



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

To: John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

From: Ronald F. Kennedy, Director of Governmental Relations 

Re: Comment on Proposed Rules for Electronic Filing in the Appellate Division of
Supreme Court

Date: July 19, 2017

Herewith please find comments of the New York State Bar Association's Commercial and Federal Litigation Section, relating to the proposed rules for electronic filing in the Appellate Division of Supreme Court, which proposed rules were released for comment by your memorandum date June 1, 2017.

In addition, I bring to your attention the Report and Recommendations of the Association's Task Force on Electronic Filing of Court Documents, adopted in April 2007. Please note that the recommendations relating to appellate courts may be found in Section IX, Part D of the Report, beginning on page 63.

The Report and the appendices may be viewed via the following links:

<http://www.nysba.org/EFilingReportMarch312007>

<http://www.nysba.org/EFilingReportVolumeTwo>

New York State Bar Association

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Comments on Proposed Rules for Electronic Filing in the Appellate Division of the Supreme Court

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #1

July 6, 2017

The Commercial and Federal Litigation Section of the New York State Bar Association (“Section”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, Counsel to Chief Administrative Judge Lawrence K. Marks, dated June 1, 2017 (“Memorandum”), proposing rules for electronic filing in the Appellate Division of the Supreme Court of the State of New York. As stated in the Memorandum, the proposed rules “are designed to facilitate the expansion of e-filing to the Appellate Division as authorized by chapter 237 of the Laws of 2015.” *Id.* The Memorandum advises that, “[i]f ultimately approved by the Departments of the Appellate Division, it is anticipated that th[e] rules would take effect with the initiation of Appellate Division e-filing in the fall.” *Id.* The proposed Rules are attached as Exhibit A.

I. EXECUTIVE SUMMARY

As Chief Judge DiFiore has stated, “[e]-filing is the centerpiece” of New York State’s efforts “to enhance the efficiency and productivity of court operations, as well as to improve our service to the public.” “Electronic Filing in the New York State Courts,” June 1, 2016 Report of the Chief Administrative Judge to the Legislature, the Governor, and the Chief Judge of the State of New York. Among the benefits noted by the Chief Judge, e-filing “reduces costs and saves time for both the court system and litigants, improves access to the courts, and sharply reduces the environmental impact of litigation.” *Id.* The proposed rules further these critical public policy goals and, among other things, (1) provide for substantial uniformity among the Departments even as the proposed rules permit each Department the flexibility necessary to take into account local practices and conditions;¹ (2) recognize the same case exclusions for mandatory e-filing that obtain in the trial courts; and (3) also consistent with current law, exempt from mandatory e-filing self-represented litigants and attorneys who make the certification required by CPLR 2111(b)(3)(A) or (B). After providing a high-level summary of the proposed rules, the Section points out certain technical issues, suggests certain minor revisions and states certain readily-addressed concerns.

¹ Section 2112 of the Civil Practice Law and Rules, enacted by Chapter 237 of the Laws of 2015, grants authority to “the appellate division in each judicial department” to promulgate rules authorizing e-filing, and mandates that “[t]o the extent practicable, rules promulgated by the appellate division in each judicial department pursuant to this section should be uniform.”

II. SUMMARY OF PROPOSAL

The proposed rules for electronic filing in the Appellate Division were drafted by a working group of senior personnel from the four Departments of the Appellate Division, with the goal of facilitating the expansion of e-filing. Section (A) of the proposed rules contains definitions of terms used therein, including among others, “cause” and “matter” which identify the nature of the cases to which the proposed rules apply. The proposed rules also provide that each Department “may require or permit e-filing in such cases and case types as it deems appropriate.” Section (B).

Section (C) contains rules for registration and notice of electronic filing, including timing requirements for e-filing users as well as exempt persons. Statutory exemptions from the e-filing method for self-represented parties and certain attorneys are set forth in Section (D). A self-represented litigant may voluntarily participate in e-filing, and withdraw consent to participate at any time by filing and serving notice on all parties. Section (E) of the proposed rules refers e-filing users to the NYSCEF site www.nycourts.gov/efile (misspelled in the proposed rules) for instructions on how to file documents under the electronic filing method. The formatting instructions contained in Section (E) require that e-filed documents must be in searchable PDF/A format, contain bookmarks linking tables of contents of briefs and records to the corresponding page of the document, as well as additional format requirements set forth in an attachment A (not included for review). Filed documents must be within the 100 MB size limitation and must contain an attestation that the document was scanned for viruses using commercial scanning technology.

Section (F) of the proposed rules contains instructions for filing and serving hard copies of documents in addition to filing by electronic means. Variations on that rule for service on exempt attorneys and self-represented parties are also provided. Pursuant to Section (G), the timeliness of e-filed documents is deemed to be when the document has been electronically transmitted and when the appropriate fee has been paid. E-filed documents may later be reviewed and rejected by the Clerk for any reason. The Court’s e-filed notice to all e-filers in the matter that a document has been filed is deemed service on all parties. Filing and service of hard copies of documents on exempt parties is as provided by the CPLR or court directive.

Section (H) of the proposed rules provides that confidential or sealed documents are to be e-filed, but they will be maintained in a way that prevents viewing by the public. In Section (I), the proposed rules permit scanning of hard copy filings, to be uploaded to the court’s NYSCEF system. Both scanned documents and e-filed documents may be deemed part of the official record in a cause or matter. Finally, Section (J) permits the Clerk to reject a document for filing or e-filing that does not comply with the rules “or is otherwise unsuitable” and the Clerk may direct that a document be refiled.

III. COMMENTS

Section (E)(2) specifies certain formatting requirements for e-filed documents. Pursuant to section (E)(2)(a)(iii), e-filed documents must “comply with additional formatting requirements set forth in attachment A.” In an apparent oversight, however, no such attachment is included with the proposed rules. The erroneous reference to www.nycourt.gov/efile in Section (E)(1) should be replaced with www.nycourts.gov/efile.

Pursuant to section (F)(1)(a), parties required to e-file documents are also required—unless otherwise directed by the court—to file hard copies of specified documents, including briefs, records, motions and applications. Paragraph (b) of subsection (1) of section (F) goes on to require filers to “delay the filing of hard copies of documents required under subsection (G)(3) until the clerk has reviewed and approved the electronic version of the document.” However, subsection (3) of section (G) does not require the filing of any hard copies of documents or, for that matter, any documents at all. Rather, subsection (3) of section (G) provides that “[u]pon receipt of an e-filed document and appropriate fee, if any, NYSCEF or such other court-approved site shall immediately notify all e-filers in the matter of the receipt and location of the document.” Paragraph (b) of subsection (1) of section (F) may have been intended to read, in substance, as follows: “Filers shall delay the filing of hard copies of documents required under section (F)(1) until the clerk has reviewed and approved the electronic version of the document pursuant to subsection (G)(3).” Neither section (G) nor any other section of the proposed rules, however, contains a provision directing the clerk to notify e-filers that the electronic version of a document has been reviewed and approved.

One provision of the proposed rules authorizes the clerk to refuse to accept documents for e-filing and another authorizes the clerk to reject an e-filed document that had been deemed filed for purposes of the timeliness of the document’s filing. Thus, section (J)(1) provides that “[t]he clerk may refuse to accept for filing or for e-filing any document that does not comply with this Part, or is otherwise unsuitable” And section (G)(2) provides that “[a]n e-filed document deemed filed for purposes of timeliness under this Part may thereafter be reviewed and rejected by the Clerk for any reason.” These provisions are problematic. If a document submitted for e-filing complies with the proposed rules, it is unclear why the clerk should have the apparently unfettered authority to refuse to accept it on the ground that it is “unsuitable.” Similarly, if an e-filed document has been deemed filed for purposes of timeliness, it is unclear why the clerk should have the apparently unfettered authority to reject the document “for any reason”; by its terms, moreover, this authority under section (G)(2) could be exercised even if the document does comply with the proposed rules. The Section recognizes that the clerks of the Departments of the Appellate Division would not exercise this authority in an arbitrary or capricious manner. Nonetheless, the Section recommends that if there are sound reasons to authorize the clerks to refuse to accept and to reject documents that comply with the proposed rules, the authority should be circumscribed so as to conform with those reasons.

Finally, the Section is concerned about the potential impact of the proposed rules on emergency applications and motions pursuant to, typically, CPLR §§ 5704, 5518, and 5519(c). Emergency relief is available, of course, because parties sometimes are presented with necessitous circumstances; not infrequently, moreover, counsel for the parties seeking emergency relief are constrained to prepare the supporting submissions in exceptionally short periods of time. These urgent circumstances may arise after the expiration of the registration and notice period of 14 days described in section (C)(4). If so, the documents supporting the motion for emergency relief would have to be e-filed and satisfy the formatting requirements of section (E)(2). In addition, it would appear that the requirement of section (F)(1)(b)—review and approval of the e-filed documents supporting the motion—would apply.

With respect to motions to the Appellate Division or a justice thereof under CPLR § 5704—certain of which can be made without notice—these motions invoke the original jurisdiction of the Appellate Division in that the availability of relief is not dependent on a notice of appeal from an appealable order of the trial court having been filed. Accordingly, it appears that the parties making such motions are subject to the provisions of section (C)(2), which governs the commencement by e-filing of original proceedings. In addition, the documents supporting the motion would have to be e-filed and satisfy the formatting requirements of section (E)(2). Here, too, the review and approval requirement of section (F)(1)(b) would appear to apply.

Given the time constraints attendant to the preparation of emergency applications and motions, the Section is concerned that compliance with the applicable requirements of the proposed rules would be unduly burdensome and could interfere with the ability of some practitioners to vindicate their clients' right to seek emergency relief. This concern could be eliminated, however, if the proposed rules permitted the initial submissions by a party for emergency relief to be e-filed as soon as reasonably practicable after the motion or application is brought on by the filing and service of the application or motion in hard copy format.



**NEW YORK
CITY BAR**

**STATE COURTS OF SUPERIOR
JURISDICTION COMMITTEE**

ADRIENNE B. KOCH
CHAIR
605 THIRD AVENUE
NEW YORK, NY 10158
PHONE: (212) 716-3225
FAX: (212) 716-3349
AKOCH@KATSKYKORINS.COM

**COUNCIL ON JUDICIAL
ADMINISTRATION**

HON. CAROLYN DEMAREST
CHAIR
CED79P@GMAIL.COM

LITIGATION COMMITTEE

BARBARA SENIAWSKI
CHAIR
1460 BROADWAY
FLOOR 4
NEW YORK, NY 10036
PHONE: (212) 595-4536
FAX: (917) 591-4692
BARBARA@SENIAWSKILAW.COM

July 24, 2017

By Email

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: New York City Bar Association Comments on Proposed Rules for Electronic Filing in the Appellate Division

Dear Mr. McConnell:

We write on behalf of the New York City Bar Association to comment on the Proposed Rules for Electronic Filing in the Appellate Division of the Supreme Court. We strongly support the expansion of electronic filing to the Appellate Division and offer the following comments aimed at improving the Proposed Rules.

First, under paragraph E(2)(iii), e-filed documents “shall . . . comply with additional formatting requirements set forth in attachment A.” However, the Request for Public Comment on the Proposed Rules does not include the “attachment A.” Thank you for responding to our inquiry on this question. We understand that no form of attachment A is currently available; and that, if ever promulgated, attachment A would likely differ across the Departments of the Appellate Division. We also understand that the document closest to what might become attachment A is the set of technical specifications used by the First Department for electronically-submitted documents. At this juncture, however, we do not know what requirements may be contained in each Department’s attachment A when the rules are promulgated.

Though the current First Department specifications for electronically-submitted documents are innocuous enough, we respectfully request that the Proposed Rules not be enacted

until the final form of attachment A is circulated for comment and is fully vetted. Moreover, we believe that the e-filing requirements should not vary from Department to Department. Variation would only engender confusion and inefficiencies and create unnecessary expense and complications. As with electronic filing in the Supreme Court throughout all 62 counties of this State, the e-filing requirements for all Departments in the Appellate Division should be uniform. To allow each Department to set different standards and protocols or to alter the specifics of “attachment A” or any other portion of the Proposed Rules would be inconsistent with the purpose of having unified rules.

Second, paragraph F(1)(b), concerning filing of hard copy documents, currently reads:

Filers shall delay the filing of hard copies of documents required under subsection (G)(3) until the clerk has reviewed and approved the electronic version of the document. Where hard copies of documents are not filed following such approval, the filing shall be deemed incomplete.

This language lacks clarity concerning how an e-filer will know whether the clerk has reviewed and approved the electronic version of a document, and how much time the filer thereafter has to file hard copies. We propose these additions (in bold and underlined) to clarify paragraph F(1)(b):

Filers shall delay the filing of hard copies of documents required under subsection (G)(3) until the clerk has reviewed and approved the electronic version of the document **and notified the filer by e-mail that the electronic version of the document has been approved. The filer shall file the hard copies within two business days of being notified of the clerk’s approval.** Where hard copies of documents are not filed following such approval, the filing shall be deemed incomplete.

Third, the Proposed Rules should incorporate language similar to that in the rules governing e-filing in the Supreme Court in respect of filing by agents or other authorized persons and should specifically permit appellate printers to act as authorized filing agents. We recommend adding this language to paragraph C.5 of the Proposed Rules:

(e) An authorized e-filer may authorize another person to file a document electronically on his or her behalf in a particular action using the User ID and password of the user, but, in such event, the authorized e-filer shall retain full responsibility for any document filed.

(f) Documents may be electronically filed by a filing agent if that filing agent is registered as an authorized user of the NYSCEF site. Such filing agent shall e-file a statement of authorization from counsel of record in an action, in a form approved by the Chief

Administrator, prior to or together with the first e-filing in that action by the agent on behalf of that counsel. Appellate printers may act as filing agents for counsel in an action.

See generally 22 NYCRR 202.5-b(c)(2)(i); 22 NYCRR 202.5-b(c)(4); 22 NYCRR 202.5-b(d)(1). This proposed language will keep e-filing practices in the Appellate Division consistent with those in Supreme Court, and will also permit appellate printers, already widely used by many counsel to produce and file both electronic and paper documents in the Appellate Division, to attend to electronic filing. Attached is a proposed form statement of authorization for a filing agent before the Appellate Division.

We hope you will find these comments helpful and would be pleased to discuss them or assist in any other way we can.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair, Council on Judicial Administration

Adrienne B. Koch
Chair, Committee on State Courts of
Superior Jurisdiction

Barbara Seniawski
Chair, Committee on Litigation

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, _____ DEPARTMENT**

**STATEMENT OF AUTHORIZATION FOR
ELECTRONIC FILING
(Single Attorney Authorizing Individual Filing Agent)**

I, _____, Esq., (Attorney Registration No. _____) am an authorized user of the New York State Courts Electronic Filing System ("NYSCEF") (User ID _____). I hereby authorize _____ ("the filing agent") to utilize his/her NYSCEF filing agent ID to file documents on my behalf and at my direction in any e-filed matter in which I am counsel of record through the NYSCEF system, as provided in Section _____ of the Rules for Electronic Filing in the Appellate Division of the Supreme Court.

This authorization extends to any consensual matter in which I have previously consented to e-filing, to any mandatory matter in which I have recorded my representation, and to any matter in which I may authorize the filing agent to record my consent or representation in the NYSCEF system.

This authorization extends to any and all documents I generate and submit to the filing agent for filing in any such matter. This authorization, posted once on the NYSCEF website as to each matter in which I am counsel of record, shall be deemed to accompany any document filed in that matter by the filing agent.

This authorization also extends to matters of payment, which the filing agent may make either by debiting an account the filing agent maintains with the County Clerk of any authorized e-filing county or by debiting an account I maintain with the County Clerk of any authorized e-filing county, or by making payment directly and seeking pre-payment or reimbursement from me for those fees as agreed between the filing agent and me.

This authorization regarding this filing agent shall continue until I revoke it in writing on a prescribed form delivered to the E-Filing Resource Center.

Dated: _____

Signature

City, State and Zip Code

Print Name

Phone

Firm/Department

E-Mail Address

Street Address

(6/6/13)



ZACHARY W. CARTER
Corporation Counsel

**THE CITY OF NEW YORK
LAW DEPARTMENT**

100 CHURCH STREET
NEW YORK, NEW YORK 10007

RICHARD DEARING
Chief of Appeals
Phone: 212-356-2500
rdearing@law.nyc.gov

July 24, 2017

John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004
rulecomments@nycourts.gov

*Re: Comments on Proposed Rules for
Electronic Filing in the Appellate Division*

Dear Mr. McConnell:

As the state's largest law firm and a repeat player in the Appellate Division, the Office of the Corporation Counsel of the City of New York writes to comment on the proposed rules for e-filing in the Appellate Division. We thank the members of the working group and the statewide coordinator for their efforts to expand e-filing and to promote uniformity among the Departments in the process.

The proposed rules are an important step toward enhancing public access to court proceedings, avoiding confusion caused by disparate practices, reducing the burdens for everyone involved in the appellate process, and diminishing the environmental impact of litigation.¹ To build on this foundation, we offer the following comments. In an appendix, we suggest amendments consistent with our comments.

Scope of Mandatory and Permissive E-filing

The law authorizing e-filing in the Appellate Division identifies uniformity among the Departments as a virtue. *See* C.P.L.R. 2112 (codifying L. 2015, ch. 237). But on the central issue—the scope of mandatory and permissive e-filing—the proposed

¹ *See* Office of the Chief Administrative Judge, *Electronic Filing in the New York State Courts: Report of the Chief Administrative Judge to the Legislature, the Governor, and the Chief Judge of the State of New York* (“E-filing in New York”), at 5 (2016), available at <http://bit.ly/2tCh81G>.

rules contemplate not uniformity, but diversity. Proposed (B) states that “[t]he court”—elsewhere defined as each Department—“may require or permit e-filing in such cases and case types as it deems appropriate.” To achieve meaningful uniformity, the final rules instead should, to the greatest extent possible, specify when e-filing will be mandatory and when it will be permissive.

Mandatory e-filing should be the norm, and consensual e-filing should be allowed whenever a mandate is not now allowed. As Chief Judge DiFiore has observed, e-filing is “the centerpiece” of efforts to use technology to “enhance the efficiency and productivity of court operations, as well as to improve our service to the public.”² New York is now well into its second decade of e-filing; other federal and state appellate courts began embracing e-filing long ago.³ We believe that now is the time for a robust e-filing program in the Appellate Division.

In the appendix, we suggest an amendment to proposed (B) that would make e-filing permissive for classes of cases where it cannot be mandated, and for two additional classes routinely before the Third Department that may be less suitable for e-filing at this stage: unemployment insurance and workers’ compensation. E-filing would be mandatory for all other cases, absent a personal exemption.

Documents Subject to E-filing

The definition of “documents” subject to e-filing in proposed (A)(5) includes “letter applications” but excludes “correspondence.” Setting aside that the line between the two may prove difficult to administer, in our view, the electronic docket should reflect the official file whenever possible, with the idea that the electronic docket will one day be recognized as the official record. To that end, we propose an amendment to (A)(5) that would expand the universe of documents subject to e-filing to capture all documents that would otherwise be filed by hard copy method.

Our suggested amendment would also bring notices of entry within the universe of documents subject to e-filing. Using NYSECF to encourage prompt service of notices of entry will promote expedient post-decision motion practice and help avoid the disputes that arise when notice is served by alternative methods.

E-filing Platform

Our experience with NYSECF coincides with the observation of the Chief Administrative Judge that the platform is “reliable, efficient, convenient and

² See *id.* at Stmt. of the Chief Judge.

³ National Conference of Appellate Court Clerks, *E-Filing in State Appellate Courts: An Appraisal* (2010), available at <http://bit.ly/2tc1wCw>.

secure.”⁴ The final rules should make clear that “all four Departments” will adopt a module “incorporated into NYSECF.”⁵ Clarity on this point early on is critical, before Departments invest resources into alternative platforms that would make statewide integration all the more difficult down the road. Therefore, In the appendix, we suggest amendments to proposed (A)(1), (A)(7), (C)(1)(a), (C)(1)(b), (C)(2)(a), (C)(2)(b), (C)(4)(a)(i), (C)(4)(a)(ii), (D)(2)(b), (E)(1), (G)(1)(a), (G)(1)(b), (G)(3), (H), and (I)(1) to omit references to another “court-approved site.”

Authority to Reject Documents

Read literally, proposed (G)(2) and (J)(1) authorize the Clerks of Court to reject documents “for any reason,” including when they find documents “unsuitable.” We recommend amendments to those sections to clarify that this simply means that the Clerks retain their traditional authority to refuse to accept for filing documents that fail to comply with any applicable statute, rule, or order, including the final rules.

We also suggest a modification to (J)(1) to align it with the practice of the Court of Appeals, where the Clerk “direct[s] the filer to resubmit” non-compliant documents within a certain time and the filer must cure any defect “within the time set.”⁶ We borrow from the Second Circuit’s practice to suggest a parallel modification to (G)(2) that would provide that, when a party cures a defective filing within the time allotted by the Clerk, the document will be accepted as timely.

Timing of Registration and Notification

Proposed (C)(4) affords a responding party 14 days from service of the initiating party’s notification to file a form in the Appellate Division, but proposed (C)(1) does not specify when the initiating party must file its notification. Since the notification triggers obligations on the part of the responding party, clarity and consistency as to its timing are important. We therefore propose an amendment to (C)(1) that would afford the initiating party 14 days from the underlying event to file its notification. Given that the initiating party is aware that it has initiated appellate proceedings, it is well positioned to file a notification within a 14-day period.

We also propose an amendment to (C)(4) that would afford the responding party an additional 7 days, for a total of 21, to file its form. Because the initiating party’s notification will be served by hard copy method, receipt may be delayed. In large government law offices, like our own, it takes time for papers served by non-

⁴ *E-filing in New York* at 4.

⁵ *Id.* at 10.

⁶ N.Y. Court of Appeals, *Technical Specifications for Submission of Briefs and Record Material in Digital Format*, ¶ 9, available at <http://bit.ly/2tbD309>.

electronic means to be routed between physical offices and from trial to appellate attorneys, who are ordinarily not familiar with a matter. The additional 7 days will enable our office and others like it to submit accurate information on a timely basis.

Finally, we suggest amendments to (C)(5)(a), (C)(5)(b), and (C)(5)(c) that would account for this extended period and also make e-filing mandatory, rather than optional, when all parties have registered before the time allotted has expired. Once all parties have registered, there is no need to delay e-filing.

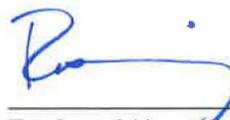
* * *

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact Richard Dearing, Chief of Appeals, at (212) 356-2500 or rdearing@law.nyc.gov.

Respectfully submitted,

ZACHARY W. CARTER
*Corporation Counsel
of the City of New York*

By:



Richard Dearing
Chief, Appeals Division

**APPENDIX: RECOMMENDED
AMENDMENTS TO PROPOSED RULES**

Part 12__.

A. Definitions.

For purposes of this section:

1. The phrase “e-filer” shall mean a person who has registered and entered case information at the NYSCEF site, ~~or at another site approved by the Court,~~ to deliver documents electronically in a matter pursuant to this Part.
2. The word “cause” or “matter” includes an appeal, a special proceeding transferred to the court pursuant to CPLR 7804(g), a special proceeding initiated in the court, and an action submitted to the court pursuant to CPLR 3222 on a case containing an agreed statement of facts upon which the controversy depends.
3. Any reference to the “clerk” means the Clerk of the Court of a Judicial Department of the Appellate Division, or his or her designee.
4. Any reference to the “court” means the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over the cause or matter.
5. The word “document” shall mean a brief, motion, application, record, appendix, notice of entry, or any other paper relating to a cause or matter that would otherwise be filed in the Appellate Division by hard copy method. ~~“Document” shall not include correspondence, other than letter applications.~~
6. The term “NYSCEF” shall mean the New York State Courts Electronic Filing System, and the “NYSCEF site” shall mean the New York State Courts Electronic Filing System website located at www.nycourts.gov/efile.
7. The phrase “electronic filing method” or “e-filing” shall mean the filing and service of a document in a cause or matter by electronic means through the NYSCEF site ~~or other court-approved site.~~
8. The phrase “electronically-filed matter” or “e-filed matter” shall mean a cause or matter in which a filing has been made under the electronic filing method pursuant to this Part.
9. The phrase “hard copy” shall mean a document in paper format.

10. The phrase “hard copy filing method,” “hard copy service method” or “hard copy method” shall mean, respectively and as context requires, filing or service of a document in paper format by a method other than electronic means.
11. The phrase “PDF/A” (Portable Document Format) shall mean the required format of a document e-filed pursuant to this Part.
12. The phrase “self-represented litigant” shall mean party to a cause or matter who is not represented by counsel.

B. Designation of Case Types Subject to Mandatory E-filing.

~~The court may require or permit e-filing in such cases and case types as it deems appropriate.~~

1. In the following types of cases, a party must file and serve documents by electronic means only if it consents to electronic filing and service:

(a) Matrimonial actions, as defined in CPLR 105(p);

(b) Election law proceedings;

(c) Proceedings under Article 70 of the CPLR;

(d) Proceedings under Article 78 of the CPLR;

(e) Mental Hygiene Law proceedings;

(f) Residential foreclosure actions involving a home loan, as defined by RPAPL § 1304;

(g) Proceedings related to consumer credit transactions, as defined in CPLR 105(f);

(h) Unemployment insurance proceedings; and

(i) Workers’ compensation proceedings.

2. In all other case types, unless a party is exempt under section (D) (1) of this Part, it must file and serve all documents by electronic means.

C. Registration and Notice of Electronic Filing.

1. Appeals or Transferred Matters – Initial Entry of Contact Information and Service of Notice of Case Number. Within 14 days of (i) filing of the notice of appeal, where an appeal is taken as of right, (ii) entry of the order granting leave to appeal, where an appeal is taken by leave, or (iii) entry of the transfer order, where a matter is transferred, ~~At such time and in such manner as the court shall direct by Departmental rule,~~ and unless exempt from e-filing under section (D) (1) of this Part, counsel for the appellant or the petitioner in an appeal or transferred matter of a case type designated for electronic filing, or a self-represented appellant or self-represented petitioner in such a matter, shall take the following steps:
 - (a) if not already registered, register as an authorized e-filing user with NYSCEF ~~or other court-approved site~~;
 - (b) enter in NYSCEF ~~or other court-approved~~ e-filing system such information about the case and parties and such notice of appearance as the court may require;
 - (c) if not already provided, obtain from the court an appellate case, docket or e-filing tracking number for the matter;
 - (d) serve upon all parties by hard copy service method as provided by CPLR 2103 and court rule, on a form approved by the Appellate Division, notification of that case, docket or tracking number and other pertinent information about the case and the electronic filing method; and
 - (e) e-file proof of service of this notification.

2. Original Proceedings – Commencement by E-filing. Unless exempt from e-filing under section (D) (1) of this Part, counsel for a petitioner or a self-represented petitioner commencing an original proceeding in a case type subject to e-filing shall:
 - (a) if not already registered, register as an authorized e-filing user with NYSCEF ~~or other court-approved site~~;
 - (b) file the notice of petition (or, as appropriate, the executed order to show cause), the petition and other initiating documents in the matter by electronic filing method through NYSCEF ~~or other court-approved~~ e-filing system as provided in this Part;

- (c) if not already provided, obtain from the court a case number or e-filing tracking number for the matter; and
- (d) serve upon all parties by hard copy service method as provided in CPLR 2103 and court rule
 - (i) the initiating documents in the case; and
 - (ii) on a form approved by the Appellate Division, notification of the case, docket or tracking number and other pertinent information about the case and the electronic filing method; and
- (e) e-file proof of service of the initiating documents and notification.

3. Initial Filing Where Petitioner, Appellant or Counsel is an Exempt Person.

- (a) A self-represented appellant or petitioner, or an attorney for an appellant or petitioner, claiming exemption from e-filing pursuant to section (D) (1) (a) of this Part shall, at the time of an initial filing of any document with the court in a case type designated for e-filing, serve upon all parties and file with the court by hard copy method an appropriate notice of status as a self-represented party or attorney exemption certification.
- (b) Where a self-represented party or an attorney has filed a notice pursuant to subsection (3) (a), the clerk may direct another party or attorney in the matter to undertake the entry and service of case information as set forth in subsection (1) or (2), on such terms as it deems just.

4. Entry of Additional Information. Within ~~14-21~~ days of service of the notification of the case, docket or tracking number as required in subsection (1) or (2), counsel to all other parties to the matter, or other self-represented parties, shall:

- (a)
 - (i) if not registered, register as an authorized e-filing user with NYSCEF ~~or other court approved site~~; and
 - (ii) ~~enter e-file, on a form approved by the Appellate Division, in NYSCEF or other court approved e-filing system~~ such

contact information and additional information as the court may require; or

- (b) if a self-represented party or an attorney exempt from e-filing pursuant to section (D) (1) (a) of this Part, serve upon all parties and file with the court by hard copy method an appropriate notice of status as a self-represented party or attorney exemption certification.

5. Service and Filing.

- (a) Prior to the expiration of the ~~2114~~-day period described in subsection (4) (“registration and notice period”), service and filing of documents by all parties in an e-filed matter, including without limitation service and filing of emergency applications and orders to show cause, shall be by hard copy method. In the event that all parties to an appeal have complied with the requirements of subsection (4) at a date prior to the expiration of the ~~2114~~-day registration and notice period, parties ~~may~~ shall file and serve documents by electronic method as further set forth in this Part on and after that earlier date.
- (b) Upon the expiration of the ~~2114~~-day registration and notice period described in subsection (4), service and filing of all documents by and upon all parties, other than persons exempt from e-filing under section (D) (1), shall be by electronic method as further set forth in this Part. The participation in a matter by a person exempt from e-filing under section (D) (1) shall not alter the e-filing obligation of other parties.
- (c) Once the ~~1421~~-day registration and notice period has concluded, any party, other than persons exempt from e-filing under section (D)(1), who fails to meet his or her obligation to register and enter information as required under subsection 4, will be deemed served with any document electronically filed in that matter as set forth in section (G) (3) of this Part.
- (d) Service of documents in an e-filed matter by and upon persons exempt from e-filing under section (D) (1), and the filing of documents by such exempt persons, shall be by hard copy method as specified in section (F) of this Part.

D. Exemptions of Certain Persons from the Electronic Filing Method.

1. Personal Exemptions. The following persons are exempt from the requirement of participation in the electronic filing method:
 - (a) self-represented litigants; and
 - (b) attorneys who certify in good faith, on a form provided by the Appellate Division, that they lack either (i) the computer hardware and/or connection to the internet and/or scanner or other device by which documents may be converted to an electronic format; or (ii) the requisite knowledge in the operation of such computers and/or scanners necessary to participate, pursuant to CPLR §2111 (b) (3) (A) or (B).

2. Consensual Participation. Notwithstanding this personal exemption, a self-represented litigant may voluntarily participate in e-filing in a cause or matter by
 - (a) serving on all parties at any time and filing with the court a notice of consent to participate in electronic filing on a form approved by the Appellate Division;
 - (b) registering as an e-filing user with the NYSCEF site ~~or other court-approved site~~; and
 - (c) serving and filing documents by electronic means as provided under this Part.

3. Withdrawal of Consent. A self-represented litigant who has consented to participate voluntarily in e-filing in a matter pursuant to this section may withdraw such consent at any time by filing and serving on all parties a notice of intent to cease e-filing, on a form provided by the Appellate Division.

E. Instructions for Electronic Filing; Formatting.

1. Site Instructions. In addition to the provisions of this Part, instructions for filing of documents under the electronic filing method shall be as set forth on the NYSCEF site (www.nycourt.gov/efile) ~~or other court-approved site~~.
2. Formatting.

- (a) General. In addition to compliance with the court's general rules for document formatting, e-filed documents filed pursuant to this Part shall
 - (i) comply with text searchable PDF archival format (PDF/A);
 - (ii) contain bookmarks linking the tables of contents of briefs and records to the corresponding page of the document; and
 - (iii) comply with additional formatting requirements set forth in attachment A.
- (b) Size. E-filed documents shall be no greater than 100MB in size.
- (c) Multiple Volumes. Each volume of a multi-volume record or appendix shall be submitted as a separate e-filed document.
- (d) Virus Protection. E-filers shall attest that, prior to filing, each e-filed document was scanned for viruses using updated commercial scanning technology, and that no virus was detected.

F. Hard Copy Filing and Service.

- 1. Filing of Additional Hard Copies of Documents in E-filed Matters.
 - (a) Unless otherwise directed by the court, a party required to file documents in a matter by electronic filing method shall, in addition, file hard copies of such documents as follows:
 - (i) appellate briefs, records, appendices, agreed statements in lieu of record: one original and five copies.
 - (ii) original proceedings, transferred proceedings, motions, applications: such number as is required by court rule in matters not subject to e-filing.
 - (b) Filers shall delay the filing of hard copies of documents required under subsection (G) (3) until the clerk has reviewed and approved the electronic version of the document. Where hard copies of documents are not filed following such approval, the filing shall be deemed incomplete.

2. Hard Copy Service Upon Exempt Attorneys and Self-Represented Parties. Whenever an attorney or a self-represented party in an e-filed matter is exempt from, and has not consented voluntarily to participate in, electronic filing pursuant to section (D) (1) of this Part, service upon that attorney or self-represented party shall be by hard copy service method. Service upon all other parties in an e-filed matter shall be by electronic service method.
3. Hard Copy Filing and Service by Exempt Attorneys and Self-Represented Parties; Filing of Unbound Copy. Whenever an attorney or self-represented party in a cause or matter subject to e-filing is exempt from and has not consented voluntarily to participate in, electronic filing pursuant to section (D) (1) of this Part, that attorney or self-represented party shall serve and file documents by hard copy service method and hard copy filing method. That attorney or party shall additionally file, together with the bound copy or copies otherwise required by court rule, an unbound copy of the filing, containing no staples or binding other than easily removable clips or rubber bands.

