



# **The Expansion of Electronic Filing A Report and Recommendations of the Structural Innovations Working Group**

Produced by the Structural Innovations Working Group of the  
Commission to Reimagine the Future of New York's Courts

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# TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY.....	1
II.	INTRODUCTION .....	3
	A.    Historically Incremental Approach to E-Filing Legislation. ....	3
	B.    Benefits of E-Filing Warranting Expansion .....	6
III.	THE CAJ SHOULD BE EMPOWERED WITH DISCRETION TO INSTITUTE E-FILING IN ORDER TO ALLOW FOR EXPEDITED APPROVAL .....	9
	A.    Impact of the COVID-19 Pandemic on Court Operations Demands Immediate E-Filing Access.....	9
	B.    The CAJ Should Have Discretion to Institute Voluntary or Mandatory E-Filing without Limitation as to Court or Case Type.....	12
	C.    Consultation with Advisory Committees, Bar Associations, Attorneys and Other Stakeholders Remains Vital. ....	15
IV.	CONCLUSION AND RECOMMENDATIONS .....	16

## **I. EXECUTIVE SUMMARY**

The Structural Innovations Working Group of the Commission to Reimagine the Future of New York’s Courts submits this report in support of proposed legislation to expand electronic filing (“e-filing”) of court documents throughout New York State courts and permit the Chief Administrative Judge (“CAJ”) of the Unified Court System (“UCS”) to institute e-filing in any or all of the State’s trial courts in any case type in a manner that efficiently and effectively meets the needs of the bench and bar, and enhances access to justice of all litigants. Article 6, § 30 of the New York State Constitution provides that the State Legislature may delegate to the CAJ any power to regulate practice and procedure in the courts. Since the limited initiation in 1999 of e-filing in the Commercial Division of the Supreme Court in two counties, it has gradually, but steadily, expanded to most counties in the state and to additional case types. However, the world has changed dramatically in the past 20 years, and the demand today for access to the courts through e-filing is exponentially greater. Most recently, the COVID-19 pandemic, unprecedented in scope and duration, has had a dramatic impact on New York’s courts, and has compelled the need to further expand e-filing.

Currently, the CAJ is permitted to institute e-filing on a voluntary basis, but is not authorized to institute mandatory e-filing in the absence of an act of the Legislature. This requirement was reasonable when e-filing was a pilot program, but now, in its 21<sup>st</sup> year of success, that requirement is outdated and renders the UCS unable to respond effectively to rapidly changing needs and available technology. It is critical that current law be

amended to permit expansion of the use of e-filing at the discretion of the CAJ in order to allow for expedited approval, so as to enable and, where appropriate require, the use of e-filing in all counties and courts in all case types. To that end, the legislation proposed by the UCS would empower the CAJ to institute voluntary or mandatory e-filing at the CAJ's discretion without requiring legislative approval for each phase. The Structural Innovations Working Group supports the legislation proposed by the UCS, which would:

(1) extend the CAJ's ability to institute e-filing in all of the State's trial courts of civil jurisdiction [CPLR 2111(a), CCA § 11-b];

(2) permit the CAJ to institute voluntary or mandatory e-filing, in the CAJ's discretion, without limitation as to court or case type, but only after obtaining approval of the local county clerk and consulting with various bar associations, institutional service providers, assigned counsel pursuant to section 18-B of the County Law, and unaffiliated attorneys, as well as various other participants and stakeholders in the legal process, as appropriate [CPLR 2111(b)(1),(2), and (2-a); FCA § 214 (c) (2) (i) (a); CPL § 20.40 (c)];

(3) remove the limitation on the CAJ's discretion in regard to mandatory e-filing in civil case types which are currently excluded – specifically, matrimonial matters, residential foreclosures, consumer credit actions, and proceedings under the Election Law, the Mental Hygiene Law, CPLR Article 70 and CPLR Article 78; and

(4) institute e-filing provisions in the civil courts of lesser jurisdiction and in all courts of criminal jurisdiction.<sup>1</sup>

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<sup>1</sup> Proposed legislation adds the following new sections: CRC § 42, UDCA § 2103-a, UCCA § 2103-a, UJCA § 2103-a, CPL § 10.40(2)(c), and FCA § 214(c); replaces the following sections: CPL § 10.40(2)(b) and FCA § 214(b); and amends CPL 10.40(2)(e)(ii).

