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▼ Model Court Rules  
for the Use of  
Facsimile Technology  
by State Courts

*National Center for State Courts  
State Justice Institute*

# ▼ Model Court Rules for the Use of Facsimile Technology by State Courts

Susan R. Koenig  
Frederick G. Miller  
Frederick M. Russillo

*Submitted to the State Justice Institute  
by the National Center for State Courts*

**SJI** State  
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Institute



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# *Introduction*

The "fax boom" of the late 1980s did not bypass either the courts or the legal community. The American Facsimile Association estimates that the legal profession ranks as the fifth largest group of fax owners with over 12 percent of the more than 2.5 million machines in the United States. Toward the latter part of the 1980s, fax became an established part of law practice, which stimulated interest in fax communication with courts.

Despite the common view that courts lag behind the business world in the adoption of new technology, throughout the 1980s courts around the country began buying fax machines, becoming the first local government agencies to acquire fax machines in some areas. In response to a 1990 survey of court fax use, 38 state administrative offices of the courts reported that facsimile machines are being used in one or more levels of state courts. Thirty supreme courts, intermediate appellate courts in 21 states, general jurisdiction courts in 28 states, and limited jurisdiction courts in 19 states use fax machines for administrative and legal communication.<sup>1</sup>

## *Fax Project Overview*

For what purposes have courts found that fax is useful and feasible? What effect does fax have on judicial work, accessibility of the courts, court operations, and costs? How do other justice system agencies and attorneys react to fax communication with courts, and how does it benefit them? Is fax a technology in search of a purpose, or are fax machines destined to become an indispensable means of communication for courts? With the cooperation and assistance of courts in six states, the National Center for State Courts conducted a two-phase project sponsored by the State Justice Institute to answer these and related questions about the feasibility of using fax. Phase I studied the use of fax technologies in predominantly nonurban judicial districts. Phase II was initiated to produce the Model Court Rules that follow this introduction and to analyze the use of fax in King County (Seattle), Washington; Santa Clara and San Bernardino counties in California; and the San Francisco Bay Area counties. This introduction summarizes some of the findings from phase I, which are more fully presented in Susan R. Koenig's *Courts in the Fax Lane*.

Thirteen courts in Minnesota, Washington State, Illinois, Colorado, and Idaho were visited during phase I of the project; a mail survey of 1,008 attorneys practicing in four judicial districts in three of the study states was conducted; and the state administrative office of the courts in each state was surveyed about the use of fax.<sup>2</sup> The study found that fax is playing an increasingly important role in communication between courts and attorneys for filing court documents and helping judges, court administrators and clerks, attorneys, and justice system agencies to overcome the difficulties, expense, and delay entailed in long-distance communication. The success of experiments with direct fax filing of pleadings and other court documents largely depends upon the specific provisions of court rules, equipment, and operational practices. Fax filing has had limited acceptance in some courts and wholehearted endorsement in others.

The state courts in this study have been among the first to adopt fax for both administrative and legal purposes. The interest of these courts in fax communication arose for a number of reasons, including the need to provide speedy communication in rural judicial districts, the desire to improve or maintain access to the courts, and the need to use judges' time efficiently.

The National Center project team visited eight trial courts in five judicial districts in Colorado, Idaho, and Minnesota to find out how fax-filing programs affect court operations and how attorneys who practice in these courts have responded to the new opportunity to file court documents by fax. The courts have between one and seven judges who travel on regular schedules throughout their judicial districts.

### *Statewide and Local Rules Concerning Fax Filing*

Although there are many differences between rules governing fax filing in the project sites, the most significant differences involve the type and length of documents that may be filed by fax, the hours of fax service operation, and disposition of the "original" document.

In all three states, a faxed document is deemed to be an original document for all court purposes, meeting the requirement for an original signature where required by statute. Rules usually require an attorney to retain the original document in the event of a dispute over authenticity. Minnesota rules require attorneys to submit the original document for court files within five days of filing the document by fax.

### *Direct Fax Filing in Three States*

Many similar issues and concerns emerged in each state concerning the use of fax, but the differences in the type of equipment available in the clerks' offices and the specific provisions of statewide or local rules caused participants to have some significantly different perceptions of the effect and usefulness of fax filing.

To offset the cost of starting and maintaining a fax service, most courts charge a fee for incoming faxes of \$2 to \$5 for the first several pages and between 50¢ and \$1 for each additional page. The transmission fees enable courts to cover the cost of paper, telephone line installation, and monthly telephone service charges. Some courts waive transmission charges for faxes received from other government agencies and in situations where a judge has requested that the information be faxed.

In one project site, the county bar association was instrumental in initiating the court's fax service and providing the fax equipment. With support from the judges, judicial district administrator, and clerk, the bar association installed a fax machine in the clerk's office to both receive filings and serve other uses for the court. The bar association offers a fax subscription service for \$25 to bar association members and \$100 for nonmembers and charges 50¢ per page for faxes received by the clerk's office to cover the cost of supplies, telephone charges, and maintenance, which are the responsibilities of the bar association. Bar association staff handle all billing and collection of fax fees, eliminating any additional burden on the clerk's staff. Reaction from the bar to the fax service has been favorable.

The volume of fax filings has been less than anticipated by most courts in the study—from 2 to 10 percent of documents filed. Many attorneys and court administrators foresee increased demand as the availability of the fax service becomes more generally known among attorneys practicing in these courts.