G. Timeliness of Filing and Service of Electronically-filed Documents and Hard Copy Filings; Subsequent Rejection by Clerk.

1. Timeliness of Filing of E-filed documents. For purposes of timeliness under a statute or court rule or directive, an e-filed document is deemed filed under the electronic filing method when
 - (a) the document has been electronically transmitted to the NYSCEF site ~~or other court approved site~~; and
 - (b) the appropriate fee, if any, has been paid to the court either through the NYSCEF site ~~or other court approved site~~ or, where permitted, by delivery to the office of the Clerk.
2. Rejection by the Clerk. An e-filed document deemed filed for purposes of timeliness under this Part may thereafter be reviewed and rejected by the Clerk for any reason provided by this Part or any applicable statute, rule, or order. The clerk shall accept as timely filed a document that has been rejected as non-conforming under section (J) (2) and cured within the time allotted by the clerk.
3. Timeliness of Service of E-filed Documents. Upon receipt of an e-filed document and appropriate fee, if any, NYSCEF ~~or such other court approved site~~ shall immediately notify all e-filers in the matter of the receipt and location of the document. For purposes of timeliness of

service under a statute or court rule, at the issuance of such notification the document shall be deemed served upon all parties (including persons who have failed to register and enter information as required under section (C) of this Part), other than persons exempt from e-filing under section (D) (1).

4. **Timeliness of Hard Copy Filing or Service.** The timeliness of service or filing by hard copy method by or upon persons exempt from electronic filing pursuant to section (C) (1) of this Part shall be as provided by court directive or the CPLR.

H. Confidentiality; Sealed Documents; Redaction.

E-filed matters deemed confidential by statute or court directive, as well as sealed documents or documents that are the subject of an application to seal in an e-filed matter, shall be filed and maintained on the NYSCEF ~~site or other court approved site~~ in a manner that precludes viewing by the public and such other persons and court personnel as the case may require. In all matters, e-filers shall attest to compliance with statutory redaction requirements (e.g., Gen. Bus. L. §399-ddd) and relevant sealing requirements in filings.

I. Scanning of Documents by Clerk.

1. The Clerk may scan hard copy filings in a cause or matter for upload into the NYSCEF system ~~or such other system approved by the court~~, and may deem such scanned documents to be the official record copy of the filing.
2. The court may deem documents e-filed by the parties to be the official record of a cause or matter.

J. Rejection of Non-Compliant Documents; Modification of Electronic Filing Procedures.

1. **Rejection of Documents.** The clerk may refuse to accept for filing or e-filing any document that does not comply with this Part, or any applicable statute, rule, or order ~~or is otherwise unsuitable~~.

2. If a document does not conform with this Part, or any applicable statute, rule, or order, the clerk shall direct the filer to refile the document. , and may direct that a document be refiled. Such resubmission is mandatory and must be cured within the time set by the clerk.
23. Modification of Procedures. The court or its designee may at any time modify or discontinue e-filing in a matter for good cause shown.



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL

Direct Line: 212.416.8882
E-mail: oren.zeve@ag.ny.gov

July 24, 2017

John W. McConnell
Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004

Re: Proposed Electronic Filing Rules of the Appellate Division

Dear Mr. McConnell:

The Office of the Attorney General supports the development of and protocols for electronic filing (“e-filing”) through the New York State Courts Electronic Filing system for the four departments of the Supreme Court, Appellate Division. Adoption of appellate e-filing advances Chief Judge Janet DiFiore’s Excellence Initiative because it will improve the process statewide for filing and serving appellate court documents, including original proceedings, motions, briefs, and records or appendices, just as e-filing has done for several years in State Supreme Court.

We believe that the courts, practitioners and self-represented litigants, and the public will benefit from statewide e-filing technology and procedures for the Unified Court System. Revised appellate e-filing rules should adopt as foundation the provisions of the trial court e-filing rules for comparable functions, *see* Uniform Rules for Trial Courts (22 NYCRR) §§ 202.5-b, 202.5-bb, and then build on those rules to meet particular appellate requirements that may also be promulgated in uniform Appellate Division rules of practice. *See generally* CPLR 2112 (“To the extent practicable, rules promulgated by the appellate division in each judicial department pursuant to this section shall be uniform.”); CPL § 460.90 (same); Family Ct. Act § 1122 (same).

The Office submits these comments to the Proposed Electronic Filing Rules of the Appellate Division of the Supreme Court of the State of New York based on its experience with an extensive caseload in the state courts, and on its interest in promoting the public's interest in access to justice. The comments below highlight selected provisions that warrant particular attention for revision of the rules, but these comments do not represent our only concerns about the proposed appellate e-filing technology and rules.

1. *A single statewide e-filing platform is necessary.* Several provisions of the proposed rules suggest that a system other than NYSCEF could be the vehicle for e-filing: “NYSCEF or *other court-approved site.*” This Office opposes the use of different platforms for the trial and appellate courts. At this time, that means that the NYSCEF system should be the sole, statewide platform for e-filing in the Unified Court System.

Different platforms would unnecessarily complicate the litigation process for practitioners and parties in an action when they move from e-filing in a trial court to the appellate court. *See* § C(1) (initial data entry for appeals and transferred actions). For example, the proposed rules require an appellant or petitioner to enter case information with the Appellate Division. With trial court matters that already are in the NYSCEF system, it should be possible to transfer the existing data for the trial court to the appellate court within a single system. If each department may adopt its own distinct platform, the risk of poorly integrated systems across the State increases, and the advantages of technology are significantly reduced.

A single platform presents two additional procedural advantages. First, existing e-filing rules for a wide range of functions could be readily incorporated into the appellate rules, e.g., registration; commencing an action by electronic means; signatures; filing and receipt of documents; notifications; filing decisions and orders and judgement; and entry of and notice of entry. *See* §§ 202.5-b, 202.5-bb. Second, with a single statewide system, appellate e-filing rules are more likely to be uniform. *See, e.g.,* CPLR 2112.

2. *New cases should be subject to e-filing immediately.* Section B of the proposed rules provides that “[t]he court may require or permit e-filing in such cases and case types as it deems appropriate.” We are concerned that the current proposal may hinder a prompt implementation of appellate e-filing in cases, and recommend an approach that would require, in the first instance, mandatory e-filing by date and then by procedural posture.

The court should announce a date certain on which it will initiate e-filing in all new matters.¹ If an e-filing system goes live on, for example, November 1, 2017,

¹ On July 24, 2017, CPLR 2112 was amended to remove limitations on the types of matters subject to appellate e-filing. *See* L. 2017, ch. 99.

then all matters with a notice of appeal filed or commenced in the Appellate Division on or after that date should be subject to an e-filing requirement. *Cf.* Second Circuit Local R. 25.1(a)(2) (“This [e-filing] rule applies to all appeals filed on or after January 1, 2010[.]”).

For actions with a notice of appeal filed prior to the announced date, the courts should require appellate e-filing for briefing in any appeal first perfected after that date. We also support a prompt e-filing requirement for counseled matters that, on the announced date, have been perfected but a respondent’s brief has not yet been filed. For matters in this latter group, appellant’s counsel (unless exempt under § D(1)(b)) would be directed to e-file the opening brief and record or appendix on or before the date any reply brief would be filed. We recognize that it may be more difficult to implement immediate e-filing for perfected appeals in which one or more litigants is self-represented and not an attorney. For these matters, the Appellate Division should implement e-filing expeditiously—but consistent with available resources—after the announced date.

3. *E-filed documents should be the official records.* One area in which the trial court and proposed appellate rules differ is the designation of official records of the court, but the practice of the Unified Court System, and thus the rules, should be uniform. Under the trial court rules, “[w]hen a document has been filed electronically pursuant to this section, the official record shall be the electronic recording of the document stored by the County Clerk.” § 202.5-b(d)(4). Where a party files a hard copy, the County Clerk “may scan *and* e-file,” at which point the electronic copy becomes the official record. *Id.*

By comparison, § I of the proposed appellate rules provides, in subsection (2) that “[t]he court *may deem* documents e-filed by the parties to be the official record of a cause or matter”; and under subsection (1), “[t]he Clerk may scan hard copy filings . . . and *may deem* such scanned documents to be the official record copy of the filing.” In a related provision, the proposed rules provide that, in addition to the e-filed document, a court may direct a party to file a hard copy: “appellate briefs, records, appendices, agreed statements in lieu of record: *one original* and five copies.” § F(1)(a)(i) (emphasis added).

Proposed § I carries a significant risk of confusion for attorneys and self-represented litigants, and for the general public if the departments are not uniform in their treatment of presumptively open court records. The rules should provide that all e-filed documents are the official record, as in the trial courts, without leaving the designation to the discretion of the Clerks. Consistent with this approach, where a document has been e-filed, a hard copy would not be an “original” because the e-filed copy would be the official “original” document. We acknowledge that a rule that sets e-filed documents as the presumptive originals potentially

places an additional burden on the court's staff to promptly scan hard-copy filings. See § F(3) (exempt party's duty to file unbound hard copy for scanning by the court).

But if the rule grants discretion to the Clerks, it is unclear if a Clerk (*i*) must designate all e-filed documents to be official records, or (*ii*) may make the initial designation on a case-by-case basis. Application of a default rule would not preclude a Clerk from designating a particular case as an exception to e-filing for good cause shown, and thus making the paper records (and a paper "original") in an extraordinary situation the official record. See § J(2) (modifying or discontinuing e-filing in a particular matter for good cause shown).

4. *Revise the rules regarding e-filing with exempt parties or counsel.* The rules appropriately recognize that self-represented litigants are exempt from the filing requirements (but may opt in), and some attorneys may seek an exemption.² See § D; see also CPLR 2111(3), 2112. If a litigant or attorney is exempt, the proposed rules permit a Clerk to direct another represented party, presumably including a respondent, to enter initial case information. § C(3)(b). This Office opposes shifting this responsibility given its unusually heavy caseload of self-represented litigants that would be exempt, including, e.g., inmates and CPLR article 78 petitioners. Additionally, as noted above, if the Appellate Division implements NYSCEF as the single platform, the technology may make it possible to populate the appellate filing system with existing trial court data.

5. *Clarify the standards and consequences for rejecting e-filed papers.* Section G(2) of the proposed rules allows a Clerk to "reject[] a document for *any* reason," while § J(1) authorizes a Clerk to "refuse to accept for filing or e-filing any document that does not comply with this Part, or is otherwise unsuitable, and may direct that a document be refiled." We believe that § G(2) is unnecessary and § J(1) should refer expressly to the CPLR, any uniform rules of the Appellate Division, the rules of the department of filing, or the technical requirements of the e-filing system, e.g., § E (Instructions for Electronic Filing; Formatting). Additionally, the rules should specify how the decision by a Clerk to reject a document affects the time for an opposing party to file a responsive document.

* * *

In closing, we thank the courts for the opportunity to comment on the Proposed Electronic Filing Rules of the Appellate Division of the Supreme Court of the State of New York. We reiterate our belief that implementation of Appellate Division e-filing technology and procedures will improve the litigation process across the State and access to justice. The comments above reflect some of the Office's concerns about the proposed uniform Appellate Division e-filing rules. We

² If the self-represented litigant is an attorney, then the e-filing requirement should apply absent an attorney exemption.

would welcome the opportunity to discuss other aspects of the proposed rules and provide further input with both the courts and other stakeholders while revisions are drafted.

Sincerely,

Oren L. Zeve
Managing Assistant Solicitor General

Proposed Rules for Electronic Filing in the Appellate Division: A Call for Comments

By: Jacquelyn Mouquin, Esq. of AppealTech

On June 1, 2017, the Office of Court Administration published proposed rules to be used statewide with regard to electronic filing in all four departments the Appellate Division.¹ Comments may be submitted to the OCA by July 24, 2017.

These proposed rules should be read in conjunction with the Proposed Rules Statewide Rules in the Appellate Division, which seek to unify practice and procedure in the four departments. In a previous [article](#), I discussed many of the significant changes proposed there. This article focuses on the proposed protocol specifically regarding electronic filing.

The highlights of the proposed rules include:

- **Requirement to enter preliminary case information** – currently, once the notice of appeal is filed (with accompanying preargument statement or RADI form as necessary), the only requirement prior to timely perfecting an appeal is to settle transcripts pursuant to CPLR 5525. The proposed rules would impose the obligation for the appellant to enter preliminary case information into the electronic filing system within 14 days of notification of the case number. Additionally, all parties who are not exempt must register as an e-filer during this time. Before these steps are finalized, paper copies of all documents must be served and filed, even in a mandatory e-file case. *See generally* Part 12(C).
- **Electronic filing fee** – in most cases, electronic payment of filing fees will be required prior to a document being considered timely filed under these rules. Part 12__(G)(1).
- **Pro se opt in/opt out** – under the proposed rules *pro se* litigants and a very small class of attorneys who, in good faith, certify that they do not have the requisite knowledge and commuter equipment are proposed to be exempt from the e-filing rules. Nevertheless, *pro se* litigants may opt in to the e-filing system by registering and filing a notice of their elections. That consent may later be withdrawn by filing of a form to that effect. Part 12__(D)(2)-(3).
- **Requirements of pro se/exempt filers** – under the proposed rules, *pro se*/exempt filers must meet certain obligations. First, at the time of an initial filing by an exempt or *pro se* party, a notice of such status must be served and filed. Part 12__(C)(3). Later, when filing briefs, records and/or appendices, such filers must include one completely unbound copy of the filing (held only by removable clips or rubber bands), so that the court may then scan the documents. Part 12__(F).

¹ The proposed rules may be found here: <http://www.nycourts.gov/rules/comments/PDF/Request-AppDivEfilng.pdf>

- **Timing of hard copies** – under the proposed rules, timeliness of filing will be based upon the electronic filing. Hard copies would only be due upon receipt, review, and approval of the electronic copies by the court. Part 12__(F)(1)(b).
- **Confidential filings** – under the proposal, confidential and sealed documents would still have to be e-filed, but in such a manner as to maintain their confidential or sealed status. Part 12__(H).
- **Basic formatting requirements** – under the proposed e-file rules, all formatting rules from the courts must be followed. Additionally, the electronic files must be submitted in PDF/A format with bookmarks to tables of contents and each file must not exceed 100 MB. In a multi-volume record or appendix, each volume should be a separately filed document. Part 12__(E)(2).
- **Redactions** – the proposed e-filing rules require certification of redaction rules, such as those found in Gen. Bus. L. §399-ddd. Part 12__(H). This is akin to the redaction requirement for the New York State Court of Appeals filings, but will add a significant burden to practitioners at the intermediate appellate level.

The days of e-filing in New York's intermediate appellate courts are inevitable, and drawing near. The proposed rules are meant to help attorneys prepare and anticipate the implications for their practice. Please take the time to share any comments about the proposed rules that you might have in the time between now and July 24, 2017.

I would be happy to discuss any of the proposed rules with you. Please feel free to call me or email me with your thoughts and concerns.

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Directors

July 24, 2017

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th floor
New York, NY 10004

Proposed E-Filing Rules for the Appellate Division

Dear Mr. McConnell,

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Subcommittee on the 2017 Appellate Division Rules Proposals, we write to comment on the Proposed Electronic Filing Rules of the Appellate Division of the Supreme Court of the State of New York, published June 1, 2017. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of more than 120 large, litigation based law firms and corporate legal departments. Its members' positions within their respective firms and companies and concomitant responsibilities afford them a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience with the rules and practice that govern court filings throughout the Unified Court System, including filings in the Appellate Division in all four Departments; and with e-filing in the New York State Court Electronic Filing system, in the courts of other states, via commercial vendors' e-filing sites and in the federal e-filing system, including e-filing in federal appeals courts. In a majority of our member firms, the actual filing of litigation papers in NYSCEF is performed by managing

attorney/managing clerk staff. Indeed, members of our organization over the years repeatedly have assisted the Unified Court System with feedback and beta testing of NYSCEF and its predecessor system, FBEM, as well as with the development of procedures that now are codified in Uniform Rule 202.5-b.

We welcome the prospect of e-filing in the Appellate Division and the opportunity it brings to update and harmonize practice across the four Departments. Our comments primarily concern the choice of e-filing site and better harmonizing appellate e-filing procedure with existing trial court e-filing as well as the CPLR. We have appended to this letter revised text of the Proposed E-Filing Rules as well as a black line.

E-Filing Exclusively via NYSCEF

One issue looms above all others in the Proposed E-Filing Rules: The idea that one or more Departments might use a court-approved site other than NYSCEF cannot survive a cost-benefit analysis and is unacceptable to our membership.