Section II of this report summarizes the legislative history of e-filing and identifies the benefits of e-filing warranting expansion to all courts and case types.

Section III explains why the CAJ should be empowered with discretion to institute e-filing without requiring ongoing acts of the Legislature. Additionally, this section addresses why the CAJ should have discretion to institute voluntary or mandatory e-filing without limitation as to court or case type.

Section IV contains the Committee's conclusion and recommendations.

## **II. INTRODUCTION**

### **A. Historically Incremental Approach to E-Filing Legislation.**

The New York State Bar Association's article, *Report on the Progress Toward Implementing Statewide Electronic Filing in New York State Court* (March 30, 2012), contains a thorough analysis of the legal and administrative authority authorizing e-filing.<sup>2</sup> A summary of the evolution of e-filing in New York can be found on the UCS webpage under [History of NYSCEF](#). The incremental expansion of e-filing to counties and case types is no longer effective to support the needs of a rapidly evolving court system.

E-filing was first authorized by the New York Legislature in 1999 as a pilot program, originally known as Filing by Electronic Means ("FBEM").<sup>3</sup> The CAJ was authorized to institute consensual e-filing in cases in the Commercial Division of Supreme Court in two counties and in tax *certiorari* proceedings in one county.<sup>4</sup> From

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<sup>2</sup> [New York State Bar Association's article, Report on the Progress Toward Implementing Statewide Electronic Filing in New York State Court \(March 30, 2012\).](#)

<sup>3</sup>L. 1999 c. 367.

<sup>4</sup>Id.

1999 to 2009, there were six legislative amendments which cautiously and incrementally expanded voluntary e-filing to additional counties and case types.<sup>5</sup> It took 10 years and numerous legislative amendments before e-filing was able to progress beyond its pilot program status. In 2009, the e-filing program was renamed New York State Courts Electronic Filing System (“NYSCEF”).<sup>6</sup>

In 2009, the Legislature gave the CAJ permanent authority to expand consensual e-filing to all case types in all venues in Supreme Court. In addition to further expanding consensual e-filing, the Legislature authorized a mandatory e-filing pilot program on a limited basis, subject to opt-outs for self-represented litigants and for attorneys lacking the necessary technological capabilities. The 2009 legislation also required the CAJ to file an annual report with the Governor, Legislature, and Chief Judge, evaluating the mandatory pilot program.<sup>7</sup>

Legislation enacted in 2010 imposed four additional requirements upon the CAJ: (1) before instituting any consensual e-filing program, the CAJ must consult with the affected county clerk; (2) before instituting mandatory e-filing in Supreme or County Courts, the CAJ must consult with and obtain the consent of the affected county clerk; (3) the CAJ must consult with the local county clerk and include their comments or recommendations for e-filing when preparing the annual report for the Governor, Legislature, and Chief Judge evaluating the mandatory e-filing program; and (4) the CAJ

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<sup>5</sup> L. 2002, c. 110; L. 2003, c. 261; L. 2004, c. 384; L. 2005, c. 504; L. 2007, c. 369; L. 2008, c. 95.

<sup>6</sup>L. 2009, c. 416

<sup>7</sup>Id.

must establish an advisory committee, comprised of court personnel and local county clerks, to assist and consult on future e-filing legislation.<sup>8</sup>

In 2011, the Legislature further expanded mandatory e-filing in civil cases in Supreme Court in New York City, Surrogate's Courts became eligible for mandatory e-filing, but required consultation with the affected local bar before implementation, and New York City Civil Courts became eligible for mandatory e-filing, but only for one case type.<sup>9</sup> The 2011 amendments required the CAJ to incorporate comments from various participants in the legal process and from stakeholders affected by e-filing, in the CAJ's report to the Legislature, Governor and Chief Judge. These amendments also created four e-filing advisory committees to assist with the implementation of e-filing programs in Surrogate's Court and in New York City Civil Courts, as well as to assess whether e-filing should be instituted in Criminal Courts and Family Courts.<sup>10</sup>

In 2012, the Legislature authorized a pilot program, of limited duration, permitting the CAJ to institute consensual e-filing in Family Court and in criminal parts in Supreme Court and County Court.<sup>11</sup>

In 2015, the Legislature authorized use of e-filing in the four Appellate Divisions at the discretion of each Judicial Department.<sup>12</sup> From 2015 to present, the Legislature has made modest amendments affecting e-filing.<sup>13</sup>

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<sup>8</sup> L. 2010, c. 528.

