



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #7

REQUESTED ACTION: Approval of report and recommendations of the Committee on Court Structure and Operations.

Attached is a final report of the Committee on Court Structure and Operations relating to progress toward the implementation of mandatory, statewide electronic filing (“e-filing”) in New York courts.

An Executive Summary at the beginning of the report highlights recommendations for New York State Bar Association (“NYSBA”) activities. The full set of conclusions and recommendations is provided on pages 29 to 33.

Section I of the report (pages 3 to 5) summarizes NYSBA’s policy on e-filing and identifies the fundamental advantages of a mandatory statewide system. NYSBA supports mandatory e-filing statewide, pursuant to a resolution adopted by the House of Delegates on March 31, 2007. According to the report, e-filing has the following benefits: (1) instant worldwide filing; (2) automatic service; (3) universal on-line access; (4) extensive cost savings; (5) environmental friendliness; and (6) increased security. The committee recommends that New York’s current e-filing system (known as New York State Courts Electronic Filing [“NYSCEF”]) should be adopted statewide.

Section II (pages 6 to 21) explains the legislative and administrative history of e-filing in New York, as well as the technological aspects of the e-filing system.

Section III (pages 22 to 28) outlines the current availability of e-filing in New York, and it discusses the unique role that county clerks play in implementing e-filing on a county-by-county basis. According to the report, e-filing only has been implemented in a small percentage of courts. The report states that county clerks have dual roles: (1) elected local officials; and (2) constitutionally-designated officers of the state judiciary. The committee concludes that the current law relating to e-filing strikes a delicate balance between these potentially competing interests. The report states that the non-judicial role of the county clerk is protected by prohibiting the judiciary from forcing clerks to adopt a new e-filing system unless and until each clerk’s office is ready to do so. The report further states that the current law ensures uniformity and efficiency for attorneys, litigants, and other users by leaving control over the form, manner, and methodology of

e-filing in the hands of the chief judge, chief administrative judge, and district administrative judges.

As stated above, Section IV (pages 29 to 33) provides conclusions and recommendations. The committee recommends the following: (1) continued approval of recommendations made by the NYSBA Task Force on E-Filing of Court Documents; (2) amendments to e-filing legislation; (3) further expansion of e-filing through the issuance of administrative orders by the judiciary; (4) expansion of e-filing technology; (5) input from NYSBA and local bar associations and organizations; and (6) increased education about e-filing for members of the bar.

This report was circulated for comment and posted on the Reports Group page on February 13, 2012. No comments have been received to date.

Stephen P. Younger, a co-chair of the Committee on Court Structure and Operations, will present the report.

REPORT ON THE PROGRESS TOWARD IMPLEMENTING STATEWIDE ELECTRONIC FILING IN NEW YORK COURTS

COMMITTEE ON COURT STRUCTURE AND OPERATIONS: SUBCOMMITTEE ON ELECTRONIC FILING

EXECUTIVE SUMMARY

The New York State Bar Association (“NYSBA”) Committee on Court Structure and Operations: Subcommittee on Electronic Filing (respectively “Committee” and “Subcommittee”) submits this report on the progress toward the implementation of mandatory, universal electronic filing (“e-filing”) of court documents throughout New York State, and recommends the following for NYSBA’s continuing efforts toward achieving this goal:

- (1) That NYSBA support legislative amendments that expressly:
 - a. Authorize mandatory e-filing in all courts across the State, with the exception of opt-outs for *pro se* litigants and for those attorneys who lack the technical capacity to participate;
 - b. Allow court administrators, including the Chief Judge, Chief Administrative Judge (“C.A.J.”) and District Administrative Judges, to adopt rules regulating the form, manner and methodology of e-filing;
 - c. Streamline the implementation process by minimizing or eliminating the need for input from non-judicial officers; and
 - d. Direct court administrators to phase-in mandatory e-filing in the various counties in an orderly fashion that accounts for the particular needs of the county clerks’ offices.

- (2) That NYSBA urge the Legislature to recognize the substantial cost and time savings that will result from a Statewide e-filing system, and to provide adequate funding for implementation;
- (3) That NYSBA support the decision of the Chief Judge and C.A.J. to implement the New York State Courts Electronic Filing system (“NYSCEF”), developed by the Office of Court Administration’s Division of Technology (respectively “OCA” and “DOT”), as the single, uniform e-filing system for all courts across the State; and
- (4) That NYSBA and local bar associations and organizations:
 - a. Support OCA’s efforts to provide training materials and classes to educate members of the bar on NYSCEF; and
 - b. Develop avenues for members of the bar to provide constructive feedback to OCA regarding their experiences with NYSCEF.

Section I of the report summarizes NYSBA’s policy on e-filing, and identifies the fundamental advantages of a mandatory, Statewide system. Section II explains the legislative and administrative history of e-filing in New York, as well as NYSCEF’s technological aspects, including system architecture, security and available training. Section III outlines the current availability of e-filing in New York, and discusses the unique role the county clerks play in implementing e-filing on a county-by-county basis. The report ends with the Subcommittee’s conclusions and recommendations in Section IV.

I. INTRODUCTION

NYSBA's position on electronic filing is clear: the House of Delegates, by resolution dated March 31, 2007, called for the implementation of universal and mandatory electronic filing in all New York State courts without undue delay. Relying on the work of the NYSBA Task Force on E-Filing of Court Documents ("Task Force"),¹ the House of Delegates has acknowledged the potential cost and time savings from "an ideal fully implemented e-filing system," as well as the need for simplicity and uniformity in any such system. Now, five years after the House of Delegates' resolution and the Task Force's report, the Subcommittee, under the guidance of Henry M. Greenberg, Esq., and NYSBA Past-President Stephen P. Younger, Esq., Co-Chairs of the full Committee, has reviewed the Task Force's recommendations in light of intervening developments and the current legislative and administrative framework to identify opportunities for NYSBA to provide further assistance in achieving this goal.

Importantly, and as over 10,000 practitioners can attest, New York's current e-filing system, NYSCEF, has proven to be a dependable and efficient program offering a range of benefits, including, but not limited to, the following:

- (1) Instant World-Wide Filing: No longer will an attorney race to the clerk's office before 5 o'clock or travel hundreds of miles to file papers in the proper county—now, courtesy of e-filing, practitioners can file court documents from the convenience of their own offices, homes, vacation spots, or anywhere else that has internet access;

¹ In June 2005, NYSBA President A. Vincent Buzard created the Task Force, co-chaired by Sharon Stern Gerstman, Esq. and Wallace L. Leinhardt, Esq., to analyze the status of e-filing initiatives throughout the United States, to gather data from affected constituencies in New York State, and to formulate recommendations as to whether and how e-filing should be implemented within our courts. After two years of extensive work, the Task Force issued a comprehensive report providing a clear vision for "an ideal fully implemented e-filing system" in New York State and recommendations on how NYSBA can assist OCA and other stakeholders in realizing this goal.