The alternatives to using NYSCEF would be either to build a new system for New York appellate e-filing or to use a commercial vendor. Building a new system when there is one already in place would duplicate the years of work that have gone into building NYSCEF and, more recently, developing features for its implementation in the Appellate Division. As shown by Monroe County's unsuccessful attempt to develop its own e-filing system rather than adopt NYSCEF some years ago, there is no assurance that the diversion of court resources for such purpose would produce an alternative system that actually would work—let alone one that would be superior to NYSCEF. Moreover, as participants in the business of courts throughout the Unified Court System, from landlord-tenant disputes in the New York City Civil Court to proceedings in Family, Criminal, Surrogate's, and Supreme Court in counties across the State as well as the Appellate Division, the Court of Claims and the Court of Appeals, we see a dire need for resources ranging from overtime to allow trial courts to resume operating on normal, pre-2009 schedules, to additional law clerks for Acting Supreme Court Justices, to additional staffing in the County Clerks' offices, and much more. For the court system to expend resources on a duplicate e-filing system in the face of such needs would make no sense.

Using a commercial vendor would impose higher costs on litigants and the public and would sacrifice opportunities to further make the *Unified* Court System a reality by unifying trial and appellate court records, as well as proceedings in the Appellate Division in all four Departments, in a single e-filing and court records platform. New York litigators should be able to access e-filing and e-filed records through a single portal with a single ID and password, rather than have to learn different e-filing systems for different courts within the Unified Court System. Further, a commercial vendor's product would not automatically be integrated with cases in the courts below that are filed in NYSCEF. That means either that appellants in that Department would be forced to forego the efficiencies of a unified court filing and records system or that development

would be required to integrate the vendor's system with NYSCEF and other data systems employed by the courts (such as e-Track); given the for-profit nature of commercial vendors' business, any such development would be paid for either by litigants in the form of inflated filing and retrieval fees or by taxpayers funding extra budget if the judiciary elects to absorb the costs rather than pass them directly on to litigants—or both. Use of a vendor's product also would substantially delay the implementation of e-filing in the Department that rejected NYSCEF, as NYSCEF already is built and requires comparatively minor customization for use in the Appellate Division while it likely would take a commercial vendor several years to build a system that works for New York appellate practice.

Customization of a commercial product would not be the end of higher costs for New Yorkers. The Delaware Chancery Court has employed one such commercial vendor with the result that the surcharge for a party to file a single document, in addition to the court's own fees, is \$9, with an additional \$12 for electronic service on the other parties. Non-parties pay a charge of \$40 to retrieve a document, even if only a one-page notice of appearance. See Attachment C (File & ServeXpress Pricing Sheet). NYSCEF imposes none of these charges. In addition to the general problem of unnecessary costs associated with a commercial vendor's system, the prospect of litigants and the public being charged higher filing and retrieval fees in one Department than another also is troubling.

Whether a homegrown alternative to NYSCEF or a commercial vendor, an alternative e-filing site also would require additional resources to operate and maintain it. Present staffing levels in the Statewide Electronic Filing Resource Center would need to be augmented in order to be able to provide training and user support for any alternative system in addition to NYSCEF. It would be even more inefficient if a Department that employed an alternative e-filing system opted to provide user support from its own staff. And if a commercial vendor provides user support, it becomes another part of the services the vendor is selling—for a price that covers both the vendor's costs and its profit. Any of those scenarios would cost substantially more than providing user support for a single e-filing system throughout the Unified Court System.

With such an array of costs and disadvantages associated with an alternative e-filing system, it would have to have overwhelming benefits to justify its adoption. But our collective experience with NYSCEF, the federal CM/ECF system, commercial e-filing systems and other states' e-filing systems has shown us that NYSCEF is at least as good an e-filing, communication and storage system as the rest. In fact, there have been far fewer outages of NYSCEF over the years than of the other e-filing systems with which we are acquainted. Accordingly, the only reason we can conceive of for using a system other than NYSCEF is some local preference for a system that executes its functions in a different manner than NYSCEF.

We submit that such preferences might properly drive future development of NYSCEF, but cannot be allowed to drive increases in the judiciary's budget or filing and retrieval

fees, or indeed to isolate one Department's electronic filing and records systems rather than further the Departments' standardization and unity within the Unified Court System, all of which one Department's use of an alternative e-filing system would effect. NYSCEF is New York State's investment in a court e-filing system, it works quite well, and it is maintained by a small but very dedicated and competent staff. It is a superior public resource that does not impose fees to retrieve information from it and does not impose any filing fees on litigants other than those mandated to be collected by the County Clerks for certain court filings without regard to whether in hard copy or electronic. It thus is a model of economy and efficiency, and the staff who support it have shown a nimbleness and flexibility that enables them to address the needs of the different constituencies that rely on the system effectively. Based on these factors and its established track record over the years, there is no legitimate reason to implement any e-filing system other than NYSCEF in every court within the State of New York that has reason to adopt e-filing. To do otherwise would be an extravagant waste of resources.

Accordingly, the following text should be deleted from the Proposed E-Filing Rules:

- “, or at another site approved by the Court,” § A(1).
- “or other court-approved site” §§ A(7); C(1)(a); C(2)(a); C(4)(a)(i); D(2)(b); E(1); G(1)(a) & (b); G(3); H
- “or other court-approved e-filing system” §§ C(1)(b); C(2)(b); C(4)(a)(ii)
- “or such other system approved by the court,” § I(1)

Definitions and Designation of Case Types (§§ A & B)

We reviewed the language of the Proposed E-Filing Rules with an eye to consistency with e-filing in the lower courts, as a matter of ease of use for lawyers and their staff, clarity in communications between appellate and lower court staff concerning e-filing and e-filed records, and standardization of terminology across the Unified Court System. Our comments on the rest of the Proposed E-Filing Rules include edits to conform terminology to the definitions as revised below.

Uniform Definitions. We propose that the definitions set forth in Uniform Rule 202.5-b(a)(2) be adopted in their entirety in a new Section A(1). Doing so would perpetuate a single nomenclature for e-filing throughout the Courts of the State of New York, and also would obviate the need for the following definitions, which we would delete: “e-filer” (§ A(1)); “NYSCEF” (§ A(6)); “electronic filing method” or “e-filing” (§ A(7)); “hard copy” (§ A(9)); and “self-represented litigant” (§ A(12)).

Cause or Matter. The definition of “cause” or “matter” should be revised to include applications for review of *ex parte* orders pursuant to CPLR 5704. Such review often is

sought in circumstances in which proceeding expeditiously is especially important, and the efficiencies of serving and filing electronically would help litigants and the court alike to resolve such applications in a timely manner.

Document. The definition of “document” should include correspondence between the court and the parties (but not correspondence between the parties that is not addressed to the court, even if the court is copied). Litigants occasionally have need to correspond with the court about a case, such as when the court requires parties to advise it of dates counsel are available for oral argument and the amount of time a litigant wishes to request for argument, or when the Court of Appeals remands a case to the Appellate Division with guidance about which the parties differ in their interpretations. The submission of such correspondence to the trial court via NYSCEF has worked well for many years and results in a more complete record of proceedings in NYSCEF. If the Appellate Division wishes to discourage correspondence to the court, that should be done in the Statewide Rules rather than the E-Filing Rules, since it should apply equally to e-filed and hard copy causes and matters.

§ A(5) The word “document” shall mean a brief, motion, application, record, appendix, or other paper relating to a cause or matter. “Document” shall not include correspondence that is not addressed to the court or correspondence on which the court is merely copied.

Hard Copy Method. We would eliminate the definition of “hard copy method” and its variations (§ A(10)) as duplicative of concepts that are well-established in the CPLR and in the definition of “hard copy” we are suggesting be incorporated by reference to Uniform Rule 202.5-b(a)(2)(vi), above. The single instance of “hard copy filing method” later in the proposed rules can be replaced with a reference to filing in hard copy pursuant to CPLR 2102 and 5530. “Hard copy service method” can be replaced with references to service in hard copy pursuant to CPLR 2103 (or Article 3 of the CPLR, as the case may be). The term “hard copy method” is only used in the proposed rules in connection with service and filing, and therefore is wholly unnecessary.

Appellate Index Number. A new definition should be added for “appellate index number.” The Proposed E-Filing Rules include language, “an appellate case, docket or e-file tracking number,” which suggests the Departments do not intend to adopt a unified approach to numbering appeals. In our experience, it is far easier for litigants and counsel when the Appellate Division assigns and makes public a case number for each matter before it at the outset of an appeal; and if sixty-two different counties have been able to adapt to the common use of an index number for all proceedings in the Supreme Court then the four Departments likewise should be able to adopt a unified approach to numbering their causes and matters. We propose the term “appellate index number” because counsel and litigants in the New York courts already are familiar with the term “index number.”

PDF/A. The term “PDF/A” is a technological designation of an archival portable document file type that is familiar to e-filers in New York from its use in NYSCEF as well as in the U.S. District Court for the Southern District of New York’s implementation of the federal CM/ECF system. The meaning of the term is wholly independent of the Unified Court System. In addition, the definition in the proposed E-Filing Rules is circular: In Section A it is defined as the required file type, while Section E(2)(a)(i) specifies that the required file type is PDF/A. For these reasons, the definition of PDF/A should be eliminated.

Section B. Section B should be revised to provide that actions that are e-filed in the court from which an appeal or request for review is taken, a transferee court or in the Court of Appeals when it remands a case to the Appellate Division (once the Court of Appeals eventually adopts e-filing via NYSCEF) are presumptively e-filed in the Appellate Division. The court and litigants should benefit from the efficiencies that can be realized from e-filing in the Appellate Division in a cause or matter that was e-filed in the court from which it came.

For purposes of clarity, Section B also should be revised by adding the following language: “In matters and causes that are not e-filed, filing shall be in hard copy accordance with CPLR 2102 and 5530 and service shall be in accordance with CPLR 2103. In matters and causes that are e-filed, service and filing shall be as specified herein.”

Registration for, Exemption from and Notice of Electronic Filing (§§ C & D)

Truncated Procedure when Case Below on NYSCEF. The creation of an appeal or transferred matter in NYSCEF can and should be a very simple matter when the action being appealed or transferred was filed in NYSCEF in the court below, in contrast to when creation of a matter in NYSCEF happens for the first time in the Appellate Division. Section C(1) should be divided into two subsections in order to differentiate between what needs to be done in those two situations, with the new text below inserted immediately following the heading for Section C(1) and replacing existing text, and the existing subsections (a) through (e) redesignated (i) through (v) under the new subsection (b).

1. Appeals or Transferred Matters — Initial Entry of Contact Information and Service of Notice of Case Number.

- (a) Prior Proceedings in NYSCEF. Where an action on appeal or remand or a matter transferred to the Appellate Division was filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred, upon transmission to the Appellate Division by such court of the document invoking the Appellate

Division's jurisdiction the Appellate Division shall issue a notice via NYSCEF to all parties of the appellate index number for the matter, the designation of the matter as e-filed or hard copy and other pertinent information about the case. Unless the matter is designated hard copy under section (B) of this Part, at such time and in such manner as specified by Departmental rule, the appellant, petitioner or party in an analogous role shall take the following steps unless exempt from e-filing under section (D) below:

- (i) if not already an authorized e-filing user, shall register as such in accordance with the procedure established by Uniform Rule 202.5-b(c); and
- (ii) serve in accordance with CPLR 2103 and file via NYSCEF such notice of appearance as the court may require.

Counsel and unrepresented litigants who are exempt from e-filing under section (D) below shall serve and file any required notice of appearance in hard copy in accordance with CPLR 2103 and 2102, respectively.

(b) *Prior Proceedings in Hard Copy.* Unless a cause or matter is designated hard copy under section (B) of this Part, where it was filed in hard copy in the court from which the appeal is taken, the remand issued or the action is transferred, the appellant, petitioner or party in an analogous role shall take the following steps unless exempt from e-filing under section (D) below:

- (i) if not already an authorized e-filing user, shall register as such in accordance with the procedure established by Uniform Rule 202.5-b(c); *etc.*

Section C(4) should be modified similarly to limit its registration and notice of e-filing requirements to causes and matters that were not preceded by proceedings filed in NYSCEF in another court, as well as to conform to revisions of Sections A and C(1), noted above:

§ C(4) *Entry of Additional Information.* Within 14 days of service of the notification of the appellate index number as provided in subsection (1)(a) or (1)(b)(iv), above, counsel to all parties to the matter and unrepresented litigants, other than the appellant, petitioner or party in an analogous role, shall:

- (a) Where an action on appeal or remand or a matter transferred to the Appellate Division was not filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred,
 - (i) if not registered, register as an authorized e-filing user with NYSCEF; and
 - (ii) enter in NYSCEF such contact information and additional information as the court may require; or *etc.*

Section C(5) should be modified similarly, by creating a new subsection (a) to govern causes and matters that were preceded by proceedings filed in NYSCEF in another court, and redesignating subsections (a) through (c) as (b)(i)–(iii), and redesignating subsection (d) as (c):

§ C(5) Service and Filing.

- (a) Where an action on appeal or remand or a matter transferred to the Appellate Division was filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred, service and filing of all documents by and upon all parties, other than persons exempt from e-filing under section (D), shall be by electronic filing as further set forth in this Part. The participation in a matter by a person exempt from e-filing under section (D) shall not alter the e-filing obligation of other parties.
- (b) Where an action on appeal or remand or a matter transferred to the Appellate Division was not filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred,
 - (i) Prior to the expiration of the 14-day period described in subsection (4) (“registration and notice period”), service and filing of documents by all parties in an e-filed matter, including without limitation service and filing of emergency applications and orders to show cause, shall be made in hard copy in accordance with CPLR 2102, 2103 and 5530. In the event that all parties to a cause or matter have complied with the requirements of subsection (4) at a date prior to the expiration of the 14-day registration and notice period, parties may file and serve documents via NYSCEF as further set forth in this Part on and after that earlier date.

(ii) Upon the expiration of the 14-day registration and notice period described in subsection (4), service and filing of all documents by and upon all parties, other than persons exempt from e-filing under section (D), shall be made via NYSCEF as further set forth in this Part. The participation in a matter by a person exempt from e-filing under section (D) shall not alter the e-filing obligation of other parties.

(iii) Once the 14-day registration and notice period has concluded, any party, other than persons exempt from e-filing under section (D), who fails to meet his or her obligation to register and enter information as required under subsection 4, will be deemed served with any document electronically filed in that matter.

(c) Service of documents in an e-filed matter by and upon persons exempt from e-filing under section (D) shall be in accordance with CPLR 2103; and the filing of documents by such exempt persons shall be in hard copy in accordance with CPLR 2102 and 5530.

Transmission of Appellate Index Number. Renumbered Section C(1)(a) above includes a modification to provide that the Appellate Division will communicate the appellate index number to the party that invoked the court's jurisdiction. Where a cause or matter already is filed in NYSCEF prior to proceedings in the Appellate Division, the court is in a position to be aware of the cause or matter from the outset without needing to be informed by a party. The court therefore can and should take the initiative to assign an appellate division index number and notify the parties, just as the trial courts do when an action is commenced in NYSCEF.

Initial Steps To Be Taken by Appellant, Petitioner or Party in Analogous Role. Section C(1) above also includes revisions to specify that only the appellant, petitioner or party in an analogous role need take the steps specified therein, inasmuch as Section C(4) specifies the initial steps to be taken by other parties to the cause or matter.

Commencement of Special Proceedings in NYSCEF. In order to commence an original proceeding in the Appellate Division, the Proposed E-Filing Rules require the party to file not just the petition but also a notice of petition or an executed order to show cause. But CPLR 304(a) provides that all that is necessary to commence a special proceeding is a petition. Section C(2)(b) accordingly should be revised to be consistent with the CPLR.

§ C(2)(b) file the petition and other initiating documents in the matter by electronic means through NYSCEF as provided in this Part;

(Notably, this revision eliminates the prospect of submitting a proposed order to show cause outside of NYSCEF. Practice in the trial courts has demonstrated that submission of proposed orders to show cause via NYSCEF is workable and efficient for litigants and court personnel alike.)

Service of Process in Original Proceedings. When a party commences a special proceeding, service of the initiating papers on the other parties is service of process. CPLR 403(c). Accordingly, the reference in Section C(2)(d) to service pursuant to CPLR 2103 is inapposite; the reference instead should be to Article 3 of the CPLR.

E-Filing Exempt Litigants' Documents. Section C(3)(b) should be deleted from the Proposed E-Filing Rules. That provision purports to empower the court to require an authorized e-filing user to undertake the entry and service of case information for another party that is exempt from e-filing. In essence, such a requirement would shift the cost of e-filing from the exempt party to the e-filer. We respectfully submit that the Courts of the State of New York are not empowered to shift costs except as a sanction and remedy for frivolous conduct, pursuant to Rule 130-1.2—and then only based on specific findings set forth in a written decision. If the court system concludes otherwise, we nonetheless urge the deletion of this provision as imposing an unnecessary burden that is as likely as not to discourage litigants from choosing New York's courts to hear their disputes.

