, when conducting their business, the entities under the authority of the Washington State Supreme Court consider the Principles, together with other rules and governing law. The general focus of the document means that such mandated consideration is unlikely to dictate the details of any particular result, but it does mean that ignoring the Principles would violate the order. The precise language contained in the order is:

> The Access to Justice Technology Principles appended to this Order state the values, standards and intent to guide the use of technology in the Washington State court system and by all other persons, agencies, and bodies under the authority of this Court. These Principles should be considered with other governing law and court rules in deciding the appropriate use of technology in the administration of the courts and the cases that come before such courts, and should be so considered in deciding the appropriate use of technology by all other persons, agencies and bodies under the authority of this Court.

JSJ 27-3 9/28/06 11:19 AM Page 261

The official Comment to the Preamble, which was adopted by the Supreme Court, states:

> These Principles do not mandate new expenditures, create new causes of action, or repeal or modify any rule. Rather, they require that justice system decision makers consider access to justice, take certain steps whenever technology that may affect access to justice is planned or implemented, avoid reducing access, and, whenever possible, use technology to enhance access to justice.

The Principles do not create new causes of action. Therefore, a legal claim could not be predicated *solely* on an alleged violation of the specifics of the Principles. However, the purpose of the Principles was to provide guidance that could be used in interpreting the relevance, scope, and requirements of any other law related to technology and its use in courts. In the event these assumptions about the sufficiency of this approach turn out to be wrong, the ongoing implementation processes will bring the appropriate decision makers back to the deliberating table to pursue a different approach.

POST-ADOPTION DEVELOPMENTS IN WASHINGTON STATE

Implementation and institutionalization of the Principles began in 2005. Soon after the Principles were adopted, the state Administrative Office of the Courts (AOC) informed its information technology staff about them and communicated its expectation that the Principles be used to guide future AOC work. The AOC made specific reference to using the Principles to guide the development of judicial information system projects in the courts throughout Washington. The rapid and forceful endorsement of the Principles by the AOC will serve as an influential precedent for other state and local agencies.

To date, the overall response to the Principles among stakeholders has been enthusiastic. However, the Principles are not universally embraced. Some in the legal-aid community argue that the court order did not go far enough, because it did not make the Principles mandatory. In contrast, some stakeholders, including a few court clerks, have expressed dissatisfaction with the Principles because, despite specific language to the contrary, they perceive them to be an unfunded mandate. These concerns are being addressed, but are likely to be diminished only by the passing of time and by positive experience with the Principles.

An unplanned juxtaposition of time and events led to a very early and precedent-setting effort to give effect to the Principles. It concerned a problem of fee equity and reasonableness related to electronic access to court records. Almost immediately after the adoption of the ATJ Technology Principles, the ATJTBoR chair, who was also the access-to-justice liaison to the supreme court's judicial information system (JIS) committee, was asked by the JIS committee to lead this effort. The JIS

JSJ 27-3 9/28/06 11:19 AM Page 262

committee was very concerned with equity and access issues created by the fee schedule established by the Pierce County Clerk's Office (which includes the city of Tacoma) when it implemented electronic filing and electronic access to court records through the Pierce County Legal Information Network Exchange (LINX). The ATJTBoR chair worked with the county clerk's office to revise its fee schedule to ensure that all individuals and organizations, including the bar, the public, pro se litigants, and nonprofit legal-services providers, have reasonable and equal access to electronic records, that the fees do not discriminate against any group or exclude anyone on the basis of economic status, and that fees are waived where appropriate. Thus, besides the required provision for appropriate *in forma pauperis* fee waiver, the ordinance and fee schedule now provide that no fees other than the minimal one-time set-up fee will be charged to any "non profit legal services, legal aid, or pro bono agency" for access to records through LINX. While still producing sufficient revenues to maintain the system, this will significantly improve and assist in providing for reasonable and equitable access to electronic court documents for all, and can be used as a model for adaptation and adoption statewide (see http://www.co.pierce.wa.us/cfapps/linx/Main.cfm).