<sup>9</sup> L. 2011, c. 543.

<sup>10</sup> Id.

<sup>11</sup> L. 2012, c. 184.

<sup>12</sup> L. 2015, c. 237.

<sup>13</sup> L. 2013, c. 113, L. 2015, c. 237, L. 2017, c. 99, L. 2018, c. 168, and L. 2019, c. 212.

Subsequent to each legislative amendment outlined above, the CAJ issued Administrative Orders to implement e-filing, voluntary and mandatory, in various courts and case types throughout the State. It has been more than two decades since the inception of e-filing in the State. The Legislature has authorized e-filing in an incremental manner, resulting in its gradual expansion. While a cautious approach may have been appropriate in 1999, such an approach fails to meet current and urgent needs, resulting in delays and impediments to access to the courts. As of this date, New York law does not afford the CAJ discretion to implement e-filing in a manner that best serves the courts, the lawyers, and the litigants in an expeditious manner. In our view, the CAJ should have the authority to determine, in consultation with affected stakeholders, whether e-filing is appropriate in each court and case type, rather than tasking the Legislature with managing the implementation of e-filing throughout the State's diverse and complex court system. The CAJ is in the best position to assess the benefits of e-filing with respect to the needs of particular courts, case types and litigant access.

**B. Benefits of E-Filing Warranting Expansion**

More generally, E-filing allows the court system to broadly meet the needs of the public during the current pandemic. NYSCEF offers a range of benefits to the bench, the bar, court personnel, litigants – including self-represented litigants -- and other court users. These benefits, include, but are not limited to:

- (1) **Obviate Need for Physical Appearance:** E-filing eliminates the need to physically appear in court to file documents, thereby reducing foot-traffic in courthouses and reducing the spread of COVID-19.

(2) **Instantaneous Filing / Retrieval Access:** The bar and self-represented litigants can securely e-file and retrieve court documents anywhere that has internet access. The time spent waiting for court documents filed in person or by mail to be received by a court and appropriately processed is reduced. Users can easily browse and quickly access filed documents.

(3) **Simultaneous Service upon Filing:** Upon the completion of e-filing, NYSCEF automatically effects and records service of all court documents, except the commencement papers, upon all other registered parties. NYSCEF eliminates the two step process of first serving, then filing, court documents, as well as the need for separate proof of service.

(4) **Cost Effectiveness:** Use of electronic files, rather than traditional paper files, reduces the cost associated with court filings. Physically mailing documents or traveling to court saves time and money. The costs for physical storage of documents is also reduced.

(5) **Environmentally Friendly:** NYSCEF provides a “greener” method for service and filing of court documents.

(6) **Increased Security:** NYSCEF security is much greater than that which exists for paper filed court documents. Documents are not left out in public areas or misplaced. It also allows the court to keep track of which users have accessed the files.

(7) **Digital Record:** E-filing automatically creates a digital record of the case, which significantly improves finding and retrieving court documents. Self-represented litigants, the bar and bench all have equal access to the files. Digital records are not subject to destruction by fire or flood.

E-filing may be particularly beneficial in Family Courts and lower courts throughout the State by enhancing access to justice. Family Courts are specialized courts which hear matters involving children and families. The lower courts are civil courts, which can hear civil claims below a certain damages threshold, and may have a small claims and/or a housing part, and criminal courts which handle misdemeanors and lesser offenses, and may conduct arraignments and preliminary matters for felonies.<sup>14</sup> In New York City, these are called the Civil Court of the City of New York and the Criminal Court of the City of New York. On Long Island, these are called District Courts. Elsewhere throughout the state, these matters are handled by Town and Village Justice Courts, which handle civil claims up to \$3,000 and misdemeanors and lesser offenses; City Courts, which handle civil claims up to \$15,000 and misdemeanors and lesser offenses; and County Courts, which handle claims up to \$25,000 and have exclusive authority over felonies outside of New York City.