Providing a cover sheet identifying the sender has become part of the evolving "fax etiquette" in the business community. Cover sheets also are essential when filing a court document to help clerks to identify urgent matters requiring immediate attention, to identify the sender and the case involved, and to provide other instructions that would ordinarily be given verbally if the document were filed in person. Credit card billing information also is required on many cover sheets.

Some clerks were concerned initially that attorneys would routinely file long documents by fax, tying up the court's machine. Experience to date shows that attorneys usually do not fax long documents, although a few court administrators reported memorable exceptions. Receiving longer documents has not presented a problem for courts that use cut-sheet paper machines because these models are generally equipped with large paper supplies and a paper tray. Long faxes are problematic for courts equipped with machines that use rolls of thermal paper.

Many clerks initially were skeptical about the feasibility of fax filing because of concerns that it would increase work load. When thermal-paper fax equipment is used, clerks' offices have experienced a significant increase in the amount of time necessary to process a filing. Because the thermal paper curls, is difficult to handle, and may blacken or deteriorate with heat, each page must be cut from the roll and copied onto plain paper. Thermal-paper faxes are too time-consuming and impractical to be used as court documents. Where plain-paper fax machines are used, the processing of fax filings is far simpler and has less effect on workload. Fax

machines that print on plain bond are recommended for fax filing. A sheet cutter and "decurling" feature to flatten the sheets are necessary for fax equipment that uses rolled paper.

The requirement for Minnesota attorneys to send the original document within five days after the fax filing creates additional work for both attorneys and court staff. Many attorneys agreed that this requirement makes fax filing impractical for them. Where follow-up originals are required, as many as three copies of the same document could be placed in the file—the fax, the copy of the fax, and the original. Internal operating procedures must be set up to ensure that only one copy of each document is officially filed and placed in the case file.

Even when pleadings are received on plain paper, some additional work is necessary to prepare the filing. Clerks must count the number of pages, check for any garbled text, and assemble or staple the documents. Monitoring the fax machine was generally assigned to counter clerks. Monitoring incoming faxes was not a problem except in rare situations where the fax machine had been installed in an inconvenient location, or if long faxes were received near closing time. The low volume of faxes received kept the extra steps from becoming a problem for any of the courts that used plain-paper fax, but long faxes would be a significant issue for courts with high-volume operations. A substantial increase in fax filings could affect the organization of the clerk's office, but no substantial reorganization would be necessary if fax filings remained low.

Most courts reported occasional transmission problems that caused garbled lines of text or interruption of a transmission. Courts that had experienced serious, continuing transmission disruptions solved the problems by installing a dedicated phone line, dedicated electrical circuit, or electrical surge protector for the fax machine.

The Colorado courts' rules specifically state that clerk's office staff are not required to notify attorneys that a fax has been received. This provision was included to prevent a flood of phone calls that would burden the clerk's office. However, clerk's staff find it impractical to follow this provision when fax documents are not received properly. In such cases, the transmittal sheet is faxed back to the attorney with a notation, or a clerk calls the attorney's office.

The method of collecting filing and transmission fees has a significant effect on how clerk's office staff view the feasibility of fax filing. Court administrators in Minnesota expressed approval that attorneys generally did not file fee-based documents by fax because collecting filing fees after the fax transmission required new monitoring procedures. The clerks found it necessary to establish a procedure to monitor the receipt of fees through entries in the computerized case-processing system's register of actions. Most attorneys comply with Minnesota's deadline for sending fees within five days, but a few cases have required follow-up action by the court administrator or a judge. In contrast, the credit card payment system in the Colorado Ninth Judicial District ensures that fees are received at the time of filing. Originally implemented to collect criminal and traffic fines, credit

card payment has eliminated the need to monitor fee collection. Attorneys are required to include credit card billing information on the fax cover sheet accompanying the filing. Although some additional work is associated with reconciliation of the monthly credit card statement, this procedure was already in place, and the few extra transactions have not caused significant additional work for the clerks.

### *Attorneys' Perspective on Fax Filing*

Attorneys from the phase I project sites were surveyed by mail to determine how they use fax in their practice and how they view fax communication with courts.<sup>3</sup> The survey group represents all types of legal practice, including lawyers in private practice, public defenders and legal aid attorneys, and prosecutors. One-third of the attorneys who use fax reported filing documents by fax with a state court in their judicial district. Over 90 percent of the fax filers had found the service useful and convenient. The overwhelming majority (89 percent) agreed that fax filing makes courts more accessible.<sup>4</sup>

### *Private Fax-filing Services*

Fax and express delivery services have become commonplace in urban law practice in California, where litigation increasingly involves litigants and attorneys from across the country or around the world. Through the combined efforts of the California Judicial Council, the State Bar Association, and the California Administrative Office of the Courts, legislation was passed in 1989 to test fax filing in several California courts.

In several urban California counties, local court rules now permit fax filing of court documents through third-party fax services. Local entrepreneurs have established fax-filing services close to courthouses in many counties. Attorneys must first set up an account with the service, which receives the documents by fax, prints them on plain-bond paper, and walks the documents to the courthouse in time to meet filing deadlines. A copy of the face sheet accompanying the document is file stamped at the courthouse and returned by fax to the attorney for proof of filing. Court-filing fees, if any, are advanced by the filing service and billed to the attorney in addition to charges for the fax service, which range from \$15.00 for the first 5 pages to \$47.50 for 40 pages or more. This type of service is likely to succeed in urban areas with a large client base, but may not be economically feasible for businesses in smaller communities.