Failure To Register and Enter Information. Although some might view it as draconian to provide that a litigant who fails to register for and/or enter additional information in NYSCEF will be deemed served with any document that is filed electronically, we support renumbered Section C(5)(b)(iii)'s provision to that effect. "Mandatory electronic filing" needs to be enforced in order to work. At the same time, especially during the first year or so of e-filing in the Appellate Division, the court should invest extra resources to support the bar's transition to appellate e-filing with a system of notices to those who fail to register and/or enter additional information as required. The court can address chronic offenders via Part 130 of the Rules of the Chief Administrator.

Exemptions. The proposed text of Section D should be replaced in its entirety with a provision that adopts Uniform Rule 202.5-bb(e). There is no material difference between the two provisions (except that the proposed Appellate Division rule includes the requirement that an unrepresented party file a notice of consent to participate in e-filing, which experience in the lower courts has shown to be unnecessary), and for purposes of consistency and ease of use by litigants and counsel there should be only one.

Electronic Filing and Hard Copy Filing (§§ E & F)

Distinguishing Procedure for E-Filed Documents from Hard Copy Filings. Section F is conceptually confusing because it addresses both hard copy service and filing by those who are exempt from e-filing, on the one hand, and the submission of hard copy versions of e-filed documents for the convenience of the court (similar to working copies in the

trial court), on the other. In addition, Sections E and F in their current form fail to make clear what is the officially filed version of a document that is e-filed and for which hard copies also are submitted. The solution is to make Section E about service and filing of papers that are e-filed (including the follow up submission of hard copies) and Section F about service and filing of papers that are served and filed only in hard copy. The primary change required to effect that solution is the transfer of present Section F(1) to a new Section E(3).

Renumbered Section E(3) needs to be revised to eliminate the concept of *completion of the filing* with hard copy submissions, which conflicts with Section G(1) as well as the parallel provision in the Proposed Statewide Rules. We respect the court's need for litigants to comply with the requirement of submitting hard copies of their briefs, records, motions, etc. that likely prompted resort to the completion of filing concept. At the same time, the precept that a case should be decided on the merits weighs heavily against any approach that would prejudice a party for failure to provide what in essence are courtesy hard copies for the court's convenience. Experience with the analogous working copies requirement in the trial court suggests that non-compliance is almost always inadvertent and mostly occurs with those new to New York State e-filing or during the initial transition period after a court adopts NYSCEF. We accordingly believe that the best approach is for the Appellate Division to support the bar's transition to appellate e-filing with a system of e-mail and docket reminders to those who do not submit their hard copies when due, like other courts that require hard copy submissions of e-filed documents (including New York trial courts and the United States Court of Appeals for the Second Circuit). The court should address repeat offenders via Part 130 of the Rules of the Chief Administrator, the same as it should with other compliance issues.

Some language changes also are required within the existing text to eliminate the potential for confusion about when an e-filed document is timely filed (we are proposing related revisions to Section G(1) below to harmonize it with Section 1.0(C)(1)(a) of the Proposed Statewide Rules of the Appellate Division); to make clear that the e-filed version is the official court record; to provide a time within which hard copies are to be submitted; and to set a specific number of hard copies required for original and transferred proceedings, motions and other applications:

§ E(3) Submission of Additional Hard Copies of E-Filed Documents.

(a) Unless otherwise directed by the court, a party required to file documents in a matter by electronic filing shall, in addition, submit hard copies of such documents as follows:

(i) appellate briefs, records, appendices, agreed statements in lieu of record: six hard copies.

(ii) original proceedings, transferred proceedings, motions, applications: one hard copy.

(b) Filers shall delay the submission of hard copies of documents required under subsection (G)(3) until the clerk notifies the e-filing party of his or her approval of the electronic version of the document. Hard copies are to be submitted within five days following such notification.

We are proposing a conforming revision of Section I and also will be proposing a revision to the Proposed Statewide Rules of the Appellate Division to define what constitutes the official record for e-filed documents as well as documents filed only in hard copy.

Anti-Virus Attestation. The proposed requirement of an anti-virus attestation for electronic filing (§ E(2)(d)) should be eliminated. No such attestation or certification ever has been required for filings in NYSCEF, and the United States Court of Appeals for the Second Circuit, which previously required an anti-virus certification, eliminated that requirement some years ago after finding it unnecessary. We are aware of no problems resulting from not requiring such an attestation, and advances in anti-virus and other data security functionality suggest that the risk of there being any is too low to justify requiring one.

Signatures. A new subsection should be added to Section E(2) that incorporates Uniform Rule 202.5-b(e) by reference. That provision concerns signatures on e-filed documents, which the Proposed E-Filing Rules should address.

Hard Copy Filings by E-Filers. Even in a fully e-filed case there can be occasion for hard copy filings, such as when a litigant seeks a TRO in circumstances in which notice to the other parties is not required. The E-Filing Rules need to provide for such filings. Accordingly, a new Section F(3) should be added to incorporate Uniform Rule 202.5-b(d)(ii), which sets the procedure for e-filers to file in hard copy in the trial court.

Notice of Hard Copy Filing. In order to facilitate the court's processing of hard copy filings in e-filed cases, whether by an exempt attorney or party or in the circumstances addressed in the preceding paragraph, the court should adopt the practice of requiring that such filings be accompanied by a notice of hard copy submission that provides information the clerk needs in order to be able to accept the filing in hard copy. A new Section F(4) therefore should be added to incorporate Uniform Rule 202.5-b(d)(iii), which establishes the notice of hard copy filing requirement in the trial court.

Proof of Hard Copy Service. Every document filed in court that was served on any party in hard copy pursuant to Section F should include proof of service, consistent with

current practice. A new Section F(5) should be added to make that requirement explicit, similar to the requirement for trial court filings set forth in Uniform Rule 202.5(a).

Timeliness; Rejection by Clerk; Sealed Documents (§§ G, H & J)

Timeliness of Hard Copy Submissions. For purposes of clarity and logistics, the following sentence should be added to Section G(1) following (but not within) subsection (b) thereof:

Hard copies of e-filed documents that are delivered to the court by mail or overnight courier are deemed submitted on the date they are deposited with the United States Postal Service or overnight courier.

Rejection of Filings. Section G(2)'s provision that the clerk may reject a document for any reason and Section J(1)'s provision that the clerk may reject documents that are non-compliant with the rules or otherwise unsuitable are impermissible under CPLR 2101(f) and 2102(c). Moreover, there should be a single standard for rejecting documents in the Appellate Division whether e-filed or hard copy, such that the rule on rejections belongs in the Statewide Rules of the Appellate Division rather than in the E-Filing Rules. Accordingly, Section G(2) of the E-Filing Rules should be deleted and Section J(1) should be revised to refer to the standard in the Statewide Rules (which we separately are recommending revising to comport with the CPLR):

§ J(1) Rejection of Documents. The court shall reject for e-filing documents filed in causes and matters only as specifically provided by the Statewide Rules of the Appellate Division, a statute, a Rule of the Chief Administrator or an order of the court.

Timeliness of Service. For purposes of clarity, the following sentence should be added to the end of Section G(2):

A document that is timely filed in NYSCEF shall be deemed timely served on all parties other than persons exempt from e-filing under section (D)(1), unless the court rules otherwise.

Scanning Documents by the Clerk. Section I should be modified to eliminate the court's discretion to deem documents that are e-filed or scanned and uploaded by the clerk as the official record. We are proposing an addition to the Proposed Statewide Rules of the Appellate Division that defines the official record of proceedings in the Appellate Division, borrowing in part from Uniform Rule 202.5-b(d)(4). Such definition belongs in the Statewide Rules rather than in the E-Filing Rules because it should define the record

for hard copy filings as well as e-filed documents. Section I also should indicate that subsequent scanning and uploading of the document by the clerk does not affect the filing date of the document.

§ I. Scanning of Documents by the Clerk. The Clerk may scan hard copy filings in a cause or matter subject to e-filing for upload into the NYSCEF system. Where a document that was filed in hard copy is thereafter scanned and uploaded by the clerk, the filing date recorded in NYSCEF shall be the date of the hard copy filing.

Modification of Procedures. In Section J(2), the phrase “or its designee” should be deleted. Presumably those words were included in connection with the misguided notion that a platform other than NYSCEF could be used for one of the Departments. Moreover, the establishment of court procedure is and should remain the exclusive domain of the legislature and the courts; in no event should that power be delegated to a non-government entity.

Miscellaneous and Conforming Revisions

Renumbered Section C(1)(b)(iv) should be revised to replace the phrase “case, docket or tracking number” with “appellate index number;” and to replace “ and the electronic filing method” with “, including its designation as an e-filed cause or matter”

Sections C(3) and C(4)(b) both should be revised to replace the phrase “serve upon all parties and file with the court by hard copy method” with “serve upon all parties in accordance with CPLR 2103 and file with the court in hard copy” to conform to changes to the definitions in Section A noted above.

The phrase in renumbered Section F(1) to “by hard copy service method” should be replaced with “in accordance with CPLR 2103.” The final sentence in that subsection is superfluous and should be deleted.

The first sentence of renumbered Section F(2) should be revised as follows to delete the unnecessary word “voluntarily,” and to conform to the revisions of Sections A and D noted above:

Whenever an attorney or unrepresented litigant in a cause or matter subject to e-filing is exempt from and has not consented to participate in electronic filing pursuant to section (D) of this Part, that attorney or self-represented party shall serve documents in accordance with CPLR 2103 and file them in hard copy in accordance with CPLR 2102 and 5530. . . .

Renumbered Section G(3) should be revised to conform to the elimination of the definition of “hard copy method” from Section A, above, and to make clear that the CPLR and the Statewide Rules of the Appellate Division control the timeliness of service and filing of hard copies, as follows:

§ G(3) Timeliness of Service and Filing by Other Means.
The timeliness of service and filing by means other than NYSCEF shall be as provided in the CPLR and the Statewide Rules of the Appellate Division.

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Again, we are grateful for the opportunity to comment on the Proposed Electronic Filing Rules of the Appellate Division of the Supreme Court of the State of New York, and very much look forward to helping achieve successful implementation of NYSCEF for the Appellate Division. Should you have questions or would like further elaboration on any of the foregoing, please contact Tim Beeken at tkbeeken@debevoise.com.

Respectfully submitted,

Kurt R. Vellek
Managing Clerk
Allen & Overy LLP

James A. Rossetti
Managing Clerk
Boies Schiller & Flexner LLP

Brendan Cyr
Assistant Managing Attorney
Cleary Gottlieb Steen & Hamilton LLP

Timothy K. Beeken
Counsel & Managing Attorney
Debevoise & Plimpton LLP

Ime A. Nelson
Managing Clerk
Harris Beach PLLC

Robert Westrom
Managing Attorney
Jones Day

John A. Marsala
Managing Clerk
Mayer, Brown LLP

**Proposed Electronic Filing Rules of the Appellate Division
of the Supreme Court of the State of New York**

~~Issued for Public Comment~~

Per Managing Attorneys & Clerks Ass'n, Inc. Revision

~~June 1~~July, 2017

Part 12__.

A. Definitions.

For purposes of this ~~section~~Part:

~~1. The phrase “e filer” shall mean a person who has registered and entered case information at the NYSCEF site, or at another site approved by the Court, to deliver documents electronically in a matter pursuant to this Part.~~

1. The definitions set forth in Uniform Rule 202.5-b(a)(2) are incorporated into this Part.

2. The word “cause” or “matter” includes an appeal, an application for review of an ex parte order pursuant to CPLR 5704, a special proceeding transferred to the court pursuant to CPLR 7804(g), a special proceeding initiated in the court, and an action submitted to the court pursuant to CPLR 3222 on a case containing an agreed statement of facts upon which the controversy depends.

3. Any reference to the “clerk” means the Clerk of the Court of a Judicial Department of the Appellate Division, or his or her designee.

4. Any reference to the “court” means the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over the cause or matter.

5. The word “document” shall mean a brief, motion, application, record, appendix, or other paper relating to a cause or matter. “Document” shall not include correspondence, ~~other than letter applications~~ that is not addressed to the court or correspondence on which the court is merely copied.

~~6. The term “NYSCEF” shall mean the New York State Courts Electronic Filing System, and the “NYSCEF site” shall mean the New York State Courts Electronic Filing System website located at www.nycourts.gov/efile.~~

6. 7. The phrase “~~electronic filing method~~” or “~~e-filing~~appellate index number” shall mean ~~the filing and service of a document in a cause or matter by electronic means through the NYSCEF site or other court approved site.~~a unique case, docket or tracking number that the court assigns to each cause or matter brought before it, which the parties

and the court are to inscribe on the first page of any document filed in such cause or matter.

7. ~~8.~~ The phrase “electronically-filed matter” or “e-filed matter” shall mean a cause or matter in which a filing has been made under the electronic filing method pursuant to this Part.

~~9. The phrase “hard copy” shall mean a document in paper format.~~

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~~10. The phrase “hard copy filing method,” “hard copy service method” or “hard copy method” shall mean, respectively and as context requires, filing or service of a document in paper format by a method other than electronic means.~~

~~11. The phrase “PDF/A” (Portable Document Format) shall mean the required format of a document e-filed pursuant to this Part.~~

~~12. The phrase “self-represented litigant” shall mean party to a cause or matter who is not represented by counsel.~~

B. Designation of Case Types Subject to Mandatory E-filing.

The court may require or permit e-filing in such cases and case types as it deems appropriate. Causes and matters resulting from an appeal or request for review from an action that was e-filed in the court below, from the transfer of a proceedings that was e-filed in the transferor court or from a remand of an appeal that was e-filed in the Court of Appeals presumptively will be e-filed in the Appellate Division. In matters and causes that are not e-filed, filing shall be in hard copy accordance with CPLR 2102 and 5530 and service shall be in accordance with CPLR 2103. In matters and causes that are e-filed, service and filing shall be as specified herein.

C. Registration and Notice of Electronic Filing.

1. Appeals or Transferred Matters -- Initial Entry of Contact Information and Service of Notice of Case Number. ~~At~~

(a) Prior Proceedings in NYSCEF. Where an action on appeal or remand or a matter transferred to the Appellate Division was filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred, upon transmission to the Appellate Division by such court of the document invoking the Appellate Division’s jurisdiction the Appellate Division shall issue a notice via NYSCEF to all parties of the appellate index number for the matter, the designation of the matter as e-filed or hard copy and other pertinent information about the case. Unless the matter is designated hard copy under section (B) of this Part, at such time and in such manner as ~~the court shall direct~~specified by Departmental rule, ~~and~~the appellant, petitioner or party in an analogous role shall take the following steps unless exempt from e-filing under section (D) ~~(1) of~~below:

(i) if not already an authorized e-filing user, shall register as such in accordance with the procedure established by Uniform Rule 202.5-b(c); and

(ii) serve in accordance with CPLR 2103 and file via NYSCEF such notice of appearance as the court may require.

Counsel and unrepresented litigants who are exempt from e-filing under section (D) below shall serve and file any required notice of appearance in hard copy in accordance with CPLR 2103 and 2102, respectively.

(b) Prior Proceedings in Hard Copy. Unless a cause or matter is designated hard copy under section (B) of this Part, ~~counsel for~~ where it was filed in hard copy in the court from which the appeal is taken, the remand issued or the action is transferred, the appellant ~~or the~~ petitioner ~~in an appeal or transferred matter of a case type designated for electronic filing, or a self-represented appellant or self-represented petitioner in such a matter,~~ or party in an analogous role shall take the following steps unless exempt from e-filing under section (D) below:

~~(a)-(i)~~ if not already ~~registered, register as~~ an authorized e-filing user ~~with NYSCEF or other court-approved site,~~ shall register as such in accordance with the procedure established by Uniform Rule 202.5-b(c);

~~(ii)~~ if not already provided, obtain from the court an appellate index number for the matter;

~~(b)-(iii)~~ enter in NYSCEF ~~or other court-approved e-filing system~~ such information about the case and parties and such notice of appearance as the court may require;

~~(c) if not already provided, obtain from the court an appellate ~~case, docket or e-filing tracking~~ number for the matter;~~

~~(d)-(iv)~~ serve upon all parties, on a form approved by the Appellate Division, notification of ~~that case, docket or tracking~~ the appellate index number and other pertinent information about the case ~~and the electronic filing method,~~ including its designation as an e-filed cause or matter; and

~~(e)-(v)~~ e-file proof of service of this notification.