Family Courts and lower courts play a crucial role in the lives of millions of people across the State, dispensing justice in a variety of case types, and collecting fines and fees on behalf of state, county and local governments.<sup>15</sup> Many of the litigants in these courts are self-represented and quite often do not reside in the vicinity in which these courts are located. E-Filing enables litigants and attorneys in rural areas without easy access to transportation to conveniently upload their court documents securely. It is a valuable resource for self-represented litigants who may otherwise have to take time off

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<sup>14</sup> [Initial Report on the Goals And Recommendations for New York State's Online Court System \(November 9, 2020\).](#)

<sup>15</sup> [Justice Most Local: The Future of Town and Village Courts in New York State \(September 2008\).](#)

from work in order to file their documents in person. NYSCEF accepts credit cards for payment of fees online and generates a receipt. Additionally, NYSCEF creates an electronic docket which can be used to create a record on appeal or entering a judgment. The technology available to self-represented litigants directly affects the quality of justice received.

### **III. THE CAJ SHOULD BE EMPOWERED WITH DISCRETION TO INSTITUTE E-FILING IN ORDER TO ALLOW FOR EXPEDITED APPROVAL**

#### **A. Impact of the COVID-19 Pandemic on Court Operations Demands Immediate E-Filing Access**

The sudden and devastating onset of the coronavirus pandemic has forced the UCS to examine its existing operations and to quickly devise new ways to improve public access to justice, while prioritizing the safety of all those involved. Most court operations were suspended in March 2020<sup>16</sup> and were gradually being restored,<sup>17</sup> albeit with limits on in-person proceedings, restrictions on paper service and filing, and an emphasis on expanding the use of e-filing. With the current resurgence of COVID-19, the courts are forced to reduce their staff and limit operations once again. The pandemic has unintentionally been a catalyst for change, and we should not squander this opportunity to advance technology that will enhance the future of New York's courts.

Throughout the COVID-19 pandemic, NYSCEF has proven to be a reliable and efficient process of enhancing access to justice to court users. Further expanding e-filing to additional courts and case types will reduce the number of people traveling to court and entering the courthouses, thereby maximizing safety for all, while continuing to

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<sup>16</sup> [Administrative Order of the Chief Administrative Judge \(AO/78/20\) \(Mar. 22, 2020\).](#)

<sup>17</sup> [Administrative Order of the Chief Administrative Judge \(AO/87/20\) \(May 1, 2020\).](#)

ensure public access to justice. E-filing increases access to courts by eliminating the need to travel long distances to file papers in the appropriate court prior to closing time which, for some, is an impossibility. It also conserves time and effort by allowing parties to serve and file papers simultaneously, rather than preparing paper copies in multiple sets for service and filing. Additionally, NYSCEF facilitates public access to documents without compromising their confidentiality. The true benefits of NYSCEF, discussed above, are now being realized, where e-filing is available.

The pandemic has already justified and resulted in the swift expansion of NYSCEF to additional courts, where currently authorized. For example, in October, e-filing was expanded to all five boroughs of the New York City Housing Court. As of November 18, 2020, e-filing has been instituted in the Supreme Court in 60 of the State's 62 counties and in Surrogate's Court in 47 counties<sup>18</sup>. On December 7, 2020, e-filing in actions transferred from the Supreme Court to the New York City Civil Court was expanded citywide to Kings, Bronx and Richmond Counties.<sup>19</sup>

In courts where NYSCEF previously had not been implemented, a viable solution was needed quickly to provide access to the justice system for many and to address the backlog in court filings. Initially, some courts rushed to develop their own internal systems to find ways to help litigants and avoid increased case backlogs. This led to disjointed access to the court system and caused confusion among court users. To fill this emergency need in a more structured manner, UCS introduced Electronic Document

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<sup>18</sup> [Message from the Chief Judge Janet DiFiore, \(November 2, 2020\).](#)

<sup>19</sup> Id.