- (2) Automatic Service: In addition to accepting filings, NYSCEF automatically effects and records service of all papers after the summons—eliminating the use of affidavits of service and relieving judges of the need to hear the “age-old practice of bickering among lawyers about whether they received a copy of this or that”²;
- (3) Universal Online Access: Digital storage of electronic documents provides litigants, courts, and the public the additional benefit of instant access to court papers anytime and anywhere, as well as greater transparency in our judicial system;
- (4) Extensive Cost Savings: Use of electronic files in lieu of physical documents eliminates the cost of purchasing paper, printing and copying, storage and disposal, and service by mail, overnight delivery or messenger: estimated savings for each e-filed document range from \$40 to \$95,³ and, for a mandatory, universal e-filing system across the State, total “hundreds of millions of dollars a year”⁴;
- (5) Environmentally-Friendly: Electronic documents provide a “greener” and more environmentally friendly method for filing and service, not only by reducing the amount of paper used, but by eliminating the need to transport literally thousands of tons of paper each year to courts across the State and attorneys around the globe; and
- (6) Increased Security: NYSCEF contains a comprehensive technological infrastructure providing security for all e-filed documents “that is far greater than that which exists for

² William Glaberson, *Amid Stacks of Paper, “E-Court” is Finally in Session*, New York Times, July 7, 2011, section A20.

³ Report of the Chief Administrative Judge, E-filing in the New York State Courts 3 (June 2011) citing Case File Xpress, *A Case Study: Time is Money: e-filing Saves Both*, at 6 (2010).

⁴ See Report of the Chief Administrative Judge, E-filing in the New York State Courts 3 (June 2011); *see also* Jonathan Lippman, *E-filing Program Must be Retained; Our Experience Justifies Expansion*, NYLJ, May 1, 2001, at 23, col 3.

documents in paper form.”⁵ Documents uploaded to NYSCEF are encrypted, backed-up and preserved on multiple computer servers in separate locations in the State, ensuring preservation of all documents in the event of a natural disaster or computer malfunction, and NYSCEF features protections against hackers and viruses, including advanced encryption, real-time system monitoring, and on-site server maintenance.⁶

Despite the clear benefits of NYSCEF, the road to implementation has been long (over 12 years) and there is far to go before a Statewide system is achieved. As discussed below, the Legislature has authorized e-filing on a piecemeal basis, county-by-county, and, in stark contrast to the implementation of the federal e-filing program, New York law does not give the Judiciary exclusive control of the process. Instead, the C.A.J. must obtain the approval of various constituencies who otherwise have no part in court structure and operations. This fragmented implementation, coupled with inclusion of non-judicial officers, has resulted in delays that were absent from the federal experience.

It is the Subcommittee’s view that while the progress over the past 12 years has been, at times, slow, OCA’s current e-filing system, NYSCEF, is well-suited to the needs of the State’s Judiciary, practitioners, litigants and the general public. Therefore, the Subcommittee calls for the Statewide adoption of NYSCEF as soon as practicable, which the Subcommittee believes accords with the goals set in 2007 by the House of Delegates.

⁵ Report of the Chief Administrative Judge, E-filing in the New York State Courts 8 (June 2011).

⁶ *Id.*

II. HISTORY OF E-FILING IN NEW YORK STATE

There are two elements in the history of e-filing in New York State: (1) the legal and administrative authority authorizing e-filing; and (2) its technological creation and implementation. A proper understanding of New York's current system can be achieved only through an analysis of both.

A. Legislation, Regulations and Administrative Orders

1. The Pilot Program: L.1999, ch. 367

The New York Legislature authorized e-filing as a mere pilot program in 1999,⁷ which it amended six times before making it a permanent fixture in 2009.⁸ Originally known as the "Filing by Electronic Means," or FBEM, the program was scheduled to run for a three-year period beginning on July 1, 1999.⁹ Under FBEM, as well as its eventual successor NYSCEF, litigants were able to file and to serve court documents simply by uploading them to the FBEM website.

The pilot program consisted of three key elements. First, it authorized the C.A.J. to establish a consensual e-filing program in commercial cases in the Commercial Division of the Supreme Court, Monroe and New York Counties and tax certiorari claims in the Supreme Court, Westchester County.¹⁰ Commencement of these actions could now be performed upon electronic delivery of the requisite papers to the court clerk,¹¹ and, following physical service of

⁷ L. 1999 ch. 367.

⁸ L. 2002, ch. 110; L. 2003, ch. 261; L. 2004, ch. 384; L. 2005, ch. 504; L. 2007, ch. 369; L. 2008, ch. 95.

⁹ Judiciary L. § 212, as amended by L. 1999, ch. 367.

¹⁰ See Mem. of Unified Court System, Bill Jacket L. 1999, ch. 367; CPLR § 2103(f)(6), as amended by L. 1999, ch. 367. This legislation additionally authorized facsimile commencement for commercial cases in the Commercial Division of the Supreme Courts of Monroe and New York County; as well as for tax certiorari cases and mental hygiene and conservatorship proceedings in Suffolk County, as well as claims against the State of New York in the Court of Claims. Mem. of Unified Court System, Bill Jacket L. 1999, ch. 367.; Ct. Cl § 11(i), as amended by L. 1999, ch. 367.

¹¹ See CPLR § 304, as amended by L. 1999, ch. 367.

commencement papers, counsel could exchange interlocutory service electronically.¹² While FBEM offered numerous time and cost savings, “participation in this experiment [was] strictly voluntary” and “only to take place upon the written consent of the parties and of the judge assigned to the case.”¹³ Thus, if the party initiating a lawsuit elected to use the e-filing system, the opponent could veto that decision by simply withholding consent.

Second, this legislation amended the CPLR and other statutes to expedite the process of e-filing. Most notably, the legislation amended the CPLR and Judiciary Law to allow payment of court fees by credit card.¹⁴ The legislation also amended the CPLR to authorize the use of documents in electronic form,¹⁵ and to clarify the definition and procedure surrounding electronic service.¹⁶

Third, the C.A.J. was required to issue a written report on the success of the FBEM pilot to the Governor, Legislature and Chief Judge by April 1, 2002—three months before the pilot’s sunset date of June 30, 2002.¹⁷

2. Expanding the Pilot Program

Beginning in 2002, the Legislature extended and expanded FBEM six times until the program lost its pilot status and became a permanent fixture in New York courts in 2009.

FBEM received its first one-year extension in 2002, pushing the sunset date to July 1, 2003.¹⁸ This first amendment also expanded the coverage of the pilot program by allowing

¹² See CPLR § 2103(7), as added by L. 1999, ch. 367.

¹³ Mem. of Unified Court System, Bill Jacket L. 1999, ch. 367.

¹⁴ See CPLR § 8023 as added by L. 1999, ch. 367 and Jud. L. § 212(2) as amended by L. 1999, ch. 367.

¹⁵ CPLR § 2101, as amended by L. 1999, ch. 367.

¹⁶ CPLR § 2103, as amended by L. 1999, ch. 367.

¹⁷ Judiciary L. § 212, as amended by L. 1999, ch. 367.

¹⁸ Judiciary L. § 212, as amended by L. 2002 ch. 110.

voluntary e-filing in commercial division cases in Supreme Court, Albany, Nassau, and Westchester Counties.¹⁹

In 2003, the Legislature extended FBEM for an additional two years until September 1, 2005,²⁰ because, as stated in the Sponsor's Memo, e-filing "requires further study and extending these programs will permit additional time to evaluate the performance and utility of these modern methods of exchanging information."²¹

FBEM was amended a third time in 2004, significantly expanding the counties and types of cases that were eligible for the e-filing. The law authorized e-filing in commercial division cases in the remaining counties in New York City (Bronx, Kings, Queens and Richmond), as well as in Supreme Court, Erie County. E-filing also was authorized for tax certiorari claims in Supreme Court, Bronx, Kings, Queens, and Richmond Counties, and a new Surrogate's Court e-filing pilot was started in Erie County. Finally, this amendment expanded e-filing to tort claims in all of the pilot jurisdictions, which by this time included Albany, Monroe, Westchester, New York, Bronx, Kings, Queens, Richmond, Nassau and Suffolk Counties.²²

The pilot program was amended a fourth time in 2005, postponing the sunset until September 1, 2009, and authorizing e-filing in five additional counties: Niagara, Broome, Essex, Onondaga, and Sullivan.²³ The 2005 amendment also authorized the C.A.J. to implement e-filing for commercial, tax certiorari, and tort claims in all counties already authorized for the e-filing program.