### *Other Uses of Fax by Courts*

When the document has to get there quickly, court staff, judges, attorneys, and law enforcement personnel turn to the fax machine in situations where they previously

delivered the document personally or sent it by courier or overnight mail. Court personnel have found that there are many instances (often daily) where fax communication between justice system participants saves time and expense:

- Courts can save considerable travel time and expense when law clerks can fax changes to jury instructions and legal research material to traveling judges, instead of driving long distances to deliver the information.
- Attorneys reported faxing required orders and briefs on short notice to traveling judges or to courts in another county saved them considerable time and expense.
- For some courts and attorneys, fax virtually eliminated the expense of overnight mail. Although one court reported that fax had not yet had much effect on the amount of overnight mail it received, fax had eliminated the need for a regular courier route between two courts in the judicial district.
- By faxing paperwork between the jail and the courtroom during video arraignments and first-appearance hearings, jails have saved prisoner transport costs and personnel time. Where fax is used to transmit bail documents and release-on-bond orders, delivery time is saved, and jail personnel can process defendant releases more quickly.
- Judges also found that fax helps keep cases moving and contributes to a court's ability to provide better service to litigants, attorneys, and law enforcement agencies.
- Judges found that fax can eliminate the need for continuances when it is discovered that a document is needed, but not at hand, during a hearing or trial.
- Many courts routinely fax warrant recalls, or "quash orders," to law enforcement agencies to ensure that the law enforcement personnel receive this information promptly.
- Fax communications can substantially speed up communication between the courts and agencies responsible for support disbursements and enforcement.
- After regular court hours or in the absence of a judge in the county, two of the states in the study permit judges to accept affidavits for search or arrest warrants by fax, and three states permit signed warrants to be returned by fax to law enforcement officials.
- Both judges and attorneys agreed that fax expedited the handling of emergency matters, such as domestic violence petitions, and saved countless hours of judge travel when long-distance communication was required.

Some judges have begun using portable fax machines to conduct business during weekends or evenings. Although skeptical at first that the portable fax would be helpful, off-hours duty judges quickly learned that handling warrants by fax and phone was far more convenient, and saved time for law enforcement

personnel, than lengthy trips to the judges' houses or another county. Judges who have accepted search and arrest warrants by fax generally feel comfortable with the procedure because law enforcement and prosecutorial personnel had not abused the procedure. Having the option to require an in-person hearing gives judges latitude to use their discretion as to the best way to handle each situation.

Administrative uses of fax are also common. When court administrators need to send an announcement or legislative update to numerous courts, the fax machine's broadcast capability (scan and store the document once, then broadcast to each court's fax machine) is far simpler and faster than making and mailing multiple copies. Administrators use fax to broadcast announcements of the need for a judge to take a calendar in another court, administrative and personnel memos, and routine correspondence. Judges involved in statewide committees have found fax invaluable for exchanging information with other members. Meeting deadlines, expediting purchase requisitions, and transmitting case documents from one court to another are among the many reasons fax is used daily by court staff.<sup>5</sup>

### *Conclusions*

Fax filing of court documents has gained acceptance by many attorneys who find it adds an extra measure of convenience when other methods of delivering documents are more expensive or time-consuming. Gordon Litwiler, chief judge of the Colorado Ninth Judicial District, captured the sentiments expressed by many attorneys, judges, and court administrators: "Using communication technologies and credit cards gives rural jurisdictions great flexibility to improve access to the courts and provides an additional convenience for litigants."

Fax filing of court documents is feasible for the courts, provided the courts use proper fax equipment and develop rules and procedures to control the process and to minimize additional work for clerks' offices. Fax filing has the least effect on the work load of the clerks' offices that use plain-paper fax machines and collect fees by credit card payment or by a third-party billing service. Fax filing through private fax services is an alternative to faxing documents directly to the court that may serve urban areas well, but it may not be economically feasible in smaller communities.

Fax has become an important means of communication for judges, attorneys, and judicial district administrators in the large rural judicial districts in the study. The clearest positive effect was observed in situations where fax makes it possible for a traveling judge to review and sign warrants and emergency orders that law enforcement personnel, attorneys, or court staff would otherwise have to drive long distances to deliver. Fax enables traveling judges to keep in contact with their home chambers and helps maintain a speedy pace of litigation. Above all, fax promotes accessibility of the courts for attorneys, litigants, and justice system agencies.

## End Notes

1. Monica Lee, *Fifty-state Survey of Fax Use* (National Center for State Courts 1990).
2. For those readers who would like a more detailed treatment of fax use in each of the study sites, individual site reports are available from the Publications Department of the National Center for State Courts, 300 Newport Avenue, Williamsburg, VA 23187-8798.
3. Susan Koenig, *Survey of Fax Use By Attorneys in Four Judicial Districts* (National Center for State Courts 1990); see also *The Facts on Fax for Court Managers*, The Court Management and Administration Report (vol. 1, no. 3, March 1990).
4. Most attorneys responding to the survey work in small firms or public agencies with 10 or fewer lawyers (56 percent) or are solo practitioners (24 percent). Only 3 percent of the respondents work in firms with more than 40 attorneys.