Delivery System (“EDDS”),<sup>20</sup> a temporary digital document delivery system, in order to increase access to courts while limiting the number of people traveling to court. EDDS allows users to enter case information on a webpage, upload their pdf documents and send the documents electronically to a court or clerk selected by the user for review.<sup>21</sup> Unlike NYSCEF, however, EDDS is a document delivery portal, therefore submission of a document does not constitute service upon other parties. While EDDS can be used to file documents in certain courts where NYSCEF is not available, any document uploaded through EDDS, must first be reviewed by the clerk for sufficiency before it can be deemed filed.<sup>22</sup>

EDDS offers a temporary, but not ideal, solution to the immediate problem of accessing the courts. The use of EDDS for filing is discouraged in courts where NYSCEF is available on either a mandatory or voluntary basis. Litigants who are unfamiliar with EDDS or NYSCEF are forced to navigate both systems to determine which is the appropriate platform for their case. Although the UCS has created a webpage<sup>23</sup> to help users identify the proper filing database, the lack of uniformity throughout the State is evident by simply reviewing the number of case types and categories of authorized e-filing matters.<sup>24</sup> Implementation of a standardized e-filing program throughout the State is critically needed. Therefore, we recommend expanding NYSCEF to all courts and all

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<sup>20</sup> Notice to the Public, (May 4, 2020).

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> [Authorized for E-Filing webpage.](#)

<sup>24</sup> [Administrative Order issued by Chief Administrative Judge Marks \(October 20, 2020\).](#)

case types in order to standardize the process, while continuing the existing exceptions for self-represented litigants and for attorneys lacking the necessary technology.

The rapid expansion of NYSCEF during the pandemic and the implementation of EDDS are indicators that the bench, the bar, and the public are ready for further expansion of e-filing. In order to maximize the benefits NYSCEF has to offer, it is necessary to permit mandatory e-filing, where deemed appropriate by the CAJ, after considering the needs of all interested stakeholders. Thus, the CAJ must be given discretion to institute voluntary or mandatory e-filing without limitation as to court or case type.

**B. The CAJ Should Have Discretion to Institute Voluntary or Mandatory E-Filing without Limitation as to Court or Case Type**

The successful implementation of a statewide e-filing program, voluntary or mandatory, should be left to the CAJ, who is in the best position to determinate what is appropriate after assessing the circumstances of each affected court and case type. The New York court system is complex and often difficult to navigate. The UCS is comprised of hundreds of different courts of various types.<sup>25</sup> After more than 20 years of successful e-filing, the responsibility for managing and expanding e-filing in the New York State courts should be left largely to the CAJ's discretion in consultation with appropriate stakeholders. The CAJ is able to respond effectively to rapidly changing needs and to embrace available technology to ensure that New York has a modern, efficient justice system. Moreover, the current pandemic has demonstrated the need for swift action. The CAJ is capable of, and experienced in, managing the further expansion of e-filing in a

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<sup>25</sup> [Initial Report on the Goals And Recommendations for New York State's Online Court System \(November 9, 2020\).](#)

manner that avoids delay that results from being required to await legislative action in each instance.

In 2009, after a decade of experience, the Legislature recognized the need for the CAJ to enjoy flexibility in determining when voluntary e-filing should be available and in which case types. It gave the CAJ permanent authority to make these decisions. In 2009, the Legislature also started an experimental program in the use of mandatory e-filing. The experimental program has gradually been expanded over the past 11 years, adding courts and case types. In 2015, the mandatory program was made permanent, with the exception that certain case types (matrimonial matters; residential foreclosures; consumer credit actions; and proceedings under the Election Law, the Mental Hygiene Law, CPLR Article 70 and CPLR Article 78) were carved out, albeit voluntary e-filing was available in those cases. Now, in 2021, with over a decade's experience in the use of mandatory e-filing, it is once again time to make this next evolutionary step in the e-filing program permanent.

Current law prohibits the CAJ from exercising discretion to mandate e-filing in the following case types: matrimonial matters; residential foreclosures; consumer credit actions; and proceedings under the Election Law, the Mental Hygiene Law, CPLR Article 70 and CPLR Article 78<sup>26</sup>. These restrictions on the discretion of the CAJ should be repealed. The CAJ should be authorized to establish mandatory e-filing in these case types, as appropriate.

The CAJ is best positioned to determine, with input from other interested stakeholders, whether and when mandatory e-filing in these case types may be appropriate. Empowering the CAJ to exercise discretion in this regard does not indicate

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<sup>26</sup> CPLR § 2111(b)(2)(C).

that these case types are ready or even appropriate for mandatory e-filing. It simply allows the CAJ to determine the most efficient method to reap the benefits of e-filing, while implementing it at the right pace.

