

Supreme Court of Victoria Practice Note 1 of 2002

Guidelines for the use of technology in the civil matters

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In April 1999, the Chief Justice of the Supreme Court of Victoria authorised the issue of Practice Note 3 of 1999, which set the scene for the use of technology as an everyday tool in Victorian civil litigation. The Chief Justice has now authorised the issue of a replacement Practice Note that reflects both the changes in technology and the experience of the court and the legal profession over the last two years.

Background to the introduction of Practice Note 1

Practice Note 1 of 2002 reflects the Supreme Court's desire to keep its technology guidelines up to date and relevant. IT has advanced a great deal while Practice Note 3 has been in operation. Because of this and to address the issues that had arisen in the application of the original Practice Note, the Victorian Supreme Court decided to review Practice No. 3. The Victorian Society for Computers and the Law (VSCL) took up the challenge of reviewing and updating Practice Note 3 on behalf of the Court.

The VSCL received key feedback from the VSCL's 500 strong membership, litigation support specialists and the judges of the Supreme Court. Comments, feedback and suggested amendments were also gathered and posted on the VSCL website. A VSCL working group used this resource to develop a draft that was also exposed to the profession through the Web. Several well-attended meetings led to further drafts, until the final document was completed and presented to the court.

All-round commitment to the project was reflected in the personnel assembled for the working group. Sandra Potter and Phil Farrelly, the

VSCL's Practice and Procedures Focus Group co-chairs, headed up a team of VSCL members which included representatives from the Supreme Court, Allens Arthur Robinson, Mallesons Stephen Jaques, Blake Dawson Waldron and the Bar.

In March 2002, representatives from the VSCL working group met with court officers to finalise the new Practice Note before its publication on 29 April 2002.

Evolution, not revolution

Practice Note 1 is a refinement of its predecessor, and many comments made about the 1999 document remain true. Both were crafted as a deft balance of carrot and stick. As desirable as it is to make litigation more efficient, it is unrealistic to inflexibly mandate the use of technology in a profession that is not overpopulated with techno-literates. Both Practice Notes are, therefore, couched in terms of encouragement, urging parties to consider the use of technology in appropriate cases, and to confer with each other and the Court with the aim of developing better ways of managing the paper war.

The earlier direction was more carrot than stick, more permissive than prescriptive. The new version takes a measured but significant step in the direction of a more mandatory approach. Previously, the court expected that requests for the supply of court documents in electronic format would be treated reasonably. Now, "unless the court otherwise orders, upon request by any party, all parties to a proceeding will exchange court documents (being those required to be filed and served) in an electronic format, agreed by the parties, in addition to the required hard copy".

At first instance, Practice Note 1 leaves it to the parties to attempt to reach agreement on matters such as the format and means of exchange of digital documents, and how technology might aid the processes or preparation and trial. Naturally, the court may also use directions hearings as an opportunity to make orders that parties actively consider how best to use technology to exchange information about their discoverable documents or imaged copies of the documents, and how technology will be employed in the proceeding.

Introduction of default standards and protocols

Unlike Practice Note 3, Practice Note 1 provides for certain default standards to apply in the absence of agreement between the parties or court direction. The default standards are based on inexpensive, universal formats and techniques that should not impose an unreasonable burden on parties or their practitioners, either in terms of cost or the technological skills required to comply with those standards.

For documents, the default format is the awkwardly named but easily used ASCII file type. ASCII is a simple text format without complex formatting options. It can be read and edited in almost any word processor. Microsoft (MS) Word users can create ASCII files by selecting "Text Only" in the "Save as type:" box when saving a file.

Practitioners should be aware that saving a document as an ASCII text file will result in the loss of many MS Word formatting commands. For example, tables will disappear, leaving contents of their cells typed in a single, left-aligned column. If it is

intended to convert an MS Word document to ASCII format, the original document should be prepared with a minimum of formatting. One way of guaranteeing this outcome is to prepare the document using Notepad, the basic text editor that is part of every MS Windows installation. Notepad creates documents in ASCII in the first place, and offers no formatting options that will be lost on saving.