2. Original Proceedings – Commencement by E-filing. Unless exempt from e-filing under section (D) ~~(1)~~ of this Part, counsel for a petitioner or ~~a self-represented~~ an unrepresented petitioner commencing an original proceeding in a case type subject to e-filing shall:

(a) if not already registered, register as an authorized e-filing user with NYSCEF ~~or other court-approved site~~;

(b) file ~~the notice of petition (or, as appropriate, the executed order to show cause)~~, the petition and other initiating documents in the matter by electronic ~~filing method~~ means through NYSCEF ~~or other court-approved e-filing system~~ as provided in this Part;

(c) if not already provided, obtain from the court ~~a case number or e-filing tracking~~ an appellate index number for the matter; and

(d) serve upon all parties ~~by hard copy service method~~ as provided in Article 3 of the CPLR 2103 and court rule

(i) the initiating documents in the case; and

(ii) on a form approved by the Appellate Division, notification of the ~~case, docket or tracking~~ appellate index number and other pertinent information about the case ~~and the electronic filing method, including its designation as an e-filed cause or matter~~; and

(e) e-file proof of service of the initiating documents and notification.

3. Initial Filing Where Petitioner, Appellant or Counsel is an Exempt Person.

~~(a) An unrepresented litigant~~ ~~A self-represented appellant or petitioner~~, or an attorney for an appellant ~~or~~ petitioner, ~~claiming or party in an analogous role who claims~~ exemption from e-filing pursuant to section (D) ~~(1)(a)~~ of this Part shall, at the time of an initial filing of any document with the court in a case type designated for e-filing, serve upon all parties in accordance with CPLR 2103 and file with the court ~~by~~ in hard copy ~~method~~ an appropriate notice of status as ~~a self-represented party~~ an unrepresented litigant or attorney exemption certification.

~~(b) Where a self-represented party or an attorney has filed a notice pursuant to subsection (3) (a), the clerk may direct another party or attorney in the matter to undertake the entry and service of case information as set forth in subsection (1) or (2), on such terms as it deems just.~~

4. Entry of Additional Information. Within 14 days of service of the notification of the ~~case, docket or tracking~~ appellate index number as required in subsection (1) ~~(a)~~ or ~~(2)~~ (b)(iv), counsel to all ~~other~~ parties to the matter, ~~or other self-represented parties~~ and unrepresented litigants, other than the appellant, petitioner or party in an analogous role, shall:

~~(a)~~

(a) Where an action on appeal or remand or a matter transferred to the Appellate Division was not filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred,

(i) if not registered, register as an authorized e-filing user with NYSCEF; and

~~or other court-approved site; and~~

(ii) enter in NYSCEF ~~or other court-approved e-filing system~~ such contact information and additional information as the court may require; or

(b) ~~if a self-represented party~~ If an unrepresented litigant or an attorney exempt from e-filing pursuant to section (D) ~~(1) (a)~~ of this Part, serve upon all parties in accordance with CPLR 2103 and file with the court ~~by~~in hard copy ~~method~~ an appropriate notice of status as a ~~self-represented party~~unrepresented litigant or attorney exemption certification.

5. Service and Filing.

(a) Where an action on appeal or remand or a matter transferred to the Appellate Division was filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred, service and filing of all documents by and upon all parties, other than persons exempt from e-filing under section (D), shall be by electronic filing as further set forth in this Part. The participation in a matter by a person exempt from e-filing under section (D) shall not alter the e-filing obligation of other parties.

(b) Where an action on appeal or remand or a matter transferred to the Appellate Division was not filed in NYSCEF in the court from which the appeal is taken, the remand issued or the action is transferred,

~~(a)~~ (i) Prior to the expiration of the 14-day period described in subsection (4) (“registration and notice period”), service ~~and filing~~ of documents by all parties in an e-filed matter, including without limitation service and filing of emergency applications and orders to show cause, shall be ~~by~~made in accordance with CPLR 2103 and all parties shall file in hard copy ~~method~~in accordance with CPLR 2102 and 5530. In the event that all parties to ~~an appeal~~a cause or matter have complied with the requirements of subsection (4) at a date prior to the expiration of the 14-day registration and notice period, parties may file and serve documents ~~by electronic method~~via NYSCEF as further set forth in this Part on and after that earlier date.

~~(b)~~ (ii) Upon the expiration of the 14-day registration and notice period described in subsection (4), service and filing of all documents by and upon all parties, other than persons exempt from e-filing under section (D) ~~(1)~~, shall be ~~by electronic method~~made via NYSCEF as further set forth in this Part. The participation in a matter by a person exempt from e-filing under section (D) ~~(1)~~ shall not alter the e-filing obligation of other parties.

~~(e)~~ (iii) Once the 14-day registration and notice period has concluded, any party, other than persons exempt from e-filing under section (D) ~~(1)~~, who fails to meet his or her obligation to register and enter information as required under subsection 4, will be deemed served with any document electronically filed in that matter ~~as set forth in section (G) (3) of this Part~~.

(c) ~~(d)~~ Service of documents in an e-filed matter by and upon persons exempt from e-filing under section (D) ~~(1)~~, shall be in accordance with CPLR 2103; and the filing of documents by such exempt persons, shall be by hard copy ~~method~~ as specified in section (F) of this Part in accordance with CPLR 2102 and 5530.

D. Exemptions of Certain Persons from ~~the~~ Electronic Filing ~~Method~~.

~~1. Personal Exemptions. The following persons are exempt from the requirement of participation in the electronic filing method:~~

~~(a) self-represented litigants; and~~

~~(b) attorneys who certify in good faith, on a form provided by the Appellate Division, that they lack either (i) the computer hardware and/or connection to the~~

~~internet and/or scanner or other device by which documents may be converted to an electronic format; or (ii) the requisite knowledge in the operation of such computers and/or scanners necessary to participate, pursuant to CPLR §2111 (b) (3) (A) or (B).~~

~~2. Consensual Participation. Notwithstanding this personal exemption, a self-represented litigant may voluntarily participate in e-filing in a cause or matter by~~

~~(a) serving on all parties at any time and filing with the court a notice of consent to participate in electronic filing on a form approved by the Appellate Division;~~

~~(b) registering as an e-filing user with the NYSCEF site or other court-approved site; and~~

~~(c) serving and filing documents by electronic means as provided under [Uniform Rule 202.5-bb\(e\)](#) is incorporated into this Part.~~

~~3. Withdrawal of Consent. A self-represented litigant who has consented to participate voluntarily in e-filing in a matter pursuant to this section may withdraw such consent at any time by filing and serving on all parties a notice of intent to cease e-filing, on a form provided by the Appellate Division.~~

E. Instructions for Electronic Filing; Formatting.

1. Site Instructions. In addition to the provisions of this Part, instructions for filing of documents under the electronic filing method shall be as set forth on the NYSCEF site (www.nycourt.gov/efile) ~~or other court-approved site.~~

2. Formatting.

(a) General. In addition to compliance with the court's general rules for document formatting, e-filed documents filed pursuant to this Part shall

- (i) comply with text searchable PDF archival format (PDF/A);
- (ii) contain bookmarks linking the tables of contents of briefs and records to the corresponding page of the document; and
- (iii) comply with additional formatting requirements set forth in attachment A.

(b) Size. E-filed documents shall be no greater than 100MB in size.

(c) Multiple Volumes. Each volume of a multi-volume record or appendix shall be submitted as a separate e-filed document.

(d) ~~Virus Protection. E-filers shall attest that, prior to filing, each e-filed document was scanned for viruses using updated commercial scanning technology, and that no virus was detected.~~ Signatures. Uniform Rule 202.5-b(e) is incorporated into this Part.

~~F. Hard Copy Filing and Service.~~

~~3. 1. Filing~~ Submission of Additional Hard Copies of E-Filed Documents ~~in E-filed Matters.~~

(a) Unless otherwise directed by the court, a party required to file documents in a matter by electronic filing ~~method~~ shall, in addition, ~~file~~ submit hard copies of such documents as follows:

(i) appellate briefs, records, appendices, agreed statements in lieu of record: ~~one original and five~~ six hard copies.

(ii) original proceedings, transferred proceedings, motions, applications: ~~such number as is required by court rule in matters not subject to e-filing~~ one hard copy.

(b) Filers shall delay the filing submission of hard copies of documents required ~~under subsection (G) (3) hereunder~~ until the clerk ~~has reviewed and approved the electronic version of the~~ notifies the e-filing party of his or her approval of the electronically filed document. ~~Where hard Hard~~ copies of documents are not filed are to be submitted within five days following such ~~approval, the filing shall be deemed incomplete~~ notification.

~~F. Hard Copy Filing and Service.~~

~~21. Hard Copy Service Upon Exempt Attorneys and Self-Represented Parties~~ Unrepresented Litigants. Whenever an attorney or ~~a self-represented party~~ an unrepresented litigant in an e-filed matter is exempt from, and has not consented voluntarily to participate in, electronic filing pursuant to section (D) ~~(1)~~ of this Part, service upon that attorney or ~~self-represented party shall be by hard copy service method.~~ Service upon all other parties in an e-filed matter shall be by electronic service method unrepresented litigant shall be made in accordance with CPLR 2103.

~~32. Hard Copy Filing and Service by Exempt Attorneys and Self-Represented Parties~~ Unrepresented Litigants; Filing of Unbound Copy. Whenever an attorney or ~~self-represented party~~ unrepresented litigant in a cause or matter subject to e-filing is exempt from and has not consented ~~voluntarily~~ to participate in, electronic filing pursuant to section (D) ~~(1)~~ of this Part, that attorney or ~~self-represented party~~ unrepresented litigant shall serve documents in accordance with CPLR 2103 and file ~~documents by them in~~ hard copy service method and hard copy filing method in accordance with CPLR 2102 and 5530. That attorney or ~~party~~ unrepresented litigant shall additionally file, together

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with the bound copy or copies otherwise required by court rule, an unbound copy of the filing, containing no staples or binding other than easily removable clips or rubber bands.

3. Hard Copy Service and Filing by Authorized E-Filing Users. Uniform Rule 202.5-b(d)(ii) is incorporated into this Part.

4. Notice of Hard Copy Filing. Uniform Rule 202.5-b(d)(iii) is incorporated into this Part.

5. Proof of Hard Copy Service. Every document filed in court that was served on any party in hard copy pursuant to this section (F) shall have annexed thereto appropriate proof of service on all parties.

G. Timeliness of Filing and Service of Electronically-filed Documents and Hard Copy Filings; Subsequent Rejection by Clerk.

1. Timeliness of Filing of E-filed ~~documents~~Documents. For purposes of timeliness under a statute or court rule or directive, an e-filed document is deemed filed under the electronic filing method when

(a) the document has been electronically transmitted to the NYSCEF site ~~or other court-approved site~~; and

(b) the appropriate fee, if any, has been paid to the court either through the NYSCEF site or ~~other court-approved site or~~, where permitted, by delivery to the office of the Clerk.

Hard copies of e-filed documents that are delivered to the court by mail or overnight courier are deemed submitted on the date they are deposited with the United States Postal Service or overnight courier.

~~2. Rejection by the Clerk. An e-filed document deemed filed for purposes of timeliness under this Part may thereafter be reviewed and rejected by the Clerk for any reason.~~

~~32.~~ 32. Timeliness of Service of E-filed Documents. Upon receipt of an e-filed document and appropriate fee, if any, NYSCEF ~~or such other court-approved site~~ shall immediately notify all e-filers in the matter of the receipt and location of the document. For purposes of timeliness of service under a statute or court rule, at the issuance of such notification the document shall be deemed served upon all parties (including persons who have failed to register and enter information as required under section (C) of this Part), other than persons exempt from e-filing under section (D) ~~(1)~~. A document that is timely filed in NYSCEF shall be deemed timely served on all parties other than persons exempt from e-filing under section (D), unless the court rules otherwise.

~~43.~~ 43. Timeliness of Hard Copy Filing or Service. The timeliness of service ~~or~~and filing by ~~hard copy method by or upon persons exempt from electronic filing pursuant to section (C) (1) of this Part~~means other than NYSCEF shall be as provided by ~~court directive or~~ the CPLR and the Statewide Rules of the Appellate Division.

H. Confidentiality; Sealed Documents; Redaction.

E-filed matters deemed confidential by statute or court directive, as well as sealed documents or documents that are the subject of an application to seal in an e-filed matter, shall be filed and maintained on the NYSCEF ~~site or other court-approved~~ site in a manner that precludes viewing by the public and such other persons and court personnel as the case may require. In all matters, e-filers shall attest to compliance with statutory redaction requirements (e.g., Gen. Bus. L. § 399-ddd) and relevant sealing requirements in filings.

I. Scanning of Documents by Clerk.

~~1-~~ The Clerk may scan hard copy filings in a cause or matter subject to e-filing for upload into the NYSCEF system ~~or such other system approved by the court, and may deem such scanned documents to be the official record copy of~~. Where a document that was filed in hard

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copy is thereafter scanned and uploaded by the clerk, the filing date recorded in NYSCEF shall be the date of the hard copy filing.

~~2. The court may deem documents e-filed by the parties to be the official record of a cause or matter.~~

- J. Rejection of Non-Compliant Documents; Modification of Electronic Filing Procedures.
1. Rejection of Documents. The ~~clerk may refuse to accept for filing or e-filing any document that does not comply with this Part, or is otherwise unsuitable, and may direct that a document be refiled.~~ court shall reject for e-filing documents filed in causes and matters only as specifically provided by the Statewide Rules of the Appellate Division, a statute, a Rule of the Chief Administrator or an order of the court.
 2. Modification of Procedures. The court ~~or its designee~~ may at any time modify or discontinue e-filing in a matter for good cause shown.

Effective Date: 06/01/2013

File & ServeXpress PRICING SHEET

DELAWARE—COURT OF CHANCERY

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\$9.00 for the first case
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SERVICE TO CASE PARTIES

Online delivery:*

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DELIVERY OF DOCUMENTS TO ADDITIONAL RECIPIENTS

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***Includes 25% Court Service fee

* To File & ServeXpress Advanced users

See *Optional Services price sheet* for additional pricing information for optional features and services

Prices do not include court fees, and are subject to change.



BRADFORD H. KENDALL
DUTCHESS COUNTY CLERK
STATE OF NEW YORK



March 31, 2017

Mr. Marc Bloustein, Esq.
Deputy Counsel
Office of Court Administration
Agency Building #4
Counsel's Office, 20th Floor
Empire State Plaza
Albany, New York 12223

Re: E-Filing Legislation - 2017-18 Legislative Session

Dear Mr. Bloustein:

On behalf of the New York State Association of County Clerks (NYSACC), I would like to thank you for the opportunity to submit comments regarding the proposed amendments to the civil practice law and rules and chapter 237 of the laws of 2015, in relation to use of electronic means for the commencement and filing of papers in certain actions and proceedings. I will address the three sections of the legislation and then address some of our organization's proposed additions to the legislation.

Section 1. addresses the present prohibition on mandatory e-filing in matrimonial cases. It effectively eliminates the carve-out from the mandatory e-filing program for matrimonial proceedings in trial courts. NYSACC has found that all counties that currently process e-filed matrimonial cases are finding their systems to be effective and efficient. There have been few complaints by the users state-wide and this amendment will further add to the progress found in the current legislation. We wholeheartedly agree with the change this legislation promulgates.

Section 2. addresses the present prohibition on mandatory e-filing in the Appellate Division. It effectively eliminates all of the carve-outs from the e-filing program for proceedings in the Appellate Divisions. NYSACC has found in the counties that allow for e-filing that this prohibition in the Appellate Division is cumbersome and non-responsive to the modernization of our courts administration. We therefore applaud this change as it reduces costs, labor and increases the speed at which court administration can be performed without adversely affecting the legal industry. It will significantly reduce the workload on maintenance of files, where most counties now must scan in documents, in some cases thousands of pages long, adding expense and labor for all parties. We once again wholeheartedly agree with the change.

Section 3. addresses the September 1, 2019 sunset for authorization to use e-filing in criminal cases and Family Court cases, and substitutes a new sunset (two years after inauguration of e-filing in these cases). In addition it will eliminate the present September 1, 2017 sunset for use of mandatory e-filing in residential foreclosure and consumer credit cases where such use is now permitted. We agree on these changes but would like to express our wishes that the track records with counties that currently handle such cases have proven over the past two years that in the cases of consumer credit and residential foreclosures that mandatory e-filing does work, as evidenced by the elimination of the sunset in those counties, and wish the legislation would uniformly eliminate the sunset completely. The Office of Court Administration Supreme Court (Civil) E-filing Committee, which reviews the application for mandatory cases after a period of consensual e-filing, has found that all counties have been able to adapt well to the mandatory systems, with few or no reservations or concerns from the practicing attorneys who file.

In addition, with the incredible use of e-filing statewide, we request that the legislation would consider the inclusion of Article 78 cases as well, even if the sunset provision needs to be included to assuage the concerns of the courts and the legislature.

In summary, we are very pleased with the proposed legislation in that it takes strong steps forward in the elimination of the prohibition of e-filing in matrimonial cases and Appellate Division cases. We have found the sunset provisions to be unnecessary but understand the reason for their inclusion. We applaud the decision to eliminate the sunset for those counties who have proven adept in handling the cases to date.

We once again thank you for the opportunity to provide you with our insight and look forward to assisting in the passage of these valuable changes in the state Legislature.