¹⁹ See CPLR § 2103, as amended by L. 2002 ch. 110.

²⁰ L. 1999 ch. 367, as amended by L. 2003, ch. 261.

²¹ Sponsor's Mem., Bill Jacket L. 2003, ch. 261.

²² L. 1999 ch. 367, as amended by L. 2004, ch. 384.

²³ L. 1999 ch. 367, as amended by L. 2005, ch. 504.

The pilot, now known as the New York State E-filing program (“NYSEF”),²⁴ was amended a fifth time in 2007, authorizing e-filing for all commercial, tax certiorari and tort cases in Supreme Court, Livingston County. The Surrogate’s Court e-filing pilot was further expanded to include Chautauqua, Monroe, Queens and Suffolk Counties. Additionally, e-filing was expanded to the civil courts of New York City, but only for no-fault automobile cases which were brought by a health provider against an insurer for failure to comply with Insurance Department regulations.²⁵

In 2008, the NYSEF pilot was amended for the sixth and final time, authorizing voluntary e-filing for all cases in Supreme Court, Erie County.²⁶

By 2009, the pilot program had extended far beyond tax and commercial cases in Supreme Court, New York, Monroe and Westchester Counties to a wide range of actions in 18 counties, including Supreme and Surrogate’s Courts,²⁷ as well as the Court of Claims and New York City Civil Courts. Cumulatively, over 10,000 attorneys had registered for the pilot program, electronically filing almost 160,000 cases and over 350,000 documents.²⁸

3. Entered into Law: L. 2009, ch. 416

With the passage of L. 2009, ch. 416, e-filing shed its pilot program label, was renamed the New York State Courts Electronic Filing System (“NYSCEF”),²⁹ and became a permanent fixture in New York courts. The 2009 amendment authorized the C.A.J. to implement

²⁴ Sponsor’s Mem., Bill Jacket L. 2007, ch. 369 (“formerly referred to as ‘Filing by Electronic Means’ or FBEM”; now being referred to as ‘NYS Efiling’ or ‘NYSEF’ . . .”).

²⁵ L. 1999 ch. 367, as amended by L. 2007, ch. 369. See also N.Y. Ins. L. § 5108(b) requiring prompt payment by insurers to health insurance providers in automobile no-fault cases.

²⁶ L. 1999 ch. 367, as amended by L. 2008, ch. 95. This made Erie and Broome county Supreme Courts the only two in New York to have authorization for e-filing in all Supreme Court cases.

²⁷ The counties of Albany, Bronx, Broome, Chautauqua, Erie, Essex, Kings, Livingston, Monroe, Nassau, New York, Niagara, Onondaga, Queens, Richmond, Suffolk, Sullivan, Westchester.

²⁸ Sponsor’s Mem., Bill Jacket L. 2009, ch. 416.

²⁹ See Sponsor’s Mem., Bill Jacket L. 2009, ch. 416.

consensual e-filing programs across the State in Supreme Court, Surrogate's Court and the Court of Claims, as well as New York City Civil Courts. More importantly, the 2009 legislation authorized e-filing on a mandatory basis for certain cases³⁰ over a three-year pilot period in Supreme Court for three counties: New York (breach of contract cases and a variety of commercial cases worth over \$100,000); Westchester (tort cases); and one county outside of New York City to be selected by the C.A.J.³¹ The mandatory pilot program included an "opt-out" provision, exempting *pro se* litigants and attorneys who certify that they either do not possess, or lack the requisite knowledge of, the computer equipment necessary to e-file.³² Lastly, the 2009 law required the C.A.J. to file a report evaluating the mandatory pilot with the Governor, Legislature, and Chief Judge by April 1, 2012, before it sunset on September 1, 2012.³³

In 2010, the Legislature authorized mandatory e-filing for commercial division cases in Supreme Court, Westchester County,³⁴ and extended the mandatory pilot to include Supreme

³⁰ Cases generally eligible for e-filing included fiduciary duty, business torts, transactions under the uniform commercial code, transactions involving commercial real property, shareholder derivative actions (without a monetary threshold) commercial class actions, transactions with commercial banks, internal affairs of business organizations, commercial insurance coverage, the dissolution of business organizations, and applications to stay or compel arbitration. However, cases prohibited from mandatory e-filing included actions to collect professional fees, actions seeking declaratory judgments to insurance coverage for personal injuries or property damage, residential real estate disputes, proceedings to enforce a judgment, first party insurance claims, and certain attorney malpractice claims. For the complete list see L. 2009, ch. 416.

³¹ Excluding matrimonial actions, election law proceedings, article 78 proceedings and proceedings brought under the mental hygiene law. L. 2009, ch. 416.

³² See L. 2009, ch. 416

³³ L. 2009, ch. 416.

³⁴ Notably, this legislation would signal the demise of the facsimile machine's role in e-filing programs. The fax machine, for so long the silent endowment of e-filing legislation, was essentially put out to pasture by this amendment, which now limited fax transmissions to the filing of papers in the Court of Claims. L. 2010, ch. 528.

Court, Livingston, Monroe, Rockland and Tompkins Counties.³⁵ The 2010 legislation also amended the Judiciary Law to allow payment of court fees by credit card.³⁶

The 2010 legislation placed a number of new requirements on the C.A.J. before either consensual or mandatory e-filing could be implemented where authorized by law. Prior to implementing a consensual program, the C.A.J. must consult with the relevant clerk, and, for any mandatory program, the C.A.J. must obtain the clerk's actual consent. The law also required the C.A.J. to compile an annual report for the Governor, Legislature, and Chief Judge by the first of April, but only after consulting with affected county clerks, and allowing the clerks to submit their own comments for inclusion. Lastly, the law required the C.A.J. to establish an advisory committee to assist and consult on future implementations of e-filing, with at least one-half of its members to be designated by the New York State Association of County Clerks.³⁷

The most recent e-filing legislation was signed into law in September 2011, authorizing further development of the mandatory program, and signaling the Legislature's acceptance of e-filing's inevitable spread to other areas, including criminal matters and Family Court.

Mandatory e-filing was expanded to include tort, breach of contract and various commercial cases in all of New York City, and the \$100,000 minimum for mandatory e-filing was eliminated. Allegany, Essex, Onondaga, and Westchester Counties also became eligible for mandatory e-filing, subject to the approval of the respective county clerks.³⁸ Additionally, New York City civil courts became eligible for mandatory e-filing, but only for one type of case.

³⁵ Excluding matrimonial actions, election law proceedings, article 78 proceedings and proceedings brought under the mental hygiene law. L. 2010, ch. 528.

³⁶ See N.Y. Jud. L. § 212(2)(j) as amended by L. 2010, ch. 528. Note that the provision for payment of credit cards was originally located in the CPLR before being repealed and moved to its current location by L. 2005, ch. 457.

³⁷ L. 2010, ch. 528.