There are requirements in place which the CAJ must satisfy prior to mandating e-filing. Those requirements include the following:

**Consultation and Input:** Appropriate stakeholders must be given an opportunity to express their concerns, their views must be considered, and e-filing may not be implemented if there is a good reason to delay its use in a particular court or case type. The CAJ must consult with the local county clerk and obtain their approval prior to implementing mandatory e-filing outside of the city of New York.

**Opt Outs and Exemptions:** If the CAJ implements mandatory e-filing in a particular court or case type, it will be mandatory for attorneys only. Even attorneys who lack necessary technical skills or equipment may affirmatively opt out of e-filing. Self-represented litigants will continue to be automatically exempt from mandatory e-filing. They will, however, have the option to elect to participate in e-filing should they wish to do so. All other parties will be subject to e-filing, but service of paper copies of documents on any self-represented litigant will continue to be required.

**Confidentiality:** Matrimonial files are statutorily confidential<sup>27</sup> and must remain so. Upon commencement of any case designated in NYSCEF as a matrimonial matter, access to the file is automatically limited to the litigants, authorized court staff, and counsel of record who consented to service in the case.<sup>28</sup> Significantly, the confidentiality

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<sup>27</sup> DRL § 235

<sup>28</sup> Id.

of matrimonial files will be more secure if documents are filed using NYSCEF than in the traditional paper file. Documents also are routinely filed in non-matrimonial matters which are sealed or confidential. The same procedures would be applied to e-filed papers in all such actions, permitting access only to those authorized.

Based on the demonstrated benefits NYSCEF has to offer, its proven record of success over the past 21 years, and the established safeguards in place, removal of existing limitations on the CAJ's discretion to establish mandatory e-filing in the currently excluded case types is warranted. While those restrictions may have been useful in the earlier stages of e-filing, they no longer serve a purpose, given the extensive history of NYSCEF and the CAJ's adherence to existing safeguards. The overwhelming majority of County Clerks, practitioners and bar associations who have been surveyed on this issue have expressed the desire to permit mandatory e-filing in all case types .

**C. Consultation with Advisory Committees, Bar Associations, Attorneys and Other Stakeholders Remains Vital.**

Before exercising discretion to institute voluntary or mandatory e-filing, the CAJ should be required to consult with appropriate stakeholders, including bar associations, institutional service providers, assigned counsel, and other participants in the legal process. Extensive communication and collaboration between the CAJ and various stakeholders, both within the Court and in the affected community, is necessary to efficiently manage the expectations and demands of a successful e-filing program. An integral part of implementing e-filing, whether voluntary or mandatory, in an appropriate manner is to continuously evaluate and enhance the program, taking into consideration all of the comments and recommendations received from bar groups, individuals, legal service providers, and others. Consulting with entities and individuals affected by e-filing

ensures a collaborative effort and continued review of the process to ensure fairness and efficiency for all. The CAJ must also obtain approval from the affected local county clerk before mandatory e-filing may be instituted. Additionally, in criminal matters, mandatory e-filing may not be instituted without the consent of the district attorney, the criminal defense bar as defined in subdivision three of this section, and the county clerk of the affected county.

#### **IV. CONCLUSION AND RECOMMENDATIONS**

E-filing has become an essential tool for improving access to justice to all litigants across the State. During the early stages of e-filing more than 20 years ago, it was reasonable to expand e-filing in phases that required Legislative approval, but today that process is outdated and inefficient. The COVID-19 pandemic has compelled the need to permit significant expansion of e-filing at an accelerated pace. In order for the UCS to respond to the technological demands of today's modern world, the CAJ must be afforded discretion to institute e-filing in consultation with affected stakeholders. We recommend that the CAJ be empowered to institute e-filing in any or all of the State's trial courts in any case type, and that the existing restrictions on the CAJ's discretion to establish mandatory e-filing in case types which are currently excluded be repealed. Implementing these legislative changes will enhance access to justice without delay, while continuing to safeguard the interests of self-represented litigants and technologically challenged attorneys. These recommendations in support of the legislative amendments proposed by the UCS to expand e-filing are aimed at promoting the creation of a more efficient and effective court system in New York State.

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