Sincerely,



Bradford Kendall
President

State of New York

Nancy T. Sunshine
County Clerk, Kings County

360 Adams Street
Brooklyn, NY 11201

MEMORANDUM

TO: HON. TIMOTHY IDONI
Westchester County Clerk
HON. ELIZABETH LARKIN
Cortland County Clerk

FROM: HON. NANCY T. SUNSHINE
Kings County Clerk

DATE: July 12, 2017

RE: **Review of Proposed Rules for Electronic Filing in the Appellate
Division of Supreme Court**

I have reviewed the proposed rules for Electronic Filing in the Appellate Division of the Supreme Court. The explanatory memorandum from John McConnell dated June 1, 2017, seeking comment by July 24 2017, concisely sets forth the content of the proposed rules.

As Kings County Clerk, I endorse these proposed rules.

I have reviewed the comment received by Judith Pascale, Suffolk County Clerk. With respect to paragraph 4, the current NYSCEF rules address hard copy filing and gives discretion to each County Clerk to manage hard copy filings. The Suffolk County Clerk's suggestion to change this discretion as set forth in paragraph 4 may not be practical for other Counties. Each County has unique technological and staffing circumstances as it relates to filing hard copy documents in the NSYCEF system and any change to the current rule to restrict the discretion of the county clerks may present new issues that could impact on how our offices function.

Thank you for the opportunity to comment regarding the proposed electronic filing rules of the Appellate Divisions.

We eagerly await the Second Department becoming an authorized E-filing Court. The goals and intent of electronic filing cannot be fulfilled in any Department until parties can bring their appeals to the Appellate Division via NYSCEF. Having reviewed the proposed rules, I have a number of comments.

First, the rules refer to designated case types for E-filing. The Second Department, of which Suffolk is a part, has on a percentage basis more counties which are fully or nearly fully mandatory than the other Departments except for the First. Given the cumbersome manner in which the record on appeal of electronically filed cases must be submitted to the Appellate Division, to piecemeal the case type authorization provides no relief for the County Clerks and does not change the manner in which that Court works. This is illustrated by the fact that parties will still be required to submit an original and five copies of the bound filings plus one unbound copy. It will be business as usual for the Judges and their clerks. The mandatory authorization should also take into account that foreclosure and consumer credit cases grandfathered by the 2015 legislation permitting certain counties which were mandatory prior to its enactment continue to be mandatory for those case types. Suffolk County is one of the counties which was grandfathered concerning residential foreclosure actions. As such, it is requested that the Second Department, if not all Departments, be full mandatory authorization from day one.

Second, it is not clear from the proposed rules whether the Decision of the Appellate Division will be uploaded to the NYSCEF site. In light of the current practice in Supreme Court, the Clerk of the Appellate Division will presumably do so. However, responsibility for uploading should be spelled out.

Third, section (C) creates a 14-day period from the service of notification of the identifying number for the parties to register their information into the case. Since hard copy service on the other parties may not take place on the same day, the date upon which the 14-day period begins to run should be clarified. In the instance where the initial filing is by an exempt filer and the clerk directs another attorney or party to undertake the case information entry and service, the 14-day period should be spelled out as to when it begins to run such as a date by which the clerk directs the entry and service to be complete.

Fourth, during the 14-day period, filings are to be made in hard copy. However, except for parties or attorneys exempt from electronically filing, all documents filed in hard copy should also be required to be uploaded to NYSCEF so that a complete electronic record from non-exempt parties or attorneys is made. This is similar to the requirement in Supreme Court where a proposed Order To Show Cause is filed on an emergency basis and the proposed application must be uploaded within three business days.

Fifth, the proposed rule requires attestation with statutory redaction requirements. Will the rules also require that applicable redaction requirements in the lower court be followed (Uniform Rule § 202.5(e))?

Sixth, will the documents filed with the Appellate Division be included in the lower court docket (document list) when a party searches the case by the lower court index number in NYSCEF? Since a certified copy of the Appellate Division order and copies of the briefs and appendices are currently forwarded to the County Clerk and viewable as part of the Supreme Court file, they should likewise be viewable under the lower court index number in NYSCEF whether there is a separate Appellate Division docket or not.

Seventh, how does the requirement of approval of the E-filed documents before the hard copies can be submitted impact the period of perfection, if at all? Does the time to perfect determine the time in which hard copies must be submitted? Must the hard copies be submitted before the end of the period to perfect (the language appears to imply that they must as the filing is otherwise considered "incomplete") or will there be a set time period for them to be submitted? How will filers know that their electronic documents were approved so they know when to submit hard copies?

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Hon. Judith Pascale
Suffolk County Clerk



WESTCHESTER COUNTY CLERK

Timothy C. Idoni
County Clerk

July 21, 2017

John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street 11th Floor
New York, NY 10004

Dear Mr. McConnell,

Westchester County is pleased to hear of the proposed rules permitting the expansion of electronic filing in the Appellate Division(s). The Office of the Westchester County Clerk as well as the Supreme Court have both seen tremendous success with the implementation of the NYSCEF system in our respective county and appreciate the opportunity to comment on the proposed rules.

Of note is the definition of the phrase "electronic filing method" or "e-filing" which "shall mean the filing and service of a document in a cause or matter by electronic means through the NYSCEF site or *other court-approved site*". We request that the NYSCEF system be clearly designated to be the system used for the electronic filing of documents. At present time, the NYSCEF system is the primary e-filing system for the Court of Claims in the Albany and New York District, twenty-five Supreme Courts, and twenty-seven Surrogates' Courts within the State of New York, and is rapidly expanding throughout the state. Westchester has come to rely on the stability and security of the NYSCEF system, and has a consistent successful integration with our own local computer applications.

The Westchester County Clerk's Office has also developed a long-standing professional relationship with the NYSCEF e-filing administrative team, e-filing Resource Center, as well as the NYSCEF Office of Information Technology. We support the belief that electronic filing is best served by maintaining a uniform statewide platform and support center and recommend that NYSCEF be the sole website used for the uploading, filing and communications in the Appellate Division(s). Specifically, the 9th Judicial District which includes Dutchess, Orange, Putnam, Rockland and Westchester uses the NYSCEF system and the incorporation of the Appellate Division(s) can only be a further convenience and

benefit to the legal community, judicial staff, court and clerical staff, and even the general public who have become acclimated with e-filing in recent years via the NYSCEF system.

Although the proposed rules focus primarily on the filing relationship between filer and the Appellate Division(s), we would like to prepare for the use of the NYSCEF system to effectuate the transfer of cases from the County Clerk's Office to the Second Department. Present local practice for Westchester is to prepare a compact disc ('cd') of the civil matter and forward it by mail or courier. Westchester digitizes its records, and the original pleadings may no longer be available for physical forwarding.

The Appellate Division has been acceptant of Westchester's desire to minimize paper and has received the record in this cd format for civil cases without issue. With the Appellate Division(s) participating in electronic filing, our goal would be to copy or transfer the current case docket already filed in NYSCEF to the Appellate Divisions' intake queue for index number assignment. This transfer would take place solely through the NYSCEF system and/or with the assistance of the e-filing Resource Center as we currently do for transfers occurring between Supreme Courts that e-file. This would further increase the efficiency between both the County Clerk's Office and the Appellate Division(s) and reduce the necessity for the copying of electronic records to a cd.

We also anticipate that the County Clerks will be able to expeditiously comply with judicial subpoenas duces tecum to the Appellate Division(s) exclusively through the NYSCEF system. There could be a mechanism in which the County Clerks can certify the e-filed documents in lieu of preparing a cd. This would again eliminate the need to copy documents to a cd that have already been digitized. We would also support the uploading of Appellate Decisions as well as the electronic uploading of the Remittitur, in a manner similar to the way Judgment Rolls are linked to Judgments in NYSCEF. The Appellate case could be linked to the original court of jurisdiction's case record.

Besides the benefits that will be afforded to the legal community and general public, we believe that this expansion will provide more opportunities for courts to interact and further unify the court system. We support mandatory case type authorization to better suit the counties that are already mandated by prior legislation. We look forward to working with all involved to discuss and test methods that may make the appeals process more efficient via NYSCEF between County Clerks and the Appellate Division(s).

Sincerely,



Timothy C. Idoni
Westchester County Clerk

[REDACTED]

From: Ervolina, Anna <Anna.Ervolina@nyct.com>
Sent: Monday, July 24, 2017 2:28 PM
To: rulecomments
Subject: Public Comment on Proposed Rules for Electronic Filing in the Appellate Division

[REDACTED] [REDACTED]

**Re: Public Comment on Proposed Rules for Electronic Filing
in the Appellate Division of Supreme Court**

Dear Mr. McConnell,

The proposed rules for electronic filing provide that, absent an exemption, service of documents be made via electronic filing. *See* Proposed Rule F (2). Not being served with a hard copy of appellate papers will negatively impact the New York City Transit Authority (“the Authority”).

Limited resources and outdated, unreliable technology (including computer crashes, limited electronic storage capacity, size and security restrictions in sending and storing documents) hinder the Authority’s ability to receive and read appellate documents electronically. We therefore request that the rules provide that service upon the Authority be made via one hard copy in addition to electronic filing. Without such a rule, the Authority will be forced to bear the cost of printing the appellate documents which cost is now borne by the party prosecuting the appeal - our appellant adversaries. Given the high volume of multi-volume records and appendices received by this office on a regular basis, this cost is not insignificant.

Thank you for your consideration.

Anna J. Ervolina

Deputy Executive Assistant General Counsel
Law Department ~ Appeals Unit Chief
New York City Transit Authority
130 Livingston Street
Brooklyn, New York 11201
Tel: (718) 694-3853
Fax: (718) 694-5726
Anna.Ervolina@nyct.com



100 William Street
6th Floor
New York, NY 10038
Tel 212-417-3700
Fax 212-417-3890
www.mobilizationforjustice.org

Submitted via email to rulecomments@nycourts.gov

July 21, 2017

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Request for Public Comment on Proposed Rules for Electronic Filing in the Appellate Division of Supreme Court

Dear Mr. McConnell,

Mobilization for Justice, Inc. (“MFJ”) submits the following comments in response to the Office of Court Administration’s (“OCA”) solicitation for comments on the proposed rules for electronic filing (“e-filing”) in the Appellate Division of the Supreme Court of New York, issued by OCA on June 1, 2017 (“the Rules” or “E-Filing Rules”).

Since 1963, MFJ (formerly known as MFY Legal Services, Inc.) has been in the forefront of protecting the legal rights of New York City’s vulnerable and low-income residents by providing free legal assistance. MFJ handles more than 10,000 cases annually benefitting more than 20,000 people, prioritizing services to at-risk and underserved populations, and engaging in law reform, impact litigation, and policy advocacy. MFJ envisions a society in which there is equal justice for all. MFJ’s mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. We do this through providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation.

Because of our work, MFJ regularly files and defends appeals before the Appellate Divisions in the First, Second, and Third Judicial Departments. As a result, our comments are from the perspective of a legal services organization and an organization that regularly assists low-income, *pro se* litigants. While we applaud OCA for well-thought-out E-filing Rules, we believe that the rules could be revised to take into greater consideration the constraints on *pro se* litigants and legal services organizations. Our position here is consistent with our view, expressed previously in other forums, including comment letters to OCA and comments to the New York State Assembly’s Judiciary Committee, that New York State Supreme Court’s e-filing rules fail to protect *pro se* litigants and thus should not be used as a model. Below are our

recommendations to better balance the equities among parties and ensure that the appellate courthouse doors are open to everyone.¹

I. The Rules Should Specifically State the Category of Cases Exempt from Mandatory E-Filing.

The 2015 amendments to New York’s Civil Practice Law and Rules (“CPLR”) § 2112 specifically exempts mandatory e-filing in certain categories of appellate cases, cases that usually involve more *pro se* litigants. These include: (i) matrimonial actions, (ii) election law proceedings, (iii) Articles 70 and 78 proceedings, (iv) proceedings brought pursuant to the mental hygiene law, (v) residential foreclosure actions, and (vi) certain consumer credit proceedings. For these category of cases, e-filing is not mandatory and can only be initiated upon consent.

However, the Rules do not mention these exempted categories of cases. Because some attorneys may only look to the Rules for guidance in filing appeals, it is crucial that the Rules reiterate the CPLR’s exempted e-filing categories of cases; otherwise these carve outs might be ignored. This has already happened in Supreme Court. In Kings and Richmond, residential foreclosure cases are exempt from mandatory e-filing under the CPLR. However, MFJ’s foreclosure prevention attorneys routinely find that plaintiffs’ attorneys ignore this provision of the CPLR and e-file residential foreclosure cases.

To ensure that the CPLR’s prohibition on e-filing in the exempted case categories does not become a paper tiger as it has become in Supreme Court, we recommend that OCA amend Section B of the Rules, “Designation of Case Types Subject to Mandatory Efiling,” and specifically state the categories of cases in which the CPLR forbids mandatory e-filing and reiterate the need for counsel to abide by this provision of the CPLR.

II. OCA Should Abolish the Rule’s Requirement that *Pro Se* Litigants File and Serve a Notice of Status As a Self-Represented Party.

CPLR § 2112 specifically exempts *pro se* litigants from mandatory e-filing. And while CPLR § 2112 requires attorneys who would like to be exempt from e-filing to file a certain certificate, it does not require any notice or certificates to be filed by *pro se* litigants to exempt themselves from e-filing.

However, in Sections C(3)(a) and C(4)(b), the Rules require that a self-represented party serve on all parties and file with the Court a “notice of status as a self-represented party.” While that requirement might seem minor on paper, in reality it can be a true obstacle to *pro se* litigants, who usually are not aware of court procedure and will likely not even know that this is a requirement. Further, this requirement is redundant – the fact that a party is unrepresented is evident on the face of the papers. Finally, this requirement contradicts the law. CPLR § 2112 does not require *pro se* litigants to provide any notice that their status is one as an unrepresented party.

¹ MFJ notes that although Unified Court System’s Request for Public Comments pertains to electronic filing in the Appellate Divisions of the Supreme Court, the views expressed here and our clients’ experiences apply to the Appellate Terms as well.

To ensure that the Rules are in line with the CPLR and to guarantee that *pro se* litigants are not subject to an unnecessary hurdle, MFJ recommends that OCA abolish the requirement that unrepresented parties file a notice of status as a self-represented party.

III. OCA Should Clarify Whether *Pro Se* Litigants Need to Register as an Authorized User with NYSCEF.

Even though CPLR § 2112 exempts all *pro se* litigants from e-filed cases, Section C of the Rules appears to impose the requirement that *pro se* litigants still have to register as an authorized e-filing user with NYSCEF. By citing to Section D(1) of the Rules, the section that states that self-represented parties are not subject to e-filing, Section C recognizes that there are certain categories of individuals exempt from e-filing. However, Section C then proceeds to contradict itself by stating that ". . . a self-represented appellant or self-represented petitioner in such a matter, shall take the following steps: (a) if not already registered, register as an authorized e-filing user with NYSCEF or other court-approved site;. . . ." and provides other e-filing requirements.

Because CPLR § 2112 and Section D(1) of the E-filing Rules both recognize that *pro se* litigants are by definition exempt from e-filing, *pro se* litigants should not then be required to register with the e-filing system. As a result, MFJ recommends that the language "a self-represented appellant or self-represented petitioner in such a matter" be struck from Section C. If OCA's intention in Section C was to only apply e-filing registration to those *pro se* litigants who affirmatively opt-in to e-filing in accordance with the Rules, then OCA should specifically state this by changing the language to read "a self-represented appellant or self-represented petitioner in such a matter who has agreed to participate in e-filing in accordance with Section D(2) of this Part."

IV. OCA Should Eliminate the Requirement of Filing One Original and Five Paper Copies of the Briefs and Records.

In Section F(1)(a)(i) of the Rules, OCA still requires an original and five copies of the briefs, records, appendices and any agreed statements to be filed in all e-filed cases. But producing multiple copies of these documents is expensive. In February 2017, MFJ filed an appeal in the First Department. That appeal included a 1,200 page record. To print and bind multiple copies of the record at a local copy store cost \$1,652. When the First Department clerk used his discretion to reject MFJ's papers (*see* Part V, *infra*, regarding the Clerks' discretion), MFJ had to rebind certain portions of the record, adding additional costs. MFJ then had to pay for cabs to carry the five boxes containing the copies of the appellate record and brief to the First Department.

As a result, OCA's continued requirement that one original and five copies be filed in e-filed cases not only undermines the goal of e-filing – reducing paper – but also keeps the appellate courthouse doors closed to many low-income *pro se* litigants. And while MFJ has never made a decision to take an appeal based on costs, cost could potentially prevent smaller non-profits from being able to offer representation on appeal.

