

# **Draft Guidelines for Using Technology to Advance Access to Justice**

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The Action Group on Access to Justice (TAG) is catalyzing solutions to Ontario's access to justice challenges by facilitating collaboration with institutional, political and community stakeholders. TAG is funded by the Law Foundation of Ontario with support from the Law Society of Upper Canada.



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## USING TECHNOLOGY TO ADVANCE ACCESS TO JUSTICE DRAFT GUIDELINES<sup>1</sup>

These proposed guidelines are intended to serve as a form of assistance to those who are using or will use technology in the provision of services of various kinds in the legal sphere. They are patterned after existing guidelines elsewhere and on the lessons drawn from the issues and developments discussed in the Background Paper prepared for the October 18, 2016 Day of Discussion on Technology, Inclusion and Access to Justice: Broadening the Conversation.

The guiding spirit behind them is to promote the commitment by those providing legal and related services to a deliberate use of technology to advance access to justice, particularly for members of communities facing exclusion from the legal system and barriers in using technology. They reflect the fundamental value of equitable inclusion in the legal system, and the need to respond to differences that result in inequitable access. The objective is to enhance *access to justice*, not only *access to the legal system*, for individuals who are otherwise excluded through socio-economic factors such as race, gender, economic status, disability, place of residence or other similar reasons.

They are general guidelines: they are not meant to apply only to specific contexts, such as the courts, and they are not intended to relate only to specific forms or uses of technology, as some do (lawyers' use of social media, for example).

The proposed guidelines are linked to the Background Paper, since they are derived from the discussion of various factors in that paper.

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<sup>1</sup> The Washington State Guidelines provided the impetus for the current initiative. See Washington Courts, Washington State Access to Justice Technology Principles, online: [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=am&set=ATJ&ruleid=amatj02principles](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=am&set=ATJ&ruleid=amatj02principles). Also see California Judicial Branch, Strategic Plan for Technology: 2014-2018 (October 2, 2014), online: <http://www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf>; [the plan includes principles](#). The California principles are discussed in Bonnie Rose Hough, "Let's Not Make It Worse: Issues to Consider in Adopting New Technologies" in James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, "Using Technology to Enhance Access to Justice" (2012) 26:1 Harvard Journal of Law & Technology 256, 259, online: <http://jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech241.pdf>. Although related to the court system, both the Washington State and California principles have been a helpful source of appropriate guidelines for the system more generally.

**Underlying Principles (Guidelines 1-4); see pages 1-8 of the Background Paper:**

1. Inclusion by providers of legal services of increasing the quality of justice to benefit disadvantaged users as a major priority in selecting and implementing technology to access the legal system.

**Commentary:**

a) This principle is best achieved if technology is implemented to improve the quality of justice, rather than to be in the vanguard of advanced technology, to save costs or to be more efficient. One way of describing this is to say that the technology is governed by the concept of “user-centric”. Preferably, technology selected because it appears to save money or will lead to efficiencies will also be chosen because it is expected to increase access to justice.

b) It is desirable that replacing one way of providing services with a (new) form of technology has as its goal positive advances in experiencing the justice system by those who have been disadvantaged. Preferably, it will not result in a diminishing of the service or quality of the service for any users. For example, the decision to replace in-person services with technological access needs to have as its objective that doing so results in more effective access for those whose access requires improving. In many cases, this will also lead to efficiencies in the legal system.

2. Thinking about “technology” broadly to include not only hardware or software, but the design and process of using it, is more likely to result in equitable access.

**Commentary:** Any point along the continuum of designing, developing, implementing, applying and using technology can result in marginalized individuals being excluded from its benefits.

Therefore, in addition to the initial decision to use technology, the development and implementation of the technology are best governed by the principle of equitable access, with the objective of achieving a higher quality of justice. “Equitable access” means the development and implementation and, if necessary, adaptation, results in those who are disadvantaged not only being able to access it, but in receiving an improved quality of justice they obtain.

3. Effective consultation by institutions using technology to provide legal services includes engagement both with those who are likely to use the technology to access the service or services, and those experiencing barriers in using technology.

**Commentary:**

a) It can be misleading to assume how effectively users are able to use particular forms of technology. Therefore, consultation by those intending to use technology to deliver services with potential users, as well as others involved in the technology, is most likely to ensure that it does not pose barriers to access. Consultation with actual users of the system may not always be feasible; if so, consultation with a wide range of organizations representing or providing services to those who will be accessing the technology may be helpful.

b) Consultation may be with groups (such as government or other provider consultations with roundtables of affected stakeholders before designing online information) or individuals (for example, by lawyers ensuring that a client is able use effectively a form of technology employed by the lawyer in providing services).

4. Using technology appropriately to provide legal services is relevant to competence and is therefore a matter of ethical obligation.

**Commentary:**

a) Regardless of the provider, ensuring that technologies employed to provide legal services are appropriate to the expected users can be best accomplished by treating it as an ethical obligation. The “ethical obligation” is to take into account the needs of the users in the selection and application of technology.

b) Where providers of services are governed by a code of professional conduct, the appropriate use of technology can be most effectively achieved by including it as a form of professional conduct.

