

Only the *Really* Hard Part of eCourt Is *Really* Worth Doing

Michael H. Marcus

Some 20 years ago, I released a defendant facing a minor charge pending his trial, who promptly beat up proprietors in a new attempted robbery. I had no access to information about the defendant's criminal history. Even today, my mistakes that are based on inadequate information can allow tremendous harm to victims, communities, families, and children. I profoundly hope that I'm sending the right people to prison, to probation under proper conditions, and to the right providers.¹

It is, of course, terrible when someone we release promptly causes great harm. It is understandable that observers blame the judge for that harm (even if the judge had no lawful choice). But our decisions often play out badly over a much longer period of time. Others may participate along the path to the harm and spare us at least visible fault, but we still desperately hope that we improve the outcome: a criminal pretrial, sentence, or probation decision that best protects the community from future criminal conduct; a family custody, dependency, or delinquency decision that leads to the most successful childhood, adulthood, and subsequent parenting; a civil commitment decision that leads to the highest level of functioning for an impaired citizen; a disposition that helps any victims best emerge from their victimization and serves the legitimate purposes of "just deserts."²

Technology can bring great convenience to courts: eFiling; electronic access to content; efficient case and exhibit management; useful access to voluminous social files; and even improved participation via web forms for self-represented litigants. Yet there are many aspects of courts that threaten success for even this use of technology: diversity of case and user types, proprietary barriers to interactivity of components, security issues, and the gap between what vendors and court users know about each other. What vendors and courts know about each other can determine whether their agreements nourish productive collaboration or fuel the blame game when things go wrong.

But serving efficiency and user satisfaction is not a high

enough demand of technology. We must insist that technology also help us improve the safety of dispute resolution, to reduce the criminal behavior of those we sentence, to improve the well-being of communities and the lives of children and families we touch, and to achieve the best outcomes for impaired citizens we encounter. Outside the rare wealthy states, funding for court technology competes with such important purposes as public safety, education, child welfare, mental health, and medical care. In short: the *convenience* of improved dispute resolution doesn't take the battle for dollars very far. To warrant funding, court technology must improve our ability to impact the lives and communities we touch.

This dialog has continued over *decades* in Oregon's judicial branch. On the eve of a budgetary downturn in early 2008 that might have cost us "Oregon eCourt" funding, some of us argued that our business case to the legislature ought to be this vision of eCourt:

Oregon eCourt will give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve the lives of children and families in crisis.

The word "improve" was seen by some as improvident. But our Chief Justice Paul De Muniz courageously carried precisely this torch to the legislature:³ eCourt is worth the money *because it promises a better impact on the communities we serve.*

Insufficient access to relevant information explains bad release decisions, sentences, child placements, and even mental health placements that can lead to horrible crimes and other life-changing disasters to victims, children, families, and communities. Improving access to information and tools to reduce these tragedies has been a critical piece of the justification for our eCourt funding. Our Chief Justice, our Legislative Fiscal Office oversight participants, and our quality-assurance vendor all confirm that this vision is critical to the value of eCourt that

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Footnotes

1. See <http://www.smartsentencing.com>.
2. My position is *not* that "just deserts" is an invalid function of punishment but that we tragically allow mainstream sentencing to use that mere label to avoid accomplishing *anything* other than a sentence within legal limits, ignoring even the legitimate purposes of "just desserts." Responsible sentencing is rare (outside good treatment and juvenile courts). Sentencing should be required to employ advocacy, information, and tools to seek public safety and public values, which include the pro-social functions legitimately

bundled within "just deserts." In rare cases, public values require doing something that compromises the pursuit of public safety. Widely held social values demand substantial punishment not necessary to prevent future crime, for example, in *some* nonrecidivist DUI vehicular homicides, "opportunistic" intrafamilial child-sex-abuse cases, and shaken-baby deaths. In most cases, best efforts at crime reduction also satisfy the legitimate functions of "just deserts." See generally, e.g., *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S CAL INTERDISCIPL L J 68 (2007) (includes *A Harm-Reduction Sentencing Code*); see also <http://www.smartsentencing.info/ArticlesonSSP.htm>.

3. The testimony is in part on You Tube: <http://www.youtube.com/watch?v=ZoPjMQXQ3Lk>.

we have promised to our state in return for financial support. It has helped sustain funding through the worse economic times that have followed 2008.

What follows is what we've learned so far about pursuing the eCourt performance that matters most—to us and to those we serve.

EVEN THE REST IS HARD ENOUGH

It's probably a good idea to share some of the problems of the easier parts. Vendors and administrators see justice as an assembly line designed and managed as an electronic means for managing workflow. Even the judges who often get called first into any design meetings are those who also tend to see cases as part of a fast-flowing set of disputes whose successful handling is demonstrated by speed; they share with administrators the view that what matters is that cases be concluded quickly. They are all most likely to accept the vendor's presentation of how interfaces work best and how to process cases as if on an assembly line with efficiency, meaning speed, as the primary goal. This approach tends to accept the vendor's view of what the screen should look like, based on the efficiency mission.

What is being overlooked is that the highest calling of the judicial process is *not* speed. The lengthy hearings and trials, particularly but not exclusively jury trials, are not part of "workflow," though they may be supported by workflows. Real hearings have components totally absent from an assembly line: ceremony, respect, decision, debate, research, deliberation, and the various sources of legitimacy for the ultimate decision.

It is, therefore, critical that judges who commonly do extended hearings and trials participate in early design discussions. Ideally, this includes some judges who have some experience with web design and application customization. Many have experience with proprietary legal research and web applications. Judges must have a meaningful role in design and setting "requirements" so that costly amendments to agreements are not necessary to make an application work well in extended hearings.

An example: The first version we saw for "electronic" court was for eviction matters. The interface would have a judge select the case to work on by selecting a day of the docket (in a fast-track court, the day the judge is using the tool for all cases), then selecting the case, the beginning and ending dates that would contain documents of interest to the judge, and then receive a document on which the judge would fill in some spaces on and check some boxes, which would then produce a judgment or an order in the case. The judge may be interrupted by a "time out" box, in which case the judge would have to log in again and again navigate to the same position. Without going into all the details, suffice it to say that it took much work and money to allow a judge to select a case and gain access to all of its documents by case number, handle exhibits, write notes and opinions, and not have to worry about timing out and having to renavigate through an interface designed for an assembly line while trying to perform the legal analysis and participate in the human interaction that produce the most impor-

tant part of the administration of justice in terms of dispute resolution.

It is a challenge to ensure that court technology is making technology convenient for judicial users beyond the "workflow" to support major hearings without distracting judges from the important human interactions. But the challenge is far greater and more important: technology must be used to its full potential to improve our impact on our communities. What follows is what we've learned so far about pursuing the eCourt performance that matters most—to us and to those we serve.

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SILOS, OCM, PMBOK®

Silos

We all tend to restrict our focus to core functions, now commonly addressed as "silos,"⁴ separated from others' pursuits in their silos within the courthouse. Achieving the highest purposes of eCourt technology requires transcending such limited objectives as these:

Judges: close cases efficiently, reach a reasonable and lawful result, attribute outcomes to whatever agency is involved—collections, corrections, probation, judgment-enforcement processes, child and family services. Avoid embarrassment, criticism, and reversal on appeal.

Administrators: keep the calendar running smoothly, limit wasted time, avoid set-overs, keep users happy, and reduce the number cases unnecessarily returning for further attention. Avoid embarrassment and criticism.

Staff: calendar matters for the docket accurately; get the files (electronic or paper) where they need to be when they are needed; afford access to files; get new orders and materials into files and make them accessible to those who rely on them for the next step; be sure that sealed materials are not wrongly revealed; avoid criticism.

Technology workers: Support the technological infrastructure that increasingly supports functions that the rest of us rely so heavily upon but usually notice only when something goes wrong: filing, scheduling, communication, case management, transcript and exhibit access, video and teleconference sessions, collections and accounting, administrative and judicial conferencing, and security from unauthorized modification or access to non-public material. Supporting this growing set of functions is the easiest source of pride in serving courts with technology—and in avoiding criticism.

Law clerks: Get the right memo to the judge to get the decision made well, quickly and without ultimate embarrassment. Avoid criticism.

Facilities staff: Protect the safety of the process, the comfort of the participants, and whatever calming dignity the facilities and their maintenance can bring to difficult occasions. Avoid criticism.

4. The "silo effect" phrase currently popular in business and technology communities describes a dysfunctional isolation of per-

ceptions and skill sets within separate departments in an organization.

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OCM

The “organizational change management” (OCM) part of any technology court project must be much more than just getting the courts to accommodate *technology’s* needs. OCM must also get the bulk of all of our colleagues—all of our judicial, administrative, support, and technical colleagues—to *expect*

to use technology to improve the lives we should be improving. We need to revisit basics to achieve such an ambitious result. Though partner perspectives (lawyers, providers, vendors, agencies) vary and are important, I will focus on our colleagues within the judicial branch of government.

