



COMMITTEE ON COURTS OF APPELLATE JURISDICTION

HON. BETTY WEINBERG ELLERIN

Chair
Alston & Bird LLP
90 Park Avenue
New York, NY 10016
(212) 210-9424
FAX 212/ 210-9444
betty.ellerin@alston.com

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**REPORT ON ELECTRONIC FILING OF BRIEