

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

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #1

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

I. EXECUTIVE SUMMARY

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

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

II. SUMMARY OF PROPOSAL

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

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

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

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

III. COMMENTS

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

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

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

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

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

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

EXHIBIT A

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

Issued for Public Comment
June 1, 2017

Part 12__.

A. Definitions.

For purposes of this section:

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

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

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

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

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

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

C. Registration and Notice of Electronic Filing.

1. Appeals or Transferred Matters -- Initial Entry of Contact Information and Service of Notice of Case Number. At such time and in such manner as the court shall direct by Departmental rule, and unless exempt from e-filing under section (D) (1) of this Part, counsel for the appellant or the petitioner in an appeal or transferred matter of a case type designated for electronic filing, or a self-represented appellant or self-represented petitioner in such a matter, shall take the following steps:

- (a) if not already registered, register as an authorized e-filing user with NYSCEF or other court-approved site;
- (b) enter in NYSCEF or other court-approved e-filing system such information about the case and parties and such notice of appearance as the court may require;
- (c) if not already provided, obtain from the court an appellate case, docket or e-filing tracking number for the matter;
- (d) serve upon all parties, on a form approved by the Appellate Division, notification of that case, docket or tracking number and other pertinent information about the case and the electronic filing method; and
- (e) e-file proof of service of this notification.

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

- (a) if not already registered, register as an authorized e-filing user with NYSCEF or other court-approved site;
- (b) file the notice of petition (or, as appropriate, the executed order to show cause), the petition and other initiating documents in the matter by electronic filing method through NYSCEF or other court-approved e-filing system as provided in this Part;
- (c) if not already provided, obtain from the court a case number or e-filing tracking number for the matter; and
- (d) serve upon all parties by hard copy service method as provided in CPLR 2103 and court rule
 - (i) the initiating documents in the case; and
 - (ii) on a form approved by the Appellate Division, notification of the case, docket or tracking number and other pertinent information about the case and the electronic filing method; and
- (e) e-file proof of service of the initiating documents and notification.

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

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

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

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

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

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

5. Service and Filing.

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

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

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

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

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

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

(a) self-represented litigants; and

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

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

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

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

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

(c) serving and filing documents by electronic means as provided under this Part.

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

E. Instructions for Electronic Filing; Formatting.

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

2. Formatting.

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

(i) comply with text searchable PDF archival format (PDF/A);

(ii) contain bookmarks linking the tables of contents of briefs and records to the corresponding page of the document; and

(iii) comply with additional formatting requirements set forth in attachment A.

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

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

(d) Virus Protection. E-filers shall attest that, prior to filing, each e-filed document was scanned for viruses using updated commercial scanning technology, and that no virus was detected.

F. Hard Copy Filing and Service.

1. Filing of Additional Hard Copies of Documents in E-filed Matters.

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

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

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

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

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

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

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

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

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

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

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

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

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

H. Confidentiality; Sealed Documents; Redaction.

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

I. Scanning of Documents by Clerk.

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

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

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

1. Rejection of Documents. The clerk may refuse to accept for filing or e-filing any document that does not comply with this Part, or is otherwise unsuitable, and may direct that a document be refiled.

2. Modification of Procedures. The court or its designee may at any time modify or discontinue e-filing in a matter for good cause shown.