The judicial system is worthy of job satisfaction in spite of the imperfections that are inherent in any human institution. There is ample consensus that what we do, with and without juries, provides tremendously valuable services when they are needed: unbiased delivery of justice, the rule of law, and dispute resolution. Jury trials, though imperfect, provide the purest form of government of, by, and for the people: jurors are selected for absence of bias, decide cases based on what comes to them in court and on the record, cannot be lobbied, do not run for the office of juror, cannot accept campaign contributions, and are interested only in achieving a just and lawful result.

This is the foundation of job satisfaction that must fuel our pursuit of the valuable purposes of the eCourt vision—to improve the lives and communities we touch.

PMBOK®⁵

PMBOK® is an internationally respected set of concepts employed by our Legislative Fiscal Office (LFO) to maximize our chances of succeeding in building a court technology upgrade. Due to local and national examples of how easily eCourt projects stumble, LFO required us to produce the documents designed to maximize the likelihood of our success. However critical this effort is,⁶ we can’t expect that making documents *say* the right things will ensure that we will *accomplish* the right things. But LFO firmly agrees that we must “make sure that ‘Oregon eCourt will give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in

our communities; and to improve lives of children and families in crisis.”

One of the important PMBOK® tools is a “risk matrix” that monitors risks to the overall program as well as to its components, which include enterprise content management (ECM), Web Portal, Intranet, Servers, Integration, case management, eFiling, and OCM. The risk presented by “silo” hurdles is perfectly illustrated by this scenario:

We identified a risk titled “vision dissipation” and assigned it to OCM.⁷ The fate of the “vision dissipation” risk itself soon appeared to doom pursuit of the vision. The risk was treated as if it belonged *only* to OCM; it effectively disappeared from risk matrices assigned to projects because it was relegated solely to the “program” and not to its projects. The risk was assessed as too low to appear on *any* risk matrices presented to governance committees. The eCourt vision reached some text in most of the many documents created to comply with PMBOK® but had no apparent connection to the rest of the project each document described. Even OCM documentation suggested that merely *stating* the vision was all that was required. Every document could comfortably be read as seeking *only* efficiency, convenience, and user satisfaction. All implications were that the hardest part—improving our impact on public safety, community well-being, and rational allocation of correctional and social resources driven by our dispositions—was not the responsibility of court technology. Of course, the vision can only be achieved if each *component* of eCourt embraces and pursues the vision; it simply cannot be achieved on a “program level” unless the components are engaged and integrated in its pursuit.

What *paperwork* must do at the very least is this: (1) Demonstrate with reasonable prominence how the document and its subject relates to pursuit of our vision; (2) Never be easily readable as deeming our program sufficient if it *merely* serves efficiency of court operations and user convenience.⁸

We know that OCM is not just about getting the courts to accept and accommodate the needs of new court technology; we know that integration is not just about getting the many components of court technology to play well with each other. All of this is hard, but the hardest part of all is the most valuable—transcending silos and achieving cultural changes necessary to get us all to embrace and use court technology to improve our impact on the lives and communities we touch *as well as* the efficiency of our processes and the convenience of our constituents.

5. Project Management Book of Knowledge (PMBOK®) is a proprietary standard for successful management of a wide range of projects, certainly including technology projects.
6. We’ve expended considerable resources to drafting and vetting over 84 significant documents to meet LFO’s requests. This work has necessarily competed with energy otherwise devoted to *building* eCourt.
7. The matrix describes the risk as “Losing sight of connection to eCourt’s vision to give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve lives of children and families in crisis.” If we don’t

avoid the risk, “eCourt does not deliver just, prompt, and safe dispute resolution, improved public safety, or improved quality of life in communities or for children or families in crisis,” and we risk “[l]oss of legislative support and continued funding based on the vision’s promise.” The matrix then outlines how we should manage the risk: “Ensure vision is clearly stated in all presentations and foundational documents for the Oregon eCourt Program; Ensure that the vision drives tactics, strategy, and implementation in all phases of eCourt upon which fulfillment of the vision depends.”

8. Oregon’s eCourt’s governance committees have adopted these requirements as an eCourt document protocol.

PURSUE THE VISION THROUGH COLLABORATION WITH TREASURED COLLEAGUES

Collaboration

We cannot achieve the vision without transcending silos because none of us has all the skills, information, or perceptions we need. Judges are generally not aware of the rapid expansion of technology tools, applications, and benefits, so we are hardly in the position to identify what “requirements” would best meet our needs. Technological workers are generally not focused on what judges actually do or how our decisions impact people, lives, and communities, so they are hardly in a position to identify what “requirements” would best meet our needs to improve that impact. We need to collaborate, and we surely can benefit from outside help.⁹

We all mean well. Here is what judges bring to our ongoing collaboration:

We increasingly depend upon court technology when doing our jobs: handling papers, filings, scheduling, official records, exhibits, jury assignments, enforcement of orders, communicating with counsel, agency partners in criminal cases, family and juvenile matters, and such routine business partners as title companies, collections enterprises, and even vital statistics agencies. We tend to notice our many technology colleagues only when something goes wrong, and only until it is fixed so we can take them for granted again. Glitches can delay trials, lose critical witnesses, inconvenience jurors, inefficiently allocate court resources, frustrate users, and tarnish users’ sense of justice by the burden of its processes.

Judges should *not* gather information not offered by litigants during the decisional parts of trials and hearings. Navigating between decisional and dispositional functions in of all sorts of civil, probate, criminal, juvenile, and family cases is not always easy, but there is no doubt: (1) judges often cannot do the best we should in *dispositional* phases by relying solely on information provided by advocates; and (2) even when judges should see only information provided by litigants, others often should see much more, such as those whose role is to advocate for an outcome or to provide safety in and out of court.

Judges often know what is at stake in the decisions we make. Even judicial colleagues who most fiercely resist judicial performance measures, or complain of lack of resources or wisdom

brought by others to the tasks between our decision and the next disaster, hope to produce the best impact they can on those whose lives we touch. What we really want is lurking beyond such realities as these:

Judges who preside in treatment courts across the country are profoundly transformed by the experience;

Family and juvenile judges vigorously strive so as to serve children and families in partnership with agencies;

Judges commonly personally volunteer to assist agencies devoted to the welfare of children, families, and the impaired;

Judges have expressed hunger for the type of information that can help us do a better job to serve public safety.¹⁰

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Collaboration—the pieces of the eCourt vision

We need to start with “*person-linked data*.” Vendors now commonly claim this capability, but we need to ensure that their algorithms are up to the challenge of intentional falsification by offenders and to the reality of vast unintentional errors reflecting cultural, mechanical, and communication limits. Biometric links such as fingerprinting, DNA, and pupil scans may be our best confirmation, but all need a mechanism for feedback certification loops.¹¹

“*Just, prompt, and safe resolution of civil disputes*” begins with case management via infrastructure, communication, calendaring, electronic content management, and legal research. But that *safe* part is more challenging for technology. Staff who schedule cases are responsible for security, and they need useful access to person-linked data when data (ours and from our partners) that would reveal when a party or a witness has involvement in another proceeding, such as a protective order, a previous dispute between parties, criminal history, or a pending charge, that would suggest a risk of violence to or from parties or witnesses or enforcers of judgments in any litigation across all case types. Even when judges should be oblivious to issues irrelevant to the merits being litigated, people responsible for “safe resolution of civil disputes” must be alerted to such

9. Many resources are available, such as the many local correctional agencies committed to evidence-based practices; the criminal justice commissions of such states as Illinois, Virginia, Missouri, and Oregon; The Justice Management Institute; A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems (I’ve been on the National Advisory Committee related to this project); the Crime and Justice Institute’s EBP (Evidence Based Practices) Box Set Papers; The Center for Effective Public Policy; The Pretrial Justice Institute (among other wonderful innovations is using pretrial release processing to assess risk and need in a way to pass up the chain in the event of conviction, sentencing, and supervision in custody or on supervision instead of or after incarceration).

10. For example, a 2008 poll by the Oregon Criminal Justice Commission found that 89.3% of responding Oregon judges agreed that an upcoming risk assessment tool will be useful for all

sentencing. Missouri, Virginia, Oregon, and other states are rapidly improving risk assessment tools available to sentencers and advocates. Critics serve a useful purpose in improving the accuracy and identifying the limitations of such risk and need instruments, but they abandon rationality when they insist on ignoring all but “gold standard” evidence in sentencing as they essentially return to faith-based sentencing under the opaque version of the “just desert” umbrella. Abandoning children to faith healing with deadly outcomes can lead to criminal convictions in Oregon, and I suspect that most seeking to combat life-threatening disease would prefer that their doctors do their best to extrapolate from the best evidence available even if it doesn’t rise to “gold standard” evidence.

11. A respected local attorney (a Muslim) was wrongly accused of complicity in international terrorism due to a fingerprint error.

Finally, best chances for success require meaningful performance measures.

risks to minimize them.

“Improve public safety and the quality of life in our communities” also begins with the hard part—handling pretrial release correctly and properly processing the trial. If a conviction identifies a defendant (or a juvenile adjudication identifies a youth) who represents a risk

of future harm to the community, eCourt should provide many types of information to achieve the optimum disposition. We need ready access to legal principles that guide available choices: to waiting lists, locations, and eligibility for providers within or outside jail and prison; to monitoring and treating and correctional agencies; to information about an offender’s past behaviors, successes, failures, and risk and needs assessments; to other existing sentences, holds, protective orders (for and against the offender); to automatic notification of police contacts, no-shows at providers, and so on for those still under our supervision. The *harder* part of doing what is most likely to reduce future crime and harm requires resources our colleagues are increasingly able to provide via technology: domestic-violence-lethality assessment tools and sentencing-support tools give us our best picture of what works best or not on which offenders under which circumstances. This requires tapping the highest values of data warehouses and data-crunching applications—not just to give us a good view of *what’s happening* but to equip and encourage us to *exploit data to improve what we are doing* through our part of the process.¹²

“Improve the lives of children and families in crisis” also starts with the easier of the hard parts of technology. At least in the context of family and juvenile courts, these goals are more commonly in mind. We need access to such applications as child support calculators. But when we craft dispositions, we also need person-linked data to see opportunities, conflicting orders, challenges, and risks to avoid mistakes in prehearing or post-hearing placements, to make evidence-based choices concerning treatments, institutionalizations, or mere conditions, and to maintain useful and current communication with agency partners whose work also heavily contributes to the lives of children and families we touch. And as they become developed, we need access to the best risk and need instruments to improve our chances of success. This also all applies to the adults and children who need protective mechanisms due to developmental disabilities.

Collaboration—what a useful web portal looks like

Most court technology will be delivered by a web portal

interface, but we haven’t even started what needs to be done if it comes to this. *Web experts*: “We can produce a customizable screen—what would you like to see?” *Users*: “How can I get content on the web that will make it easier to do what I’ve always been expected to do?”

The web portal can illustrate what silo-transparent collaboration should produce in an optimal court technology. Of course, we may want to provide users with the ability to customize what the web looks like to them. But by default, what is delivered by web tools should automatically be tailored to the user and the user’s task—to “push” that which is most likely to produce the best efforts when and where it is needed. A collections clerk should certainly see all sources of court-related debt to any criminal or civil debtor facing collections. Clerks and security personnel might need information about conflicts among trial participants a judge shouldn’t get during a decisional phase. During dispositional phases, a well-delivered and well-tailored web portal presents to judges precisely those tools, applications, training materials, references, and resources that are most likely to support best efforts *in a manner most likely to encourage judges to use them appropriately*. The same information should also be freely available to advocates to be most useful in their roles. This runs the whole range from, for example, sentencing law that limits discretion, relevant offender histories, pending matters and holds, risk and need assessment, and sentencing decision support applications, to data about what programs are and are not successful with offenders like those before the court, whether in or out of custody.

Collaboration—that performance measurement piece

Finally, best chances for success require meaningful performance measures. Yes, prosecutors (who control an enormous proportion of initial sentencing through plea negotiation) and judges (who ultimately impose sentences by bargain or otherwise) naturally tend to want to avoid responsibility for an offender’s subsequent crimes. Some are outraged that any blame for a crime can be located anywhere *but* with the offender. They should understand that blame, like love, is not diminished by its sharing. Prosecutors surely don’t hesitate to blame the judge whose defendant commits a new crime right after a release the prosecutor resisted.

But we must accept this challenge; we must find ways to show which decisions work best for which offenders, children, families, and communities. As long as the performance measurement display does not blame the user but invites its exploration, it can and should motivate our best efforts to contribute to the best outcomes and show the path to the pride we should have in our public service.

12. The typical perception of researchers and statisticians is a good example of the need to transcend silos. Most researchers and statisticians believe their function is to determine what is happening and to display it in graphs and charts. Collaboration would insist that we also extract data that shows how well we are producing the promised improvements in safety, communities, and the lives of children and families, and *how to improve our impact in these*

areas. Moreover, displays of data should be intelligible to judges to help them improve that impact. The point is not to displace judicial clinical judgment and to have computers craft dispositions. Researchers have repeatedly shown (largely to each other) that clinical judgment *based on* evidence is substantially more successful than clinical judgment alone—in many fields.

CONCLUSION

The easier part of court technology is hard enough but cannot legitimately compete with social expenditures unless we also embrace the hardest part: exploiting technology to provide just, prompt, and safe resolution of civil disputes; to *improve* public safety and the quality of life in our communities; and to *improve* the lives of children and families in crisis. Success at this level requires the enthusiastic embrace of the vision and collaboration among all of our colleagues and our partners. Its pursuit is as fruitful a source of pride in public service as available to anyone on our planet.



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