**II. The Design of the Technology (Guidelines 5-6); see pages 9-19 of the Background Paper:**

5. Ensuring that to the extent funding permits, the technology selected is the most effective technology for the purpose and audience it is to serve.

**Commentary:**

a) It is desirable to take into account in the determination of the appropriate technology in a given case the weakness in the system it is meant to address and the ability of the user to use it effectively. It may be that the most effective technology is too costly, but while less effective than the “perfect” form of technology, it would be most consistent with the principles underlying these guidelines to make every effort to ensure that the technology that is selected otherwise meets these guidelines.

b) Taking care in designing and implementing software to ensure that the sequencing of steps a user must take are compatible and consistent with the purpose the technology is to achieve will be most effective in helping users navigate the system.

c) Effective technology planning or design may need to include alternatives to the use of the technology itself, in the form of in-person assistance, for example, whether to assist with the use of the technology or to provide the same service the technology is intended to provide. Despite all best efforts to create and implement technology that is fully accessible, there will be those users of the legal system who are unable to access it for one reason or another. Therefore, it may be necessary to continue to make in-person services available for those users.

d) Effective technology also means that more than one design of the technology may be necessary to accommodate different users. It may be, for example, that sophisticated users would grow frustrated by using a system that has been designed for those who are less familiar with its use, or with the legal system itself. Where possible, different streams of the technology for different users can address this concern.

e) Effective technology also recognizes that different devices require technology design. This may be a “technical” issue: websites that might have been suitable for PCs require a different design for mobile devices, for example. It may also be a “people” issue: for instance, people read material on a website differently from the way they read it in print and therefore, it is not effective simply to post printed material online or to prepare separate material as if it is being communicated in print.

f) Effective use of technology also means that the information provided to users (about a particular area of law or process) needs to be accurate and reliable. In this regard, it is helpful if information is dated and the source of the information identified. While this is important for all users, it may be particularly so for those self-represented users who have no other reliable and regular sources of assistance and for those users of unbundled services who may be carrying out certain step of their case on their own.

g) Technology will usually be most beneficial for the users of technology if there is consistency in what is expected of users across a multi-part organization. For example, consistency in forms across courts or government agencies whenever possible minimizes the need for users to learn how to complete new forms. Similarly, to the extent consistent with privacy legislation, replication of information provided by a user can make using the technology less frustrating and more effective for both the user and the provider of services.

h) Regular evaluation to ensure that the technology is effective and accessible on an equitable basis is necessary. Users, the capacity of users and advances in technology all change over time. It is therefore crucial to the effective use of technology to evaluate these developments on a regular basis.

6. Ensure that all privacy requirements are satisfied.

**Commentary:**

a) The use of technology must comply with privacy laws, and be secured against intrusion. Trust in the technology makes it more likely that users will accept it.

b) Compliance with privacy laws means that developers and providers need to understand the privacy implications of whatever form of technology is being considered.

c) Users need to be informed about the privacy implications of technology they are being asked or required to use to access the legal system.

**III. Cost (Guideline 7); see pages 20-21 of the Background Paper:**

7. The use of technology needs to be financially sustainable to be effective.

**Commentary:**

a) It is not possible to provide services through technology at no additional cost, although there may be cost savings elsewhere. Funding needs to be available to adapt technology to meet new requirements, to meet the needs of disadvantaged users and for remedial purposes. Failure to provide sufficient funding to ensure maintenance and currency of the technology will result in failing to keep it updated or efficient.

b) Cost may become an ethical issue if it compromises access to technology and equitable access to justice. If the purpose of replacing one way of delivering legal services with technology or with another form of technology is cost-saving or efficiency for the deliverer of the service, it is desirable to expressly state what the consequences are for users of the service, those who are able to use the technology effectively and those who are not.

c) To the extent that access for those who are unable to use the new system effectively is reduced, it is desirable that the provider clearly state how that is to be addressed. This guideline applies whether the change is from in-person delivery to delivery through some form of technology, in whole or in part, or from one form of technology to another, in whole or in part.

**IV. Education (Guideline 8); see pages 21-22 of Background Paper:**

8. Education for both employees of providers and users of the technology is crucial.

**Commentary:**

a) Preferably, training for employees responsible for the use of the technology and for delivering the particular services will be designed to ensure that the employees are able to explain its use to users or are able to refer users to no more than one other source to answer their questions.

Users' ease in using technology will be increased if those responsible for implementing it are able to respond to concerns in plain language, and are able to guide the user to a more appropriate source of assistance if possible. Frustration with using technology may stem not only from not understanding it, but also from how difficult it is to obtain help in using it.

b) It is necessary for those responsible for maintaining the technology to remain current with new forms of technology, and with the use of different forms of technology by users and the impact on them, particularly users with digital challenges.

c) Users (that is, the public) also require education with respect to the technology they are expected to use to access the legal system. Each judicial partner will be in the best position to communicate where their services can be obtained and how, using different means (print, online, pamphlets distributed in locations people frequent). Many already do this; however, it is helpful to review communication plans regularly to ensure reaching as many potential users as possible.

d) Since providers of legal services will become lawyers or paralegals, the inclusion of courses on the professional obligations associated with the use of technology in the curriculum of law schools and colleges training paralegals would be an important message to future practitioners of ensuring technology is suitable for all users (this could also be a segment in an existing course, if appropriate).