³⁸ Excluding matrimonial actions and proceedings brought under the Election Law, Article 78 Proceedings, and the Mental Hygiene Law. L. 2011, ch. 543

Finally, the 2011 legislation authorized the C.A.J. to expand mandatory e-filing to all Surrogate's Courts—provided the affected bar associations are consulted before implementation. The statutory sunset for the mandatory pilot program was postponed until September 1, 2015.³⁹

The 2011 amendments placed additional reporting and collaborative requirements on the C.A.J., such as the inclusion of comments from State and local bar groups and organizations in annual reports to the Legislature and Governor.⁴⁰ The 2011 law also created an e-filing advisory committee composed of representatives from bar associations and organizations, as well as four advisory committees to assist and consult in the implementation of new e-filing programs in Surrogate's Court, New York City civil courts, criminal courts, and Family Court.⁴¹ The criminal and Family Court committees were also to assist the C.A.J. in drafting the reports evaluating and recommending the implementation of e-filing, both of which were due to the Governor, Legislature, and Chief Judge by January 1, 2012.⁴²

4. Current Rules, Regulations and Administrative Orders

Following each legislative installment discussed above, the C.A.J. has promulgated Administrative Orders and Uniform Rules to implement consensual and mandatory e-filing programs in courts across the State. However, due, in part, to the recent legislative requirement that the C.A.J. obtain the consent of multiple advisory groups and various non-judicial officers, e-filing has been implemented in only a fraction of the courts in New York where authorized by law.

Article 22 of the New York Codes, Rules and Regulations contains the Uniform Rules regarding e-filing. E-filing in the Supreme Court is governed by Uniform Rule 202.5-b for the

³⁹ L. 2011, ch. 543.

⁴⁰ L. 2011, ch. 543.

⁴¹ Juvenile Delinquency Proceedings under Article 3 and Abuse or Neglect Proceedings under Article 10.

⁴² L. 2011, ch. 543.

consensual e-filing program, and Uniform Rule 202.5-bb for mandatory e-filing program.⁴³ E-filing in the Court of Claims is governed by Uniform Rules 206.5 and 206.5aa, and e-filing in Surrogate's Court and the New York City civil courts are governed by Uniform Rules 207.4-a and 208.4-a, respectively. Each of these rules provides practitioners with general definitions of e-filing, as well as various considerations when commencing an action by e-filing, including: creation of a NYSCEF user account;⁴⁴ obtaining consent to e-file;⁴⁵ emergency exceptions to e-filing;⁴⁶ submitting exhibits and discovery materials;⁴⁷ signatures on e-filed documents;⁴⁸ service;⁴⁹ and adding parties to e-filed actions.⁵⁰

The Uniform Rules also provide protections for “secure information” contained in electronic documents, including “individually identifiable health information, a social security number, a credit card, bank account number, an individual’s date of birth or home address, a minor child’s name, or trade secrets.” Anyone using NYSCEF is required to certify whether or not an electronic document contains “secure information” before it is uploaded, and the computer system automatically restricts access to the document to the actual parties to the action, filing agents, the county clerk and the court.⁵¹ These protections are in addition to those already applicable to paper documents filed with the court clerk.

Further, the Rules include an “opt-out” provision in connection with the mandatory e-filing program for *pro se* litigants and attorneys who certify in good faith that they either do not

⁴³ The mandatory program is also complimented by Uniform Rule 202.5(d), which forbids County Clerks from accepting legal papers that are covered by the mandatory e-filing program.

⁴⁴ 22 NYCRR § 202.5 -b(c)(2).

⁴⁵ 22 NYCRR § 202.5-b(b)(2)(i).

⁴⁶ 22 NYCRR §§ 202.5-b(d)(1)(ii), 202.5-bb(b)(2), 202.5-bb(c)(3).

⁴⁷ 22 NYCRR §§ 202.5-b(d)(6), 202.5-b(j).

⁴⁸ 22 NYCRR §§ 202.5-b(e); 22 NYCRR § 207.4-a(f); 22 NYCRR § 208.4-a(e)

⁴⁹ 22 NYCRR §§ 202.5-b(f), 202.5-b(b)(3), 202.5-b(c), 208.4-a(d), 207.4-a(g).

⁵⁰ 22 NYCRR §§ 202.5-b(g), 202.5-bb(c)(2).

⁵¹ 22 NYCRR § 202.5-b(d)(3)(iii). Note, however, that the document would still be available for public inspection at the office of the County Clerk, unless it is sealed by the court. *Id.*

possess, or lack the requisite knowledge of, the computer equipment needed to e-file. Any party seeking to use this provision is required to file a notice with the court certifying that they are qualified to opt-out.⁵²

Presently, the C.A.J. has implemented mandatory e-filing for various actions across the State. In Supreme Court, the C.A.J. has implemented mandatory e-filing for: commercial, contract and tort actions in New York County; commercial actions in Kings County; medical malpractice actions in Bronx County; and all newly commenced matters in Rockland and Westchester Counties, except for proceedings under CPLR Article 78, Mental Hygiene Law, Election Law and matrimonial actions.⁵³ Additionally, the C.A.J. intends to implement mandatory e-filing for probate and administrative proceedings in Surrogate's Court in Chautauqua, Erie and Monroe Counties.⁵⁴

Likewise, the C.A.J. has implemented consensual e-filing for commercial, tort, and tax certiorari actions in Supreme Court, Albany, Niagara, Onondaga, and Suffolk Counties; commercial, tort, tax certiorari, and workers' compensation matters in Supreme Court, Bronx, Kings, Queens, Richmond, and Westchester Counties; commercial, tort, tax certiorari, CPLR article 75 and 78 proceedings, guardianship, matrimonial, and mental hygiene matters for Supreme Court, Broome County; commercial, tort, tax certiorari, and workers' compensation matters for Supreme Court, Erie County; commercial, tort, and workers' compensation matters in Supreme Court, Nassau County; commercial, tort, tax certiorari, workers' compensation and Department of Health matters in Supreme Court, New York County; probate and other

⁵² 22 NYCRR § 202.5-bb(e).

⁵³ Chief Administrative Judge of the Courts, Administrative Order (5/18/11).

⁵⁴ Please note that this report includes the projected jurisdictional additions to the mandatory e-filing pilot program for 2012 as identified by C.A.J. Prudenti. *See* Memorandum from Chief Administrative Judge regarding Mandatory Electronic Filing in the New York State Courts [Amended Version] (Jan. 4, 2012) (on file with author).

administrative proceedings in the Surrogate's Court of Cayuga, Chautauqua, Erie, Livingston, Monroe, Ontario, Queens, Seneca, Steuben, Suffolk, Wayne and Yates Counties; designated claims in the Albany District⁵⁵ of the Court of Claims; and no fault automobile cases brought by a health provider against an insurer for failure to comply with Insurance Department regulations in New York City civil courts.⁵⁶

5. Local Rules Affecting E-filing

As the C.A.J. implements e-filing in courts across the State, it will be important for practitioners to be cognizant of applicable local rules. For now, the small number of local rules addressing e-filing generally defer to the current NYSCEF framework, typically by reiterating NYSCEF rules or pointing practitioners to NYSCEF's webpage.⁵⁷

It must be noted, however, that certain courts require that e-filed motions be accompanied by a "working copy" or courtesy hard copy" in paper form.⁵⁸ For example, in Supreme Court, Queens County, Part 14 requires a paper copy of motion papers to be submitted "prior to the submission of the motion to the court for determination,"⁵⁹ while Part 31 requires a physical copy of motion papers "on the return date of the motion/application."⁶⁰ This is also the case in various trial parts of the Commercial Division of Supreme Court, New York County.⁶¹ Erie County, on the other hand, currently does not require working copies, unless required by the

⁵⁵ Which includes Albany, Clinton, Columbia, Essex, Franklin, Greene, Rensselaer, Saratoga, Schenectady, Ulster, Warren, and Washington Counties.