Public attorneys and solo practitioners are still less likely to use fax than private firms. For those attorneys who cannot justify the cost of the equipment, local copier stores and public libraries in some towns offer fax services for a fee. Many solo practitioners and smaller firms share fax machines with neighboring businesses or other law firms.

Fax has become an important communication medium for many practitioners to send and receive business documents and to communicate with clients and other law firms. In urban areas snarled with traffic, fax is increasingly taking the place of messenger services to get documents from "here" to "there," and in rural areas, fax is replacing overnight mail for many attorneys. Public law libraries in some areas have started fax services to serve attorneys who have limited access to legal reference works. With the help of a fax machine and personal computers, some attorneys find they can manage major practices from rural areas almost as easily as in an urban area.

Publicity through local bar associations, newspapers, and by word of mouth has informed almost three-quarters of the attorneys practicing in the courts studied of the availability of fax filing.

Most attorneys who have filed by fax do so only occasionally, although a minority (5 percent) reported filing by fax frequently. Faxing documents is the method of choice for many attorneys when time is of the essence, such as when requesting an emergency hearing or entering an appearance of counsel when a client retains them at the last minute. Attorneys are most likely to fax pleadings when a mailed document would not arrive in time, if no member of the firm or a courier is available to deliver the documents, or if a special trip to the courthouse is undesirable. Conversely, very few attorneys are inclined to fax documents that would arrive in time by mail.

The length of the document to be filed is also significant in determining whether attorneys prefer to file by fax or in another manner. Almost one-quarter of the attorneys said they would be "very likely" to fax documents under 10 pages, but only 5 percent would be very likely to fax documents longer than 10 pages.

The majority of attorneys also consider cost when deciding the method of filing. If the cost of faxing a document is higher than another method of delivery, over half the attorneys said they would choose the less expensive method. However, three-quarters of the attorneys who have filed by fax think the cost of fax filing is reasonable.

Attorneys who use fax for other purposes, but have never filed any court document by fax, composed the majority of respondents in each site, accounting for almost two-thirds of the fax users overall. The reason most frequently cited by respondents for not filing by fax is that other methods of delivering documents to the court are satisfactory. In the communities in our study, many attorneys have offices within a few blocks of the courthouse, and some prosecutors are located in the courthouse. For attorneys practicing near the courthouse, filing documents takes little time and may be an opportunity to visit with a judge or conduct other business at the courthouse. Proof of filing is important to many attorneys, who cited the inability to receive a confirmed copy as a reason they prefer not to file by fax.

There is considerable concern among attorneys about fax signatures. Fifty-four percent of non-fax filers felt that the lack of original signatures on faxed documents was an important reason for not filing fax documents. The lack of publicity of fax-filing services may also have a significant effect on the volume of fax filings.

The appearance of fax documents and the possibility that a fax document might not be received discouraged a sizeable minority (45 percent) from filing by fax. A small minority were very adamant about their dislike of fax, often citing drawbacks of thermal fax paper. Others find that fax is intrusive and causes even inconsequential matters to assume great importance or urgency. Some small firms and solo practitioners who do not have fax machines state that they place a higher priority on purchasing other equipment, such as computers. Many attorneys have not found the need for fax because their practices are slower paced, or they are able to get papers prepared far enough in advance of deadlines for mail to be satisfactory. Another large group indicated that although they have access to fax when needed, it is not particularly convenient or cost-efficient because they don't own the fax machines.

5. In Cook County, Illinois, the off-site records storage facility, which houses both active and inactive case files, receives fax requisitions for over 600,000 case records every year. The fax requisition process has helped to make same-day delivery of case files possible. Faxing of the entire case file is not considered feasible due to the length of many files, but individual documents are occasionally faxed if a judge requests it.

Since March 1990, the Jackson County Circuit Court in Kansas City, Missouri, has saved about \$600 a month in postage and copying costs by faxing about 60 percent of the 460 court dockets that are distributed weekly to local law firms. Although some law firms initially objected to receiving fax dockets, most firms have adjusted to receiving only one copy of the calendar instead of copies for individual attorneys. The court mails calendars to those firms that prefer not to receive the calendars by fax.

One judge in Cook County, Illinois, credits fax communication with helping him and his staff to keep pace with a yearly caseload of over 80,000 student loan defaults. The judge faxes orders to banks to freeze assets, discover funds, report account activity, and seize bank accounts. Wage garnishments, business citations, and installment agreements are faxed to attorneys by the court. Answers by banks and attorneys are faxed back to the court, avoiding the delay of mail or the need for costly courier services. The 18-year history of fax communication between the sheriff's office and the court in Cook County to send warrant recalls is also a testament to the mutual benefit of this technology in an urban setting, where distance is an impediment to communication, even if the distance is measured in city blocks rather than miles over country roads.

# *Proposed Model Facsimile Utilization Rules with Commentary and Alternatives*

## *I. General Provisions*

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# *Proposed Model Facsimile Utilization Rules*

## *I. General Provisions*

### **1-101 Short Title**

These rules may be cited as "fax-filing rules."

\* \* \*

#### *Commentary*

*Adopting jurisdictions may wish to specify "filing" rules if facsimile use is limited to filings.*

### **1-102 Definitions**

As used in this division, unless the context requires otherwise:

- (1) "These rules" means the rules in this chapter.
- (2) "Facsimile transmission" means the transmission of a document by a system that encodes a document into electronic signals, transmits these electronic signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.
- (3) "Facsimile filing" or "filing by fax" means the facsimile transmission of a document to a court or fax-filing agency\* for filing with the court.