If electronic lists of documents are to be exchanged, the default format is a form of ASCII text where each separate item of data is divided from its neighbours by a comma. Any standard database or spreadsheet is able to import information in that form, and arrange it in the correct columns. The easiest way to create the format is to generate the list using MS Excel, and use the "Save as type:" option to choose "CSV" (comma separated values), which is a simple text list.

For imaged documents, the default standard is "single page TIFF". Again, any scanner software is able to save scanned images in that format, and dedicated viewing software will rarely be required. It would be most unusual for an MS Windows or Apple computer not to be pre-installed with a suitable viewer.

If electronic documents are to be delivered, the default means of delivery is by floppy disk. While this is a universally available option today, it is anticipated that floppy disks will decline in use over the next couple of years as rewriteable compact disks, memory sticks and Internet transfer become standard. This emphasises the need to keep the court's IT guidelines under review and a future revision of the Practice Note may be needed to deal with this.

The default protocols are so well within the capabilities of most firms that it can readily be anticipated that more sophisticated options will normally be agreed upon. For example, formats such as Adobe's PDF file type which offer superior annotation tools for use with imaged documents, may be used.

What other technologies does Practice Note 1 have in mind?

Practice Note 1 is generally technology neutral. While the appendix sets out some document formats and means of exchange, and illustrates the default standard required, the document does not seek to pick technology winners or mandate particular solutions. The challenge is for parties and their representatives to make best use of existing tools from time to time.

For lists of documents, there is a suggested minimum database format including the fields of information that are most likely to assist in the management of extensive collections. Such databases might be created in programs like MS Access or Excel, or with software from other vendors, such as Lotus Notes or Claris' Filemaker Pro. In practice, agreement on protocols for the exchange of electronic information will be an important issue. While databases can typically read each other's output, conversion is not always smooth. For the recipient to see an electronic list as its creator intended, the use of common protocols are desirable.

Other changes to the Practice Note

Compared to its predecessor, Practice Note 1 is streamlined and simplified. The "trigger" for parties to consider electronic exchange of document data has been lowered from an expected total of 1,000 discoverable documents to 500. The status of electronic files is enhanced, with as-of-right access to digital copies of documents being more common.

Much of the benefit of IT in litigation rests in increased efficiency and reduced costs. Practice Note 1 leaves no doubt that funds properly expended in achieving that will be regarded as "necessary and proper for the attainment of justice or for enforcing or defending the rights of a party" within the meaning of Rule 63.69 of the rules of court.

Is compliance with the Practice Note mandatory?

Aspects of Practice Note 1 are

mandatory. Unless the court orders otherwise, a party must comply with a request for exchange of court documents electronically, in addition to hard copy. Discovery lists must be provided in electronic format when requested, and the parties *should* consult on a numbering protocol before doing so. Where it appears that there will be more than 500 discoverable documents in total, the parties *should* consider exchanging the images electronically.

Although the word "should" is used rather than "must", clause 14 of the Practice Note makes it clear that parties will often be expected to have explored the appropriateness of electronic discovery, and considered the best means of facilitating it.

Promoting Practice Note 1

The court intends to raise awareness of the new guidelines, both among the profession and the public. Online copies are available at the following websites:

- VSCL – www.vscl.org.au
- Supreme Court of Victoria – www.supremecourt.vic.gov.au
- AIJA – www.aija.org.au

There has been a program of information releases to the general press and professional publications, supported by workshops and seminars involving the VSCL Practice and Procedures Focus Group, members of the court and the Leo Cussen Institute.

VSCL has sent out a soft copy of the Practice Note to all its members and has forwarded a hard copy to the 75 law firms most likely to have matters in the civil list, together with a summary of the differences between Practice Note 1 and Practice Note 3.

Where next?

The evolution of the Victorian Supreme Court's policy of fostering more efficient litigation and use of resources is obvious in Practice Note 1. In addition, the revision of the guidelines has allowed the court to devise an effective model for consultation and refinement that will ensure that its approach to IT remains relevant and modern.