In another area, the Washington Assistive Technology Alliance (WATA) and the University of Washington Center for Disability Studies collaborated with the ATJTBoR to develop a Web site on "Using Technology to Improve Access to Justice for People with Disabilities" (http://justice-at.uwctds.washington.edu/). ATJTBoR is working in a broadly collaborative effort to create a pilot community-based technology justice center at the principal site of the SeaMar Community Health Centers in south Seattle and King County. SeaMar has provided health and associated services to low-income, immigrant, and other vulnerable people from centers throughout the state for more than two decades. ATJTBoR has also initiated and is collaborating with the University of Washington Law School's Shidler Center for Law, Commerce and Technology in conducting the first study of "Electronic Delivery of Legal Services: Ethical, Legal and Business Implications of the Use of Technology in the Delivery of Legal Services."

A Statewide Website Advisory Group has been established to "bring together website managers whose organizations provide substantial Access to Justice Internet content and services for all people in Washington State," and explore "potential collaborative efforts among its members, and with other state, federal and private organizations and companies."

Similarly, the JIS committee sponsored a work group that developed and proposed amendments to update the Washington Supreme Court's General Rule (GR) 15 (Destruction and Sealing of Court Records) and GR 22 (Access to Family Law Court Records). ATJ representatives participated in the group and initiated and supported changes that better serve a balance of access and privacy (see Principle Four as well as adding safety as a criterion, and assuring the general compliance of both

JSJ 27-3 9/28/06 11:19 AM Page 263

rules with the ATJ Technology Principles. The Washington Supreme Court adopted these amendments effective July 1, 2006. Currently, ATJ representatives are part of a new JIS work group to update and improve GR 30 (Electronic Filing) and ensure compliance with the Principles.

The state AOC and Northwest Justice Project, the statewide legal-aid program, completed a project to improve Web-site content for Washington Lawhelp, a Web site providing legal information and self-help materials about legal problems that affect low-income people (see http://www.washingtonlawhelp.org/WA/index.cfm). In 2005 the AOC set up a new usability-testing lab and are currently revising the 2003 Judicial Information Systems Plan to bring it up to date and ensure its consistency with the Principles.

THE ATJ TECHNOLOGY PRINCIPLES IMPLEMENTATION STRATEGY GROUP

A commitment to implementing the Principles—making them integral and fundamental threads of the fabric of the Washington State justice system and making their effects real in people's daily lives—has been expressed from the beginning. Contained in the court order is an expectation of planning and action, and the requirement of an annual report to the court. Shortly after entry of the court order, the ATJ board instructed the ATJTBoR chair to form an ATJ Technology Principles Implementation Strategy Group, the membership of which was to represent different aspects and levels of the justice system, as well as other relevant professions, disciplines, and backgrounds in positions to consider, plan for, and promote institutionalization and implementation of the Principles. Among the group's members were judges from every level of court from the supreme court to traffic courts; the solicitor general from the attorney general's office; an attorney specializing in technology law; a manager from the state Administrative Office of the Courts; a county court clerk; directors of the two major state legal-aid programs; faculty from both the Information School and the Department of Computer Science of the University of Washington; the director of Washington State University's Center to Bridge the Digital Divide; and the director of the State Office of Civil Legal Aid. Funding from the supreme court allowed the group to hire a half-time project manager, who facilitated the development of the group's recommendations and products and its final report to the supreme court, dated June 30, 2006 (the complete report can be accessed at www.atjtbor.org).

Several portions of the final report merit special attention. The group designated two groups of activities as foundation essentials for meaningful and effective implementation and institutionalization of the Court Order and the Principles:

1) The first is a Web-based resource bank, which will "house and identify a variety of tools and resources to support the planning, development, use and maintenance of barrier-free technologies within justice system and associated agencies." Such tools and activities include:

JSJ 27-3 9/28/06 11:19 AM Page 264

a) Best Practices Template: a customizable online tool that supports the integration of accessibility into plans, designs, deployment, and use of e-filing, Web-site, and public-access-terminal applications (and, over time, other applications). The template was developed through a grant from the State Justice Institute and customized for the ATJ community. It is ready for use and can be accessed online at www.techatlas.org/atj.