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\* A fax-filing agency is a private business approved by a court to receive facsimile transmissions of documents to be filed with the court. The fax-filing agency is similar to a messenger service, filing a hard-copy facsimile transmission as if it were the original with the court. The court does not have to maintain facsimile machines, establish mechanisms to accept filing fees via fax, or make copies of filed documents.

- (4) "Service by fax" or "Service via facsimile transmission" means the transmission of a document to an attorney or a party under these rules.
- (5) "Fax" is an abbreviation for "facsimile" and refers, as indicated by the context, to a facsimile transmission or to a document so transmitted.

\* \* \*

### *Alternatives/Additions*

ALT. (6-a) "Facsimile machine" means a machine that can send a facsimile transmission using the international standard for scanning, coding, and transmitting established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT),\* in regular resolution. A facsimile machine used to send documents to a court shall send at an initial transmission speed of no less than 4800 baud and be able to produce a transmission record. As applied to a court, facsimile machine also means a receiving unit meeting the standards specified in this subdivision that is connected to and prints through a printer using xerographic technology and a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. (California)\*\*

ALT. (6-b) "Facsimile machine," a device capable of facsimile transmissions, will be attached to a dedicated phone line and a dedicated electronic circuit protected by a surge protector.

The device will use 20 lb. alkaline base bond paper and will meet CCITT GROUP [ ] specifications. It will automatically place the date and time of receipt on the printed transmission.

ADD. (7) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiver.

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\* Recommendations T.4 and T.30, Volume VII - Facsimile VII.3, CCITT Red Book, Malaga-Torremolinos, 1984, U.N. Bookstore Code ITU 6731.

\*\* This reference to California and all subsequent references to states in these model rules indicate that the preceding language was either under consideration by that state or used in its statutes or court rules.

ing machine, the number of pages sent, the transmission time, and an indication of errors in transmission. (California)

### 1-103 Authority

The rules in this division are adopted under [ ] and the authority granted under [statute] and by the [Constitution, article, section].

### 1-104 Facsimile Transmission

All courts within the state *may* accept the filing of pleadings and other documents designated in this rule by facsimile transmission.

\* \* \*

#### *Alternatives/Additions*

- ALT. 1-104 (1) ... within the case categories of civil, criminal, domestic relations, juvenile, traffic, small claims, and \_\_\_\_\_ cases, ...
- (2) ... including warrants and associated affidavits, ...
- (3) ... that do not require the payment of a filing fee.
- (4) The following pleadings and matters are not acceptable for facsimile transmission to the court:
- Wills, codicils, bonds, and similar undertakings (California);
  - Any pleading or submission requiring the inclusion of a verified document or signature by rule or statute (Missouri); and [or]
  - Any citation or writ bearing the official seal of any court. (Texas)
- (5) Confidential filings will be accepted only during business hours according to procedure established by the court, or with prior approval of the clerk.

\* \* \*

#### *Commentary*

*Adopting jurisdictions may wish to limit casetypes and/or pleadings and papers for which facsimile filing is deemed appropriate. Delayed or subsequent payment of court fees or facsimile use service fees obviously entail a credit,*

*billing, or accounting system. These corollary duties and services may be minimized by limiting facsimile use to those filings not entailing a fee (Alt. 3).*

### 1-105 Transmission Does Not Constitute Filing

Electronic transmission of a document via facsimile machine does not constitute filing; filing is complete only after verification by the clerk of facial acceptability for compliance with applicable rules of court, including [rules] regarding the form or format of papers, and with [rules] regarding filing procedures.

\* \* \*

#### *Alternative/Additions*

- ADD. (a) ... and the affixing of the official date and time stamp on each page received. (Texas)
- ADD. (b) All documents filed via facsimile transmission must conform in form and format to existing court document quality standards of [rules]. They should be received on 8-1/2" x 11" 20 lb. alkaline plain paper of archival quality, and satisfy all other requirements of these rules.
- ADD. (c) ... If the clerk determines the document to be unacceptable for filing, notice of nonacceptance will be faxed to the transmitting party. Such notice will be entered on the court's docket. The rejected document will be discarded. No further notice or action is required by the clerk.

\* \* \*

#### *Commentary*

*It is not advocated that clerks be responsible for rules compliance other than the facial acceptability of incoming pleadings.*

*The utility and convenience of facsimile filing should not occasion greater burdens on court staff in copying or cutting nonstandard or nonconforming paper stocks. This problem can be minimized through the use of court facsimile machines capable of producing facsimile filings on paper stocks that meet court-set paper size and quality standards. Thermal-paper fax machines may create undue burdens on staff to copy and cut transmissions. If such machines are in service and cannot be readily replaced for budgetary reasons, the court*

*may wish to require that conforming originals follow the acceptance of the facsimile filing by mail, within a set period of time. The filing of these conforming originals would then be effective upon the date of the receipt of the original facsimile transmission.*

ADD. (a) [Oversized Exhibits.] No facsimile filings will be accepted where any part of that filing cannot be legibly reduced to 8-1/2" by 11."