⁵⁶ Chief Administrative Judge of the Courts, Administrative Order (10/26/11); Chief Administrative Judge of the Courts, Administrative Order (1/9/12).

⁵⁷ See New York County Courthouse Procedures, Procedure II; New York County Justices Rules Rule 14; Erie County E-filing Doc. 1; Queens County Supreme Civil Term Part 5, 10.

⁵⁸ A "working copy" is defined as "a hard copy that is an exact copy of a document that had been electronically filed in accordance with [the rules.]" See 22 NYCRR 202.5-b(a)(2)(vii).

⁵⁹ Queens County Supreme Civil Term Part 14 Rules.

⁶⁰ Queens County Supreme Civil Term Part 31 Rules.

⁶¹ Commercial Division of New York County Part 39 & 56 Rules.

individual justice.⁶² The lesson, as usual, is that practitioners must be aware of applicable local rules, especially as e-filing becomes more prevalent throughout the State.

B. Technology and Implementation

If the Legislature and C.A.J. are responsible for the legal authority behind New York's e-filing program, it is OCA's Division of Technology ("DOT") that actually created it—currently in the form of NYSCEF. Much to the DOT's credit, this work was done wholly in-house, relying mainly on open-source software and ongoing technological advances resulting in savings of hundreds of thousands of dollars to taxpayers over the past decade. The technology behind NYSCEF creates not only the website where the user interfaces with the system (the "front end"), but also a complex and secure infrastructure for receiving and storing electronic filings, processing payments, effecting service, and transmitting data to courts, clerks and other end users across the State (the "back end").

For New York's e-filing system to ensure maximum efficiency and ease of access for practitioners filing in any State court, then, as the Task Force concluded, it "should use a uniform method of access and filing throughout the state. All courts should be accessible through one initial Web site that directs users either through links or drop-down boxes to specific courts and counties." The Subcommittee, as did the House of Delegates, wholly supports this recommendation for two reasons: (1) the use of different e-filing websites by individual clerks across the State in lieu of NYSCEF's standard interface would increase the opportunity for human error as well as the number of computer systems subject to malfunction; and (2) the use of different e-filing websites will require additional time and expense to develop extra layers of

⁶² Erie County E-filing Doc. 1.

internet architecture and web services before e-filed documents and information can be transmitted and interpreted by all end users, including trial and appellate courts across the State.

The Subcommittee has evaluated the form and functionality of OCA's current e-filing system, and concludes that NYSCEF is sufficient to provide both a uniform user experience in accord with the report and recommendations of the Task Force, as well as a secure technological infrastructure able to maintain and serve court documents. The Subcommittee, therefore, recommends that NYSBA support OCA's decision to use NYSCEF as the single, uniform e-filing system for all courts in New York State.

1. User Accounts and Electronic Signatures

Before an individual can use NYSCEF either to access or to e-file documents, he or she must create an individual account—which can be done quickly and efficiently through NYSCEF's website.⁶³ The user, once logged into the system, is then able to access his or her active cases, upload documents, or search the entire database. In addition, a NYSCEF user account provides the vehicle for certifying a user's identity, and the act of logging into NYSCEF constitutes a signature for purposes of Part 130 of the Rules of the Chief Administrator.⁶⁴ Thus, if the user is filing a brief, notice or even affirmation bearing his or her name, the user can electronically sign the document with a typewritten “/s/” instead of printing, physically signing, and scanning documents—wholly eliminating the need to create a paper version. Documents bearing another person's name, however, must bear that person's signature (physical or electronic) before uploading to the system.⁶⁵

2. NYSCEF User Interface

⁶³ New York State Unified Court System, *New York State Court Electronic Filing – Create Account*, at <https://iapps.courts.state.ny.us/nyscef/CreateAccount> (last visited Jan. 5, 2012).

⁶⁴ 22 NYCRR § 202.5-b(e).

⁶⁵ *Id.*

NYSCEF also provides a uniform method of access and filing that complies with the Task Force’s recommendation that e-filing occur “through one initial Web site that directs users either through links or drop-down boxes to specific courts and counties.” This interface has been updated to provide easier access as well as to comply with the Americans with Disabilities Act. For example, all information has been re-coded into static pages to ensure compatibility with text readers for the visually impaired. The DOT also developed NYSCEF to maximize compatibility with OCA’s electronic case management system, which the DOT also created.

Some have argued that alternative systems may be more “user friendly” when compared with NYSCEF, and that a clerk, not OCA, should determine what final system will be used in the clerk’s office. As discussed above, however, the use of a single interface would maximize efficiency by eliminating the need for users to learn different e-filing websites, as well as the corresponding opportunities for human error. Thus, while there may be room for improvements to NYSCEF, any potential benefits associated with allowing non-standardized interfaces across 62 counties are substantially outweighed by the potential burdens, particularly where NYSBA and local bar associations and organizations are free to work alongside OCA to improve NYSCEF’s user interface and technical functionality.

Further, NYSCEF’s standard interface corresponds to its standardized method for gathering and transmitting data to multiple end users throughout the State. When a document is electronically filed, the relevant e-filing system gathers data according to the website’s particular user interface, and then transmits the data in the system’s own language to a variety of end users, including OCA, court staff, case management systems, court clerks, and, when the system effects and records service of process via email, parties to the litigation. Any change in a system’s user interface—as well as any differences among competing systems used by individual clerks—such

as website layout, number of data fields, and coding language, would result in variations in how data is collected and transmitted to the end user. The use of NYSCEF as New York's uniform e-filing system would provide an efficient and streamlined method for ensuring compatibility of all data regarding documents e-filed in any court across the State—foreclosing the need to spend time and money constructing additional architecture and web services to facilitate communication between competing e-filing systems. This is of particular importance if New York's e-filing system is to effect and record service of process, and to communicate with case management systems used in different courts.

3. Creation of Streamlined and Secure System Architecture

The e-filing process captures a variety of sensitive data through the website and documents uploaded to NYSCEF concerning users and litigants, including names, addresses, social security numbers, medical records and credit card information. Security, therefore, is of vital importance to any e-filing system.

In response to potential security risks, the DOT has implemented a number of safeguards to protect against unlawful access to secure information, as well as loss of information due to computer malfunction:

- User login information: all user and password information is both generated and stored in a single central location by the DOT. When passwords are generated, they are one way encrypted, which cannot then be unencrypted or reverse-engineered. NYSCEF also limits the number of login attempts, and automatically logs a user out after inactivity.
- Credit card information: NYSCEF does not store credit card information for users, to protect against potential hackers, and all such information is encrypted before transmission via NYSCEF's secure website.
- Virus protection for e-filed documents: NYSCEF safeguards the integrity of uploaded files through the use of the PDF/A file format and advanced virus scanning tools tailored to those files. The PDF/A format creates wholly self-contained documents,

eliminating imbedded links and multimedia in a non-PDF/A format that may be compromised. By limiting all data to one format, virus scanning is streamlined and optimized.