(b) Two checklists, one focused on the organizational level and the other on the systems-development level, are designed to help organizations assess and prevent or remove organizational and technological barriers to access, including measuring their own incorporation of the Principles into their processes, products, and outcomes.

(c) The provision of standard language for use in contracts and procurement documents (including RFPs) to ensure that the Principles are integrated into technology projects.

(d) An accessible Web site dedicated to the ATJ Technology Principles and their implementation and institutionalization, already available at http://www.atjtbor.org.

2) The second activity calls for initial and ongoing communication and training for justice system and associated agencies about the Principles and available resources for implementation.

The group stated that "[t]hese ongoing activities have significant potential to support implementation of the Principles by reaching hundreds of key policy, project-based and day-to-day decision-makers," and "strongly recommend[ed] that the capacity to carry out these activities be established and continued."

Other activities, described in the report, that the group believed to be highly useful and desirable, but, given limited resources, not necessarily essential until the earlier foundational items were accomplished, included:

a) *Peer Consultation Resource Group*. A group of people with knowledge and experience to be made available as needed to assist others in practical planning, development, implementation, and maintenance.

(b) *Technology Expert Advisory Group*. An advisory group comprised of four to five experts in various aspects of technology. They would be high-level, well-respected people both locally and nationally. The advisory group would have no regular meetings but would be available for specific purposes.

c) *Demonstration Projects*. Support for—and, as appropriate, involvement in—development and implementation of court- and community-based projects that illustrate the benefits of applying the Principles early in the project-development process. ATJ is leading the first such collaborative effort to create a pilot community-based technology justice center at the principal site of a statewide network of community health centers, which have provided health and associated services to low-income, immigrant,

JSJ 27-3 9/28/06 11:19 AM Page 265

and other vulnerable people for more than two decades. This project is the first of a variety of efforts that may be developed to demonstrate the practical application of the Principles in the context of public access to technology.

Long-term subjects addressed by the report are the requirement of and initial means to accomplish continuing policy-level governance and guidance for effective implementation and institutionalization of the Principles and ensuring the continued relevance and effectiveness of the Principles. As technology is evolving at an ever-increasing pace, the resources and tools for implementing the ATJ Technology Principles must evolve concurrently. Implementation of the Principles and associated activities must be supported by dedicated organizational infrastructure, the purpose of which would be to maintain a high-level commitment within the justice system to keeping the Principles alive, providing consistent and effective policy-level guidance and ongoing planning, and offering permanent staffing to develop and promote ongoing implementation and institutionalization of the Principles. In addition, the group strongly recommended that a research component be developed that will periodically assess the needs of justice system agencies and the public they serve, evaluate the degree to which the Principles are being implemented, and determine the degree to which implementation of the Principles indeed serves the objectives of expanding access to the justice system and justice system services for the public at large.

CONCLUSION

Access to justice is a fundamental principle of our society. As the deployment and use of technology begins to determine the existence and quality of access, it is crucial that we have authoritative guiding principles to guide its development, adoption, and use (Alteneder et al., 2005). The Principles and post-adoption process and action described in this article are the product of an almost six-year-long effort to create such guidance for the Washington State justice system.

The genesis of the effort began in 1994 by an Order of the State Supreme Court creating the Washington Access to Justice Board, and the specific effort around technology use began in 2000 when a major broad-based collaborative initiative was launched. The results so far are a) the Principles described herein (adopted by the Washington Supreme Court in December 2004), b) certain specific post-adoption actions and products, c) a strategy for implementation and institutionalization, and d) products developed by the ATJ Technology Principles Implementation Strategy Group to begin to accomplish its goals. The Principles adopt a *general* framework that is intended to be prescriptive, but, within that framework, allows for flexibility, innovation, variety, and local decision making about technology and its funding.