ALT. (a-1) [Oversized Exhibits.] If a filing transmitted via fax is to contain exhibits of a size or nature not amenable to downsizing for facsimile transmission, the filing must contain titled insert pages representing those exhibits, with explanation. The missing exhibits must then be received by the court within five (5) court days following receipt of the filing. The date of filing will be the date of the original conforming transmission. (California)

ADD. (b) [Examination of Original.] If a demand for production of the original physically signed document is made, the parties shall arrange a meeting at which the original physically signed document can be examined.

\* \* \*

### Commentary

*Production of original documents should not pose any special problems within the framework of existing discovery rules. It is anticipated that parties will cooperate; court sanction power is sufficient to compel cooperation where it is not forthcoming.*

## II. Filing Procedures

### 2-101 Methods of Filing

- (a) [Direct Filing.] A party may file by fax directly to any court location offering this service. The court shall file the document if it complies with these rules.
- (b) [Availability of Court Facsimile Machine.] Each court offering facsimile services shall have its facsimile machine available during normal business hours.

\* \* \*

*Alternatives/Additions*

- ALT. (b) [Availability of Court Facsimile Machine.] Each court offering facsimile services shall have its facsimile machine available 24 hours a day.
- ADD. (c) A document received in whole or in part after normal business hours, as indicated by the receiving facsimile machine in the court, shall be processed on the next court day and deemed received at the opening of business on that day.
- ADD. (d) No facsimile transmissions of over [ ] pages in length (including cover sheet) will be accepted during normal court hours. Transmissions of more than [ ] pages must be made after the close of the court business day. (Idaho, Colorado, Minnesota)
- ADD. (e) [Required Copies.] Required copies of motions or briefs under [rule] must be transmitted with the original. Copies will be included in page counts. (Colorado)

\* \* \*

*Commentary*

*The committee recommends consideration of after hours or unattended facsimile service. This decision should be made in consideration of facsimile machine capabilities, such as memory capacity and "stacking" ability for separating individual filings and standard-paper (versus thermal paper) printing capacities. The extension of such service should not unduly burden court staff. In the same vein, adopting jurisdictions may wish to place page limits on transmissions during normal business hours. Alterations to times and limits may be made by prior approval.*

*If a failure of the court's facsimile machine occurs and a filing party is unable to complete a transmission, the filing party may petition the court with submission of adequate documentation to accept the filing retroactively at the time of the attempted transmission.*

- (c) [Mandatory Cover Sheet.] The sender must provide all required instructions and identifying information on the first page of the transmission (cover sheet) in a format prescribed by the court.

ALT. (c-1) [Mandatory Cover Sheet] A facsimile filing shall be accompanied by the facsimile transmission cover sheet adopted by [rule]. The cover sheet shall be the first page transmitted, followed by any special handling instructions needed to assure the document complies with local rules. This cover sheet shall:

- (1) clearly identify the sender by name, fax number, and state bar number, the documents being transmitted by caption and matter, and the number of pages;
- (2) have clear and concise instructions concerning issuance or other request; and
- (3) have complete information on the charge card authorization or escrow account debit for court costs and fees.

Neither the cover sheet nor the special handling instructions shall be filed in the case. The court shall ensure that any billing or credit card information on the cover sheet shall not be publicly disclosed. The court shall not be required to keep a copy of the cover sheet.

\* \* \*

### Commentary

*All information relating to sender identification, pleading identification, and any special instructions must be placed in a standardized format on a form approved by the court or appropriate authority. The committee does not recommend the open transmittal of any information pertaining to credit cards or accounts if a billing system is maintained. Only account identifier codes should be referenced by the sender.*

- (d) [No Verification of Receipt.] Court personnel will not verify receipt of a facsimile transmission by mail, telephone, or return transmission. (Colorado)

ALT. (d-1) [Return of Copy of Cover Sheet by Facsimile Transmission.] Upon receipt and processing of a filing by fax, a court shall transmit to the sending party, by facsimile transmission, a copy of the cover sheet showing filing [and any fee] information.

ALT. (d-2) [Return of Copy of Cover Sheet by Mail.] Upon receipt and processing of a filing by fax, a court *may* mail to the sending party

a copy of the cover sheet showing filing fee and information as required. (Texas)

- ALT. (d-3) [Failure to Return Endorsed Filed Cover Sheet.] The failure of a court to transmit or mail verification or acknowledgment of receipt of a facsimile filing shall not affect the validity of the filing. (California)

\* \* \*

*Commentary*

*The provision of a courtesy confirmation of receipt or a verification of transmission lies within the discretion of the court or other appropriate authority. If provision is made for such verification or confirmation and it is not received, the sender would be on notice of a potential problem.*

- (e) [Presumption of Filing.] If the attempted facsimile filing is not filed with the court because of (1) an error of transmission or (2) a failure to receive or process by the court, the sending party may move acceptance nunc pro tunc. The court, in the interest of justice, and upon the submission of appropriate documentation, may entertain a written motion and hearing in its discretion. The risk of the use of facsimile transmissions lies with the sender.

- ALT. (e-1) [Presumption of Filing.] A party filing by fax shall cause the transmitting facsimile machine to print a transmission record of each filing by fax. If the facsimile filing is not filed with the court because of (1) an error that was unknown to the sending party in the transmission of the document to the court, or (2) a failure to process the facsimile filing when received by the court, the sending party may move the court for an order filing the document nunc pro tunc.

- ALT. (e-1) -a The motion shall be accompanied by the transmission record and a proof of the transmission in the form set forth in [rule].