- Encryption of data regarding e-filed documents while in transit: NYSCEF segregates the files containing images of electronic documents from the data connecting those documents to a particular case during transmission. The image is secured according to the SHA-1 protocol designed by the National Security Agency, using a 160-bit secure hash algorithm that cannot be reverse-engineered. The data containing this hash is digitally signed using authenticated security certificates. This ensures the security of the document while in transit from a user to NYSCEF.
- Maintaining the integrity of e-filed documents: NYSCEF's network is secure from access by individuals both outside and within the DOT through multiple sub-systems, use of static IP addresses, and network segregation by internal firewalls. In short, NYSCEF sends the different pieces of information relevant to any e-filing to separate locations behind separate firewalls within its own network.
- Maintaining system integrity: the DOT uses a cluster of multiple redundant servers spread across two separate physical locations in New York. This redundant architecture maximizes NYSCEF's availability in case of systemic failures. Thus, the failure of one or more servers at either location would not cause an interruption of service as the alternative site servers would continue the operation of NYSCEF. The DOT's System Architecture Group further maintains the optimization of all software servers and monitors work-flow to ensure efficiency within the system.

It is the Subcommittee's opinion that the NYSCEF system, as created and administered by the DOT, has sufficient security measures to protect sensitive information concerning users and litigants alike. And, even assuming that private vendors can achieve the same security offered by the DOT, any expansion of electronic records management beyond the DOT would serve only to expand the number of vulnerability points and potential security threats.

4. Technical Support and Training across the State

OCA has appointed a Statewide Coordinator for E-Filing, Mr. Jeffrey Carucci, to oversee implementation and training across the State, and has created an E-Filing Resource Center⁶⁶ with

⁶⁶ New York State Unified Court System, *Statewide E-Filing Resource Center*, at <http://www.nycourts.gov/supctmanh/EFRC.htm> (last visited Jan. 5, 2012).

publications and training materials to assist users in learning and navigating NYSCEF. The DOT also staffs dedicated support technicians available 24 hours a day, 7 days a week to answer any questions that may arise during the e-filing process.⁶⁷

The E-Filing Resource Center's website provides a central location where users can learn nearly everything they need to know about e-filing, complete with user manuals, FAQs, demonstration videos, PowerPoint presentations, and the opportunity to register for free hands-on training classes.⁶⁸ OCA also publishes an e-filing newsletter, with contributions from the Chief Judge, the C.A.J., and other e-filing participants across the State.⁶⁹ And, of particular importance, OCA has developed NYSCEF training classes: each class provides 2.0 Continuing Legal Education (CLE) credit hours (1.0 credit in Professional Practice and 1.0 credit in Law Practice Management), and can be taught by OCA or any other local accredited organization. Many counties have successfully conducted these training sessions, with some, like Westchester County, holding classes every week.

Apart from OCA's training materials and resources, local courts have developed their own resources and training materials, with the 9th Judicial District as an exemplar.⁷⁰ Through the 9th District's website, users can find relevant announcements and protocols addressing local timetables and preferences for courtesy copies, etc.⁷¹

⁶⁷ New York State Unified Court System, *Contact Us*, at <https://iapps-train.courts.state.ny.us/nyscef/ContactUs> (last visited Jan. 5, 2012).

⁶⁸ New York State Unified Court System, *NYSCEF Training Resources*, at <https://iapps.courts.state.ny.us/nyscef/TrainingResources> (last visited Jan. 5, 2012).

⁶⁹ New York State Unified Court System, *NYSCEF News*, at <http://www.nycourts.gov/suptmanh/NN%20links%20page.htm> (last visited Jan. 5, 2012).

⁷⁰ New York State Unified Court System, 9th Judicial District, *E-Filing Information*, at <http://www.nycourts.gov/courts/9jd/E-file.shtml> (last visited Jan. 5, 2012).

⁷¹ *Joint Protocols for New York State Courts E-Filing (NYSCEF): Cases Filed in Westchester County*, available at <http://www.nycourts.gov/courts/9jd/efile/WestchesterCountyJointProtocols.pdf> (last modified Jan. 13, 2011).

III. AVAILABILITY OF E-FILING IN NEW YORK COURTS

Despite the numerous laws and administrative orders allowing e-filing, it has been implemented only in a small percentage of courts, leaving New York's program far behind its federal counterpart. Today, the federal Case Management/Electronic Case Files system ("CM/ECF") is used for both civil and criminal cases in all District Courts, all Courts of Appeal, all Bankruptcy Courts, the Court of Federal Claims, the Court of International Trade, and the Judicial Panel on Multidistrict Litigation. Over 500,000 attorneys use the CM/ECF program, resulting in approximately 6,000,000 documents being e-filed each *month*.⁷² In comparison, by 2009—the tenth anniversary of e-filing in New York State—only 10,000 attorneys had registered for NYSCEF, and roughly 350,000 documents had been electronically filed in fewer than 160,000 cases.⁷³

It is the Subcommittee's view that for e-filing to achieve its greatest potential, it must be used in all courts across the State. Such expansion would increase exponentially the benefits enjoyed at the trial-level courts, by, for example, allowing appellate courts simply to log-into NYSCEF and view the electronic documents already filed. No more records on appeal, no more certifications by counsel, no more printing multiple copies of each bound volume—just universal access to one e-filing system.

A. Implementation where Authorized by Statute and Administrative Order

⁷² *Annual Report of the Director of the Administrative Office of the United States Courts* (2010), at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/AnnualReport_2010/Technology.aspx (last visited Jan. 5, 2012).

⁷³ Sponsor's Mem., Bill Jacket L. 2009, ch. 416.

1. Supreme Court

a. Consensual:

Authorized	62 Counties ⁷⁴
Implemented	13 Counties Albany, Bronx, Broome, Erie, Kings, Nassau, New York, Niagara, Onondaga, Queens, Richmond, Suffolk, and Westchester ⁷⁵

b. Mandatory:

Authorized	13 Counties Commercial and Tort cases in Bronx, Kings, New York, Queens, and Richmond; and Certain Cases ⁷⁶ in Allegany, Essex, Livingston, Monroe, Onondaga, Rockland, Tompkins, and Westchester ⁷⁷
Implemented	5 Counties New York (commercial, contract, and tort actions); Kings (commercial actions); Bronx (medical malpractice actions); Westchester (all newly commenced matters [except CPLR Article 78 proceedings, Mental Hygiene Law Proceedings, matrimonial actions, and Election Law proceedings]); and Rockland (all newly commenced matters [except CPLR Article 78 proceedings, Mental Hygiene Law Proceedings, matrimonial actions, and Election Law proceedings]) ⁷⁸

2. Courts in New York City

⁷⁴ L. 2009, ch. 416.

⁷⁵ Chief Administrative Judge of the Courts, Administrative Order (10/26/11).

⁷⁶ These include one or more types of cases designated by the Chief Administrative Judge except for CPLR Article 78, Mental Health Law Article 81, matrimonial, and Election Law proceedings.

⁷⁷ L. 2011, ch. 543.; see Memorandum from Chief Administrative Judge on Mandatory Electronic Filing in the New York State Courts [Amended Version] (Jan. 4, 2012) (on file with author).