One of the most important lessons learned from the development of the Principles was the need for their legitimacy and enforceability. If the Principles were to mean anything, they ultimately had to be both embraced and considered authori-

JSJ 27-3 9/28/06 11:19 AM Page 266

tative. A form of "mandated consideration" was eventually adopted, which required all entities under the authority of the Washington State Supreme Court to meaningfully consider the Principles in their work. While it does not by itself create new causes of action, the Order of the Supreme Court gives the Principles sufficient legal weight that they must be given due consideration before the adoption of technology or technology standards that might affect access to and the quality of justice. Throughout the process, besides the courts themselves, two key allies and collaborators were the state Administrative Office of the Courts (AOC) and the Washington State Bar Association.

The impact of the Principles and the agencies, groups, and constituencies that created them is already being felt. The state AOC is using the Principles to guide the development, planning, deployment, and use of judicial information system projects across the state. The promising practices subcommittee continues to develop and identify standards, tools and resources consistent with the Principles in the areas of electronic filing, Web sites, and public-access terminals, with more to come. Very importantly, the nature of the process creating and leading to adoption of the Principles set a precedent and established a momentum for collaboration across sectors and institutional and agency lines—specifically, collaboration of the courts with other agencies and aspects of the justice system. Already such collaboration is paying off. One of a number of such examples is the work involving the judicial information system committee, the ATJ board, legal-aid providers, the media, and the Pierce County Clerk's Office to develop an equitable and affordable fee schedule for electronic access to court records. Likewise, the Washington Assistive Technology Alliance and the University of Washington Center for Technology and Disability Studies working with ATJ have created a Web site to improve justice system access for people with disabilities by providing relevant practical information not only to persons with disabilities and their advocates, but also to the judges and court workers who must enable and provide equal and meaningful access for all to judicial services.

The Washington access-to-justice community believes that the Principles and process described in this article offer an important model for how a state can ensure that technology contributes to maintaining an open and equitable judicial system. The Principles and the activities and products developed around them are the results of years of work and the participation of hundreds of individuals and organizations at all levels of the justice system, along with many outside the system who are relevant, committed, and capable. The Principles represent a carefully crafted set of accommodations between an expansive vision of the technological future, the practical needs of those charged with administering and working in a complex system, and needs of the end consumers and potential consumers of justice system services. The key is not to let the Principles languish. It is to persist in finding ways to ensure that the Principles influence the daily activities of the justice system and the daily lives of

JSJ 27-3 9/28/06 11:19 AM Page 267

those it must serve. If the ideas expressed in the Principles are given authority throughout the United States and beyond, professionals in the justice system will have made a major contribution to access, equity, and justice. **jsj**

REFERENCES

Access to Justice Technology Principles Implementation Strategy Group Final Report (June 30, 2006). www.atjtbor.org

Alteneder, K., M. Genz, M. Hertz, B. Hough, H. Jacobs, and G. Rawdon (2005). "The Role of Technology in the Access Solution," in *Future of Self-Represented Litigation: Report from the March 2005 Summit*. Williambsurg, VA: National Center for State Courts.

Dale, D. M. (2003). *Technology and Access to the Justice System: Conversations in Focus Groups with Users of the Justice System in Washington State*. Washington: Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board. www.atjtbor.org

Katsh, E. (1995). *Law in a Digital World*. Oxford: Oxford University Press.

—— (1989). *Electronic Media and the Transformation of Law*. Oxford: Oxford University Press.

Small, T.W., R. Boiko, and R. Zorza (2004). "Designing an Accessible, Technology-Driven Justice System: An Exercise in Testing the Access to Justice Technology Bill of Rights," 79 *Washington Law Review* 223.

"Symposium: Technology, Values, and the Justice System" (2004). 79 *Washington Law Review*. http://www.law.washington.edu/WLR/archives/symposium.html

Washington State Supreme Court. (2004). "In the Matter of the Access to Justice Technology Principles."
Court order: http: //www.courts.wa.gov/court_rules/?fa=court_rules.display&group=am &set =ATJ&ruleid=amatj01order
Principles: http: //www.courts.wa.gov/court_rules/?fa=court_rules.display&group=am &set=ATJ&ruleid=amatj02principles

Webster, L. P. (1996). *Automating Court Systems*. Williamsburg, VA: National Center for State Courts.