- ALT. (e-1) -b The motion shall be accompanied by the transmission record and a proof of transmission in the form set forth in [rule]. Failure to produce the transmission report does not preclude the court from ordering that the document be filed.

\* \* \*

## 2-102 Facsimile Signature Constitutes Original Signature

Notwithstanding any provision of law to the contrary, a signature produced by facsimile transmission is an original. A party who files a signed document by fax represents that the original physically signed document is in his or her possession or control.

\* \* \*

### *Alternatives/Additions*

ADD. 2-102 [Facsimile Signature Constitutes Original Signature.] The filing party must keep the original document for a period no less than the maximum allowable time to complete the appellate process.

ALT. 2-102 [Facsimile Signature Constitutes Original Signature.] For all designated filings conforming to these rules, a signature produced by a facsimile machine will be treated as an original signature for all purposes, except where rule or statutory requirements specifically demand a verified document or signature. (Missouri)

\* \* \*

### *Commentary*

*Electronic filings, whether by facsimile or other means, present new challenges to the reliance on documents bearing an "original" signature. In all cases where a document other than a hard-copy document is accepted for filing, the first-generation hard-copy document with actual signature should remain in the hands of the sender and be available for review as necessary for any subsequent challenges to authenticity within the scope of applicable discovery rules.*

## 2-103 Payment of Fees

Payment of filing fees and any additional charges levied by the court for the use of the facsimile-filing option (user service charges) shall be paid in the manner prescribed by the appropriate authority.

\* \* \*

*Alternatives/Additions*

- ADD. (a) [Payment of Fee by Charge Card.] Visa or Mastercard accounts may be used to charge filing fees and service charges on facsimile filings as follows:
- (1) A filing requiring the payment of a filing fee shall include on the cover sheet (1) the Visa or Mastercard account number to which the fees shall be charged, (2) the signature of the cardholder authorizing the charging of the fees, and (3) the expiration date of the credit card.
  - (2) If the charge is rejected by the issuing company, the court shall proceed in the same manner as required for returned checks. This provision shall not prevent a court from seeking authorization for the charge before the filing and rejecting the filing if the charge is not approved by the issuing company.
  - (3) Notwithstanding any provision of law to the contrary, the amount authorized to be charged shall be the total of the applicable filing fee plus any fee or discount imposed by the card issuer or draft purchaser, and the total court-imposed fee for the use of this service. (California)
- ADD. (b) [Filing Fee Accounts.] An account may be used to pay all fees for documents filed by fax in the courts as follows:
- (1) This method may be used only if an attorney has established an account with the court before filing by fax a paper requiring the payment of a fee.
  - (2) The court may require the deposit in advance of an amount not to exceed \$1,000 or the court may agree to bill the attorney not more often than monthly. A court subject to this subdivision shall select either the advance deposit method or the billing method. (California)
- ADD. (c) [Subsequent Payment of Filing Fee.] A filing fee may be paid by mail or in person following a facsimile filing as follows:
- (1) The filing fee, accompanied by a copy of the facsimile-filing cover sheet, shall be deposited with the court not later than seven calendar days after the filing by fax. The court may withhold entry of judgment pending receipt of the fees.

- (2) If the filing fee is not received by the court within seven calendar days after the filing by fax, the court shall proceed in the same manner as required for returned checks, except that no further notice need be given any party.
- (3) A three-day grace period will be allowed for receipt of direct (noncredit card or escrow account) payments. Nonreceipt of payments will result in suspension of facsimile privileges, the striking of pleadings for which fees were not tendered, and any other penalties deemed appropriate within the discretion of the court. (Colorado)

ADD. (d) [Fees for Filing by Fax.] The following fees will be assessed by a receiving court for all filings submitted by fax as a service charge to cover maintenance and operating costs:

Each document filed by fax shall be assessed a fax-filing fee of \$1 for each page that is received..

ALT. (d-1) The first paper filed by fax by each party in an action shall be assessed a fee of \$15. No fee for filing by fax shall be charged for subsequent papers filed by fax in the action.

ALT. (d-2) The fee for filing shall be \$10 for from 1 to 10 pages; additional pages will be \$1. (Colorado)

ADD. (e) The fees or user service charges assessed by this subdivision shall be paid as provided by this rule.

ADD. (f) State agencies exempted from filing fees under [ ] are not exempt from the user service charges enumerated within this subsection (d). (Colorado)

\* \* \*

### Commentary

*The assessment of fees or user service charges for filing by fax (a charge separate and distinct from the normal filing fee itself) should be reflected in existing statutory fee schedules. Whether a fee should be imposed for the provision and maintenance of this service is an open question. Jurisdictions considering imposition of a service charge for facsimile filing should weigh the purpose of such fees: are they a cost-recovery device for machine purchase, maintenance, and operating costs, or a revenue generator? Does facsimile*

*filing serve court or litigant convenience? Will fees serve to ration or discourage use? Facsimile filing will certainly entail some form of delayed payment system for filing fees or charges, with attendant accounting, billing, audit, and collection burdens. These corollary duties should be carefully considered and carefully planned for before implementation.*

### **III. Service of Process**

#### **3-101 Service of Process by Facsimile Transmission**

- (a) [Transmission of Papers by Court.] A court subject to these rules may serve a notice by fax if that notice may be served by mail.
- (b) [Method of Service.] Service by fax to an attorney or person to be served shall be made by transmitting the document to the facsimile machine telephone number of the office of the attorney or the person to be served.
- (c) [When Service Complete.] Service by fax is complete upon receipt of the entire document by the receiving party's facsimile machine.