OCA recognizes that justice should not depend on an ability to pay for it: the courts routinely waive filing fees for low-income New Yorkers. But that benefit is undermined if the Appellate Division maintains a requirement that results in expensive printing costs. MFJ strongly urges

OCA to eliminate the hard copy requirement for *pro se* litigants and those represented by legal services. In the alternative, MFJ recommends that the only required hard copy submission with e-filed cases be copies of the briefs.²

V. OCA Should Require Clerks in Each Appellate Division to Publicly Post Their Rules in a User-Friendly Form and Limit the Clerks' Discretion to Reject Papers Based on Unwritten Rules.

In its experience, MFJ has discovered that there are four sources of laws, regulations and rules that govern filings in the Appellate Divisions: the CPLR, the Uniform Rules, each Department's FAQs that are found on their websites, and the unwritten rules created by the clerks in each Department. It is the latter that most concerns MFJ and we strongly urge OCA to rein in the Clerks' discretion to reject appellate documents and to publicly delineate the specific basis by which Clerks can reject documents.

In Section J(1) of the Rules, OCA reaffirms the current status quo by permitting the Clerks to reject appellate e-filed documents based on failure to comply with the Rules or where the document "is otherwise unsuitable." It is this undefined term that permits Clerks to reject documents based on unwritten rules, that confounds legal services organizations and *pro se* litigants, and threatens to shut the doors to the courthouse for the average New Yorker.

Unfortunately, MFJ's experience before the First Department, Second Department, and Third Department is that our papers are often inexplicably rejected by the clerk. For example, in its most recent appellate division experience in February 2017, MFJ attempted to perfect its expedited appeal in the First Department but the papers were rejected because (1) the briefs were in plastic covers and (2) the multiple volumes for the 1,200 page record did not have a cover page in accordance with the clerk's liking. However, these prohibitions appear nowhere in the CPLR, the Uniform Rules or the First Department's website. MFJ was required to go back and rebind many portions of the record. MFJ experiences similar difficulties in attempting to file amicus papers.

Finally, MFJ is continually confronted with the inability to routinely obtain a fee waiver for *in forma pauperis* clients as each clerk handles this request differently and not necessarily in accordance with the CPLR or the Uniform Rules. Some clerks require a motion, some require just a letter, and it appears that an *in forma pauperis* status from the Court below is insufficient to obtain the status at the Appellate Division. As a result, MFJ rarely obtains a fee waiver on behalf of its low-income clients.

By maintaining unclear and unwritten rules, OCA all but ensures that legal services and *pro se* litigants – parties that do not appear as frequently in the Appellate Division compared to corporate entities – are at a disadvantage. Further, these unclear and unwritten rules force legal services organizations to use funds to hire an appellate printer. Most legal services organizations in New York do not have funding to cover the enormous costs of an appellate printer but are frequently forced to do so because of this byzantine, unwritten web of rules that currently exist and that the E-filing Rules only further encourage.

² Even for non-e-filed cases, MFJ recommends that the requirement for multiple copies, especially of the appellate record, be waived for *pro se* litigants and legal services organizations. At most, OCA should only require the filing of the original documents.

To rectify this situation, MFJ strongly urges OCA to eliminate “or is otherwise unsuitable” language from Section J(1) of the Rules. Further, if OCA prefers that Clerks be provided the ability to create their own rules, those rules must be written and uniform among clerks; they must also not be in contravention of the CPLR or the Uniform Rules. Finally, we also strongly urge OCA to post online an accessible and easy-to-understand primer of what precisely are the requirements for appellate documents. We strongly recommend that OCA use a video to communicate its expectations for appellate documents and provide a physical example of a brief and appellate record and use that to explain the precise requirements. A visual understanding of what is expected will help to conform documents to the Clerks’ standards and avoid the frustration, time and extra cost of rejected appellate documents.

Thank you for this opportunity to comment on OCA's E-Filing Rules for the Appellate Divisions. With the proper balancing between the efficiency of e-filing and the recognition of the limitations of *pro se* litigants and legal services organizations, e-filing can prove beneficial to the justice system. Please feel free to contact us should you have any follow-up questions.

Sincerely,



Elizabeth M. Lynch
Supervising Attorney
(212) 417-3779
elynych@mfjlegal.org

Ali Naini
Staff Attorney
(212) 417-3795
anaini@mfjlegal.org



NICHOLAS J. FIORENZA
HENRY F. SOBOTA
SUSAN T. JOHNS
CRAIG M. ATLAS
JOSEPH G. SHIELDS
DONALD E. BUDMEN
COLLEEN W. HEINRICH
MILES G. LAWLOR
MICHAEL L. DODD
BRIAN J. SMITH
KATHERINE E. GAVETT
CHARLES E. SYMONS

ATTORNEYS AND COUNSELORS AT LAW

SYRACUSE • ROCHESTER

5010 CAMPUSWOOD DRIVE
EAST SYRACUSE, NEW YORK 13057

TELEPHONE (315) 437-7600

FACSIMILE (315) 437-7744*

*NOT FOR SERVICE OF PROCESS

July 24, 2017

HEATHER M. COLE
JENNIFER E. MATHEWS
JEFFREY M. LEWIS
ALLISON L. MARLEY
CATHERINE E. MUSKIN
LINDSAY A. GETMAN

MICHAEL J. LOOBY
COUNSEL

BENJAMIN J. FERRARA
DENNIS T. BARRETT
MARC H. REITZ
DAVID W. LARRISON
RETIRED

Via e-mail to rulecomments@nycourts.gov

John W. McConnell, Esq., Counsel
New York State Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Proposed Rules for Electronic Filing in the Appellate Division of Supreme Court

Dear Mr. McConnell:

This letter is submitted in response to the request for public comment on the proposed rules for electronic filing (“e-filing”) in the Appellate Division of Supreme Court. I am an attorney who has been admitted to the bar of the New York State courts for thirty years. My practice has included appeals to the Appellate Division, in the Third and Fourth Departments.

The proposed rules for the Appellate Division are similar to other rules for e-filing in New York State Supreme Court and the federal courts. In general, I believe that the adoption of the rules would be a positive development. I offer three suggestions for revisions.

1. Technical Problems

Some technical problems with e-filing are inevitable. It would be helpful to have the rules address this issue up front, to provide guidance and hopefully to avoid disputes.

Therefore, I request that the rules provide an extension, and/or an alternate means of filing and service, if a user is unable to electronically file documents because of technical problems with the user’s computer or Internet connection, or because of technical problems with the New York State Courts Electronic Filing System (“NYSCEF”) or other court-approved site.

2. Rejection by the Clerk

Section (G)(2) of the proposed rules says: “An e-filed document deemed filed for purposes of timeliness under this Part may thereafter be reviewed and rejected by the Clerk for

John W. McConnell, Esq., Counsel
July 24, 2017
Page 2

any reason.” I request that, at the end of this sentence, there be added “authorized by law, rule or court order”.

3. Appeals from Certain Administrative Agencies

I suggest that consideration be given to whether any special provision should be made for appeals from certain administrative agencies, such as the Unemployment Insurance Appeal Board and the Workers’ Compensation Board.

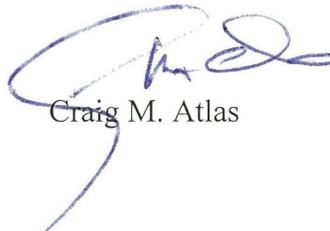
One possible approach would be to allow the Appellate Division, Third Department to decide whether, and to what extent, the e-filing rules will apply to each such category of appeals. However, once this decision has been made, it would be helpful to include it in the e-filing rules. The e-filing rules should be relatively “self-contained”, so a user can refer to them and know how to proceed.

I am submitting the above comments as an individual member of the bar and as a member of the public, not on behalf of this law firm or any other entity.

Thank you for your consideration of these comments.

Very truly yours,

Ferrara Fiorenza PC



Craig M. Atlas

CMA:cam

[REDACTED]

From: Jeffrey S. Wilson
Sent: Monday, June 5, 2017 9:03 AM
To: rulecomments
Subject: Rules for Appellate Division / e-Filing

[REDACTED] [REDACTED]

Dear Mr. McConnell,

In regards to the request for feedback for e-Filing in the appellate division, I would simply ask that counsel be able to file their **Subpoena Duces Tecum** on the County Clerk via e-Filing. This subpoena is a critical step in perfecting an appeal, of course, and still requires a lot of paperwork in hardcopy to be filed with the County Clerk.

Complete e-Filing capability for this subpoena would be a wonderful thing.

Regards,

Jeffrey Wilson
Court Clerk, Justice Edwards, NY County Supreme Civil
(Formerly NY County Clerk, Appeals Desk)

[REDACTED]

From: Alan Gray <agray@hptriallaw.com>
Sent: Friday, June 16, 2017 9:22 AM
To: rulecomments
Subject: Public Comment on Proposed Rules for Electronic Filing in the Appellate Division

[REDACTED] [REDACTED]

Dear Attorney McConnell:

I write regarding the proposed rules for electronic filing in the Appellate Division.

I believe that electronic filing in the Appellate Division would be a fabulous step forward for the New York Unified Court System. Especially given that all of the trial courts within the First and Second Departments now participate in electronic filing (almost all of them mandatorily for tort cases), the Appellate Divisions remain the largest courts in this state that do not have some form of electronic filing. The First Department has attempted to implement a version of electronic filing via email, but this manner does not leave electronic filings publicly accessible. Thus, using NYSCEF to electronically file original matters as well as appeals would be a major progression towards a twenty-first century court system.

However, I would like to call your attention to two technical matters that I believe should be considered when implementing electronic filing for the Appellate Divisions, specifically with regard to appeals. First, for the few appeals that my firm prosecutes, we choose to print our records and briefs ourselves, thus saving our clients the otherwise huge expense of hiring an appellate printer. Recently, NYSCEF began printing the "FILED" banner across the top of each electronically filed document, and in order to place the page numbers in a record at the top of each page, we have to shrink each page accordingly. Given that the Appellate Division prefers its briefs in 14-point font, I am concerned that this shrinkage may make the record difficult to read at certain points. Thus, I recommend eliminating the reproduction of the "FILED" banner across the top of each electronically filed document, or at least having a way to remove it when reproducing electronically filed documents for a record on appeal.

Second, in implementing electronic filing in the Appellate Division for appeals, I recommend offering some kind of system akin to a "judgment roll" for compiling records on appeal. Specifically, when filing a proposed judgment, NYSCEF allows a user to select which previously electronically filed documents constitute the judgment roll for that judgment. Allowing a user to similarly select which previously electronically filed documents constitute the record on appeal, and then automatically compiling the record, would save litigants an incredible amount of time, and would make the appellate process far more accessible to those who might otherwise not be able to afford to participate.

I remain strongly supportive of New York's efforts to expand electronic filing in the Unified Court System and unreservedly support offering electronic filing in the Appellate Division.

Please note that my comments and opinions herein are my own, and are not the beliefs or opinions of my firm or the other attorneys and employees therein.

Please do not hesitate to contact me with any questions or concerns that you may have. Thank you very much for your time and consideration.

ALAN R. GRAY, JR. | Associate

Tel: [914-946-3344](tel:914-946-3344) | [914-946-9733](tel:914-946-9733) | hptriallaw.com



440 Mamaroneck Avenue | Suite 408 | Harrison, NY 10528

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[REDACTED]

From: David Pincus <david@malaperoprisco.com>
Sent: Tuesday, July 18, 2017 11:50 AM
To: rulecomments
Subject: Appellate Division: Proposed Electronic Filing Rules

[REDACTED] [REDACTED]

Dear Sir/Madam:

Thanks so much for the opportunity to comment on the Proposed Rules.

I just wanted to point out the difficulty in general determining the full service list(s) for all participating parties when using ECF for the State Courts. I am hoping that when electronic filing is approved for the Appellate Court that this particular issue can be addressed.

As ECF is such an efficient tool for the filing of legal documents (and so well-administered by the various counties' Support Staff – I am continually amazed at their general good nature and helpful attitude), it would be so helpful to be able to find, on one page, the full service list for any particular matter (including all non-ECF and ECF parties).

This list would include names of attorneys, firm names, parties that are being represented, email and phone number contact info. On large cases it is sometimes very difficult to maintain an accurate service list, and if ECF made the compiling of that information a bit easier, so much time would be saved in Law Offices throughout the City.

All my best,

David M. Pincus
Legal Secretary
MALAPERO & PRISCO LLP

[REDACTED]

From: Patricia Wendell <patwl@verizon.net>
Sent: Monday, July 24, 2017 2:16 PM
To: rulecomments
Subject: Comments on proposed rule changes: E-filing: Appellate Division Appeals

[REDACTED] [REDACTED]

I am submitting this comment, per your website invitation. I realize I am only a paralegal. However, I have perfected many appeals in my career, which spans from June, 1981 to now. Our appeals are perfected in-house without the use of an appellate printer. I have perfected digital appeals in the First Department, but these are only recent experiences - most of my appeals had been in the Second Department without the digital file requirement.

My comments for you to consider are: (1) if you are going to spread the digital requirement to all of the four departments, the rejections for the digital file submission (where they do not meet specifications), **should be standardized, and explicit instructions regarding how to correct errors should be supplied** in a standardized form; (2) sample records and briefs should be posted for formatting guidance, especially for the TOC; and (3) the use of mini (condensed) transcripts.

Subject One - checklists - guidance for digital requirement

Recently, I had an appeal in the First Department: the personnel were excellent, and helped me get through the process. However, it is easy for miscommunication to occur. I did not understand that the pagination of the thumbnail views of the pages in the .pdf file needed to match the pagination in real life of the document. I received feedback, of course, that the pagination of the document was incorrect, but not much else detail. It took a couple of tries before I understood the exact spot where I went wrong for the .pdf file.

If there had been a master standardized rejection form that could be given to me, **with the solution to my particular problem in adobe**, the process of correcting the error would have been easier. In Surrogate Court, for Death Compromises, Probates and Administration, checklists and error statements are used.

I am proposing that a checklist and error rejection form be utilized by the 4 departments for the digital file requirements for appeals, similar to what is done in Surrogate Court. This checklist and rejection form can be developed in close consultation with the clerks of the 4 departments (and you would need to rely mostly on the First Department who has the most experience), as they understand what errors they see the most and what the solutions are in adobe and how to avoid the problems. It can even be uploaded to the E-filing website for review by the bar.

Opening the information flow on the digital file requirements, and how errors can be avoided vis-a-vis a checklist system and standardized rejection forms, will allow the system to function smoothly. The language of the digital requirement must be understandable to the average person and to the

bar. Simply stating the requirements, without going into detail about how to meet them in adobe, is not enough and not fair in light of the fact that public dollars will be financing the new system.

Subject Two - Samples of Records and Briefs

Samples of Records and Briefs should be posted at the e-filing website as a guide to the public. This is especially useful when it comes to the Table of Contents, as there is currently disparity as to what a correct TOC is between the Second and First Departments. Having ONE acceptable format for the TOC is crucial to success of the new e-filing system. I am especially concerned about the correct method of listing duplicated pages not printed, as the method I used for years in the Second Department is apparently not acceptable in the First Department. The various scenarios for the TOC in both records and briefs should be posted on the e-filing website for the guidance of the bar and public.

Subject Three - The Use of Mini (Condensed) Transcripts

Instead of banning statewide the use of Mini (Condensed) transcripts, you should enforce its use throughout the four departments, since the Mini (Condensed) transcripts are economical, and ecologically friendly to the environment.

Consider my recent First Department appeal: It was a very complex matter from a medical standpoint and the subject matter involved depositions - which were lengthy. There were 4 huge depositions in the case. Because the First Department allows the use of condensed transcripts, I was able to present the record on appeal in one volume. If I had to perfect this appeal under the new system, the record would have ballooned to at least three volumes (there are limits by a printer as to how many pages can be printed in a perfect bound book - and since the digital file has to match the paper one - it has to follow the volumes), and hence, the server used by OCA and the State of New York to host this material now needs to make space for two more volumes on the server.

Multiply this scenario by the thousands and thousands of appeals perfected in the State of New York every year combined between the four departments. The space required to host the digital files then becomes huge if condensed transcripts are banned. There is no reason to ban condensed transcripts. If there is something critical, all the judges and clerk has to do is log onto the e-filing system, go to that specific page and enlarge it on the computer to read. From the comments I have read regarding the e-filing system from the judges in a report released on e-filing, it appears that the state trial judges are using the e-filing system this way, (except in New York County - where extensive working paper copies are still required and relied on - but even there condensed transcripts are encouraged).

Up until now, the e-filing system has had relatively small to mid-size files. Even under motion practice, the paper volume does not match what is in a record on appeal. These are large files, and multiple files if condensed transcripts are banned. Allowing the use of Mini (condensed) transcripts statewide will ease the transition to a digital, state-wide e-filing system, make it easier for OCA to maintain the servers and conserve server space, and it will reduce cost to the bar and save the environment as less paper needs to be used to print the volumes.

The economic and ecological benefits are overwhelming. Banning Mini (Condensed) transcripts will cause the unnecessary destruction of countless trees.

I hope this is helpful to you.

Patricia Wendell - Para Legal