⁷⁸ Chief Administrative Judge of the Courts, Administrative Order (5/18/11); see Memorandum from Chief Administrative Judge on Mandatory Electronic Filing in the New York State Courts [Amended Version] (Jan. 4, 2012) (on file with author).

a. Consensual:

Authorized	Civil Courts ⁷⁹
Implemented	Only no-fault automobile actions brought by a health provider against an insurer for failure to comply with Insurance Department regulations ⁸⁰

b. Mandatory:

Authorized	Civil Courts ⁸¹
Implemented	Only no-fault automobile actions brought by a health provider against an insurer for failure to comply with Insurance Department regulations ⁸²

3. Surrogate's Court

a. Consensual:

Authorized	62 Counties ⁸³
Implemented	12 Counties Certain matters in Cayuga, Chautauqua, Erie, Livingston, Monroe, Ontario, Queens, Seneca, Steuben, Suffolk, Wayne and Yates ⁸⁴

b. Mandatory:

Authorized	62 Counties (local bar association must first be
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⁷⁹ L. 2009, ch. 416.

⁸⁰ See Chief Administrative Judge of the Courts, Administrative Order (10/16/11).

⁸¹ L. 2011, ch. 543.

⁸² See L. 2011, ch. 543; see Memorandum from Chief Administrative Judge on Mandatory Electronic Filing in the New York State Courts [Amended Version] (Jan. 4, 2012) (on file with author).

⁸³ L. 2009, ch. 416.

⁸⁴ Chief Administrative Judge of the Courts, Administrative Order (10/26/11); Chief Administrative Judge of the Courts, Administrative Order (1/9/12).

	consulted) ⁸⁵
Implemented	3 Counties Probate and administration proceedings in Chautauqua, Erie, and Monroe Counties ⁸⁶

4. Family Court

a. Consensual: None

b. Mandatory: None

5. Criminal Courts

a. Consensual: None

b. Mandatory: None

6. Appellate Division

c. Consensual: Fourth Judicial Department by CD-ROM⁸⁷

d. Mandatory: None

7. Court of Appeals

e. Consensual: By CD-ROM⁸⁸

f. Mandatory: None

8. Court of Claims

a. Consensual:

⁸⁵ L. 2011, ch. 543.

⁸⁶ See Memorandum from Chief Administrative Judge on Mandatory Electronic Filing in the New York State Courts [Amended Version] (Jan. 4, 2012) (on file with author).

⁸⁷ 22 NYCRR § 1000.3(h).

⁸⁸ 22 NYCRR § 500.2.

Authorized	Statewide ⁸⁹
Implemented	Albany District ⁹⁰

b. Mandatory: None

9. County, City, Town and Village Courts

g. Consensual: None

h. Mandatory: None

B. Role of County Clerks in the Uniform Implementation of NYSCEF

County clerks, as the constitutional officers bound to protect the integrity of and access to public documents, including records for Supreme Court and county courts,⁹¹ will play an integral part in the implementation of uniform e-filing in New York State. The clerk's role, however, is two-fold: he or she serves both as an elected local official, and as a constitutionally-designated officer of the Judiciary.⁹² As a result of the county clerk's "dual roles," there appear to be dual interests vying for the clerk's attention: (1) the authority of the Chief Administrative Judge to manage the form of electronically filed documents, as well as the manner in which court records

⁸⁹ L. 2009, ch. 416.

⁹⁰ Chief Administrative Judge of the Courts, Administrative Order (10/26/11).

⁹¹ New York Constitution, article VI, §6(e) and 22 NYCRR § 80.1(a).

⁹² This distinction has been recognized by the Court of Appeals for over a century (*Olmstead v Meahl*, 219 NY 270, 275 [1916]; *Whitmore v Mayor of New York City*, 67 NY 21, 22 [1876]) and by the Attorney General (2005 Ops Atty Gen No. 2005-8 [informal opinion] ["When acting as a clerk of the court, the county clerk is considered a state officer, but in her other general duties the county clerk is considered a local officer"]), has been utilized by courts to determine a clerk's liability as an agent for the State Judiciary or a locally elected county officer (*Nat'l Westminster Bank, USA v State of New York*, 76 NY2d 507, 509 [1990]; *Ochsenbein v Shapley*, 85 NY 214 [1881]; *Ashland Equities Co. v Clerk of New York County*, 110 AD2d 60 [1st Dept 1985]; *Brown v State of New York*, 130 Misc 2d 1073 [Ct Cl 1986] [holding Monroe County Clerk acted "as a local elected county officer in filing a Federal tax lien"]), and is a basic component of New York's Freedom of Information Law (*Newsday, Inc. v Empire State Development Corp.*, 98 NY2d 359 [2002]; Comm on Open Govt FOIL-AO-14225 [2003] ["As you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, and others, including those of your interest, which may be held as clerk of a court"]).

are filed and maintained;⁹³ and (2) the clerk's independent responsibility to manage the affairs of his or her office as it relates to retention and maintenance of local records.

If the end game for New York State is the implementation of a uniform e-filing system, then the current framework advances this goal by accounting for the county clerk's dual roles and striking a delicate balance between these potentially competing interests. Following the 2009 law first authorizing mandatory e-filing, the C.A.J. is required to consult with the affected county clerks prior to implementing any voluntary program, and, in the case of mandatory e-filing, to obtain the clerk's consent. The reasoning behind this new requirement was succinctly stated in the 2010-legislation's bill jacket: "This change will ensure that counties are well-prepared to meet the demands generated by mandatory e-filing." Under current law, therefore, the non-judicial role of the county clerk is protected by prohibiting the Judiciary from forcing clerks to adopt a new e-filing system such as NYSCEF unless and until the clerk's office is ready to do so. As a result, OCA has absorbed the costs associated with implementing NYSCEF by developing web services to allow communication with any clerk's pre-existing e-records system, providing the technical support and training for the clerks' offices, and reimbursing the clerks for fees associated with accepting credit card payments for court filings.

At the same time, the current law ensures uniformity and efficiency for attorneys, litigants and other users across the State by preserving control over the form, manner and methodology of e-filing with the Chief Judge, C.A.J. and District Administrative Judges. Under

⁹³ The Constitution grants all supervisory powers over the Unified Court System to the Chief Judge, and creates the position of C.A.J. to "on behalf of the chief judge...supervise the administration and operation of the unified court system (NY Const, art VI, § 28[b]; see also 22 NYCRR § 80.1[a]; *Corkum v Bartlett*, 46 NY2d 424, 428-29 [1979] ["the Chief Judge's administrative powers are complete, and the Chief Administrator may employ them fully when and while and to the extent that they have been delegated to him"]; *Bloom v Crosson*, 183 AD2d 341 [3d Dept 1992] *aff'd* 82 NY2d 768; *Bartlet v Evans*, 110 AD2d 612, 614 [2d Dept 1985]; *Durante v Evans*, 94 AD2d 141, 143 [3d Dept 1983] *aff'd* 62 NY2d 719 [1984]). Judiciary Law § 211(1)(e), (f), in turn, states that the administrative powers of the Chief Judge include "the form, content, maintenance and disposition of court records" and "methods and systems of the unified court system."

the 1962 and 1978 amendments to the New York Constitution, the State's Judiciary was reorganized into the present Unified Court System,⁹⁴ which incorporated New York's existing single Statewide Supreme Court⁹⁵ "[un]bounded by county or other lines which subdivide the state."⁹⁶ The Supreme Court, while undivided across the State, has seats in each county, and the Constitution designates the 62 county clerks as the clerks of the entire Supreme Court. As a practical matter, it would be contrary to the basic structure of the Supreme Court, as a single Statewide institution, to allow 62 peer court clerks to adopt their own policies and procedures regarding Statewide e-filing that are contrary to each other or to the Chief Judge. Likewise, inconsistencies in the look and operation of any e-filing system would be contrary to the interests of members of the bar: uniformity is vital for simple and efficient use by attorneys and litigants in New York State.