\* \* \*

#### *Alternatives/Additions*

ALT. (c-1) [Service that occurs in whole or part after 5:00 p.m. shall be deemed to have occurred at the opening of business on the next court day.]

ADD. (d) [Proof of Service by Fax.] For proof of service that is allowed by first-class mail with no return of service required, proof of service by fax may be made by a statement to the court that includes:

- (1) the time, date, and sending facsimile machine telephone number (instead of the date and place of deposit in the mail);
- (2) the name and facsimile machine telephone number of the person to whom sent (instead of the name and address of the person served as shown on the envelope);
- (3) a statement that the document was transmitted by facsimile transmission and that the transmission was reported as complete and without error.
- (4) A copy of the transmission report shall be attached to the proof of service, and the proof of service shall declare that the transmission report was properly issued by the transmitting facsimile machine.

ADD. (e) [Form of Proof of Service by Facsimile Transmission.] The proof of transmission required by these rules shall be in the following form: "At the time of transmission I was at least 18 years of age and not a party to this legal proceeding. I transmitted to [name] the [documents' legal description] by facsimile machine, pursuant to [rule]. The fax number that I transmitted to was [ ]. The facsimile machine I used complied with rule [ ], and no error was reported by the machine. "I declare under penalty of perjury under the laws of the State of [ ] that the foregoing is true and correct."

ALT. (e-1) Where service is made by facsimile machine, proof of service shall be made by affidavit of the person making service, or by certificate of an attorney. Attached to such affidavit or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine. (Oregon)

ADD. (f) [Consent to Service by Use of Fax Filing.] An attorney who files a paper by fax consents to service of papers on him or her by fax in that proceeding. (California)

ADD. (g) [Other Consent to Service.] An attorney who is willing to accept service of papers by fax shall so indicate by including his or her facsimile machine telephone number, designated as a "fax" number, as part of the attorney's name, address, and telephone number on a document filed in this action. (California)

\* \* \*

### Commentary

*Service by facsimile transmission should be the equivalent of service by first-class mail. Receiving machines should have the capability of providing a date and time stamp on all incoming transmissions to corroborate receipt. For service of pleadings or documents that require a return of service via registered mail, or if the service of process is not perfected until a mailed return of service is signed (California) or returned, facsimile service should be allowed using a return-of-service form established by the court, which is returned via facsimile transmission. In this instance, service of process would not be perfected until the the original fax sender's machine receives the the return of service facsimile transaction.*

#### *IV. Search Warrants*

##### **4-101 Search Warrants, Affidavits, and Orders**

Orders, affidavits for search warrants, and search warrants may be submitted and transmitted via facsimile.

- (a) An affidavit for a search warrant may be submitted by facsimile transmission if all of the following occur:
  - (1) The judge or magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection;
  - (2) The affiant signs the affidavit. Proof that the affiant has signed the affidavit shall consist of a facsimile transmission of the signed affidavit; and
  - (3) The judge or magistrate is satisfied of the authenticity of the request and the identity(ies) of the requestor(s).
- (b) A judge may issue a written search warrant in person or by facsimile transmission. If a court order is issued as a search warrant, the written search warrant may be issued in person or by facsimile transmission by a judge or magistrate.
- (c) The peace officer or department receiving a faxed search warrant shall receive proof that the issuing judge or magistrate has signed the warrant before the warrant is executed. Proof that the issuing judge or magistrate has signed the warrant shall consist of a transmitted facsimile of the signed warrant.
- (d) If an oath or affirmation is orally administered by telephone under this section, the oath or affirmation is considered to be administered before the judge or magistrate.
- (e) If an affidavit for a search warrant or a search warrant is issued by facsimile, the transmitted copies of the affidavit or search warrant are duplicate originals of the affidavit or search warrant and are not required to contain an impression made by an impression seal. (Michigan)

\* \* \*

### Alternatives/Additions

#### ALT. 4-101 [Issuance of Orders or Warrants.]

- (a) Facsimile transmission may be used for the issuance of all orders and warrants including, but not limited to, the following circumstances:
  - (1) criminal matters for the issuance of arrest and search warrants;
  - (2) juvenile matters for the issuance of orders or warrants for taking a juvenile into custody and for the release or detention of the juvenile;
  - (3) family matters for the issuance of ex parte temporary orders for protection; and
  - (4) civil cases for the issuance of temporary restraining orders.
- (b) All procedural and statutory requirements for the issuance of a warrant or order, including the making of a record of the proceedings, shall be met.
- (c) For all procedural and statutory purposes, the facsimile shall have the same force and effect as the original.
- (d) [The *original* order or warrant, along with any other documents, including affidavits, shall be delivered to the court administrator of the county where the request or application for the order or warrant was made.] (Minnesota)

\* \* \*

### Commentary

*Because of their sensitive nature and the power the warrant will confer on the requesting official, the traditionally strict requirements for verification and authenticity of warrant requests and supporting process should be maintained in facsimile transmission. Judges or magistrates may wish to consider the transmission of further proofs or identifications from requestors via facsimile during the warrant issuance process. The use of facsimile transmissions for this purpose should always be permissive for the judicial officer involved.*