The Subcommittee believes that the current framework advances the ultimate goal of universal and uniform e-filing while properly balancing the legal and practical workings of the clerk's office—as has been demonstrated with tremendous success in Westchester County—by allowing court administrators to phase-in mandatory e-filing in an orderly fashion that accounts for the particular needs of the clerks' offices, and still retain control of “the form, content, maintenance and disposition of court records” and “methods and systems of the unified court system,”⁹⁷ including the authority to adopt NYSCEF as the single, uniform e-filing system for New York State.

⁹⁴ See Art. VI, § 1(a) (“There shall be a unified court system for the state”).

⁹⁵ See Art. VI., § 6(d); see also *Nat'l Westminster Bank. USA v State of New York*, 76 NY2d 507, 509 (1990) (“Under the Unified Court System they are but separate parts of a single State-wide Supreme Court”).

⁹⁶ *Olmstead v Meahl*, 219 NY 270, 275 (1916).

⁹⁷ Judiciary Law § 211 (1)(e), (f).

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Continued Approval of the Task Force's Recommendations

The Subcommittee reaffirms the Task Force's Report and Recommendations, paying particular attention to the following:

- Recommendation 2: Any e-filing system should use a uniform method of access and filing throughout the state. All courts should be accessible through one initial Web site that directs users either through links or drop-down boxes to specific courts and counties.
- Recommendation 5: E-filing should be mandatory; The Unified Court System should provide scanning and e-filing at every courthouse facility.
- Recommendation 6: Every attorney registered to practice law within the State of New York should be required to file and maintain an e-mail address to accept service of any electronic filing.
- Recommendation 7: *Pro se* litigants would be neither required nor permitted to participate in e-filing unless certain concerns are addressed.

As explained above, the Subcommittee agrees that for e-filing to work, it must be universal, uniform, and mandatory. Without belaboring the point, e-filing will save time and money, so the universal adoption of e-filing would maximize the benefits and savings for our State. Similarly, uniformity across the State will ensure efficient implementation by OCA, protect the integrity of the single Statewide Supreme Court, and simplify use for attorneys practicing in different courts across the State. Finally, e-filing's full potential cannot be achieved unless it is mandated (with provisions allowing waivers for *pro se* litigants and practitioners who lack the technical capacity to participate). While some may complain that they lack the technical expertise to e-file, this is the clear minority, and there are ample resources for training should a user seek it.

The Subcommittee also notes that several of the Task Force's recommendations have been implemented since its report was issued, including: (1) funding for hardware, software and training of county clerk personnel is provided by OCA; (2) documents filed under an attorney's user account are deemed signed and certified; (3) there are no additional fees associated with e-filing; (4) acceptance of payment by electronic means; and (5) the NYSCEF system provides service and access for the public, in addition to being a repository of documents.

B. Changes in Legislation

To achieve a universal, uniform and mandatory e-filing system, the Subcommittee believes that e-filing legislation should be amended to:

- (1) Authorize mandatory e-filing in all courts across the State, with the exception of opt-outs for *pro se* litigants and for those attorneys who lack the technical capacity to participate;
- (2) Allow court administrators, including the Chief Judge, Chief Administrative Judge ("C.A.J.") and District Administrative Judges, to adopt rules regulating the form, manner and methodology of e-filing;
- (3) Streamline the implementation process by minimizing or eliminating the need for input from non-judicial officers; and
- (4) Direct court administrators to phase-in mandatory e-filing in the various counties in an orderly fashion that accounts for the particular needs of the county clerks' offices.

The Subcommittee takes no position on the need for "pilot programs" and "committees" to advise the Chief Judge with respect to expanding the current system, other than to suggest that the Legislature should not infringe on the Judiciary's power to manage its own affairs. While the Subcommittee recognizes that such safeguards may create a system that is more efficient and

user-friendly, it is equally likely that these additional steps may postpone the actual implementation of e-filing throughout the State. To the extent e-filing should be implemented in an incremental fashion, whether for financial, logistical or any other reasons, the Judiciary should be allowed to make that decision.

C. Further Expansion by Administrative Order

The Subcommittee believes that the Chief Judge, Chief Administrative Judge and District Administrative Judges, as the executive officers of the State's Judiciary, should have control over the form, manner and methodology of e-filing where authorized by statute. As explained above, allowing non-judicial officers to "veto" the Chief Judge would violate the integrity of the Unified Court System and constitutional separation of powers.

That being said, the Subcommittee agrees that the constitutional separation of powers authorizes county clerks to postpone implementation until their offices have the resources needed for the transition to e-filing. However, the Subcommittee would strongly oppose any attempt by a non-judicial officer to undermine the authority of the Chief Judge and Chief Administrative Judge with respect to the choice of e-filing systems.

Lastly, the Subcommittee understands that pilot programs may be necessary to develop and tailor the NYSCEF system to handle the needs of specific courts, and that there may be financial or logistical reasons for staggering or postponing implementation; however, we believe that decisions regarding pilot programs and timetables for implementation should be left to the Chief Judge and Chief Administrative Judge, and not micro-managed by the Legislature.

D. Expansion of Technology

The Subcommittee commends OCA's DOT for its efforts designing and refining NYSCEF, and finds the current system to be a great improvement from its predecessor pilot program, FBEM. There, of course, is room for improvement, including greater opportunities for user feedback during the e-filing process. The Subcommittee believes the current NYSCEF system is suitable for Statewide use, and recommends the swift but efficient adoption of this system in all courts, with the understanding that OCA will continue to revise and improve the system with input and comments from users.

The Subcommittee recognizes that the substantial budget cuts by the Legislature will impact how quickly OCA can implement e-filing, including the DOT's ability to manage technical support and other issues. These budget cuts and the resulting financial constraints will prevent e-filing whether or not it is handled through OCA or outside vendors. However, the Subcommittee expects that DOT has the greatest incentive to reduce costs, as opposed to outside vendors, which DOT has been doing over the past decade through the use of open source software, certain technological advances, and other methods.

E. Input from NYSBA and Local Bar Associations and Organizations

The Subcommittee suggests that NYSBA and local bar associations and organizations, if they are to ensure that attorneys and their clients enjoy the cost and time savings associated with e-filing, should work alongside OCA to ensure that NYSCEF is as efficient and secure as possible. These bar associations and organizations are well-positioned to relay information, including suggestions and critiques, from individuals using NYSCEF to OCA, and the Subcommittee recommends that such organizations take affirmative steps to facilitate such constructive feedback.

F. Educating Members of the Bar

Although e-filing is growing, it is clear that many attorneys are unaware of the full benefit of Statewide use, and, in some cases, of the very existence of NYSCEF. The Subcommittee believes that NYSBA and local bar associations and organizations can provide tremendous assistance in moving this project forward by educating their members, and by urging the Legislature to provide the necessary legal authority and finances to implement e-filing as soon as practicable. Once New York State's attorneys realize the benefits of e-filing, they will be a strong force in calling for its immediate expansion and funding.

NYSBA and local bar associations and organizations, in addition to placing pressure on the Legislature, are the ideal vehicles for conducting training sessions for NYSCEF users, including attorneys, legal assistants, and the general public. Because OCA has developed the necessary resources, the cost to run such programs would be minimal, and bar associations are in a much better position to interface with the tens of thousands of users across the State. Lastly, NYSBA and local bar associations and organizations should employ available channels of communication to supply their members with updates on New York's e-filing program, including user requirements, implementation dates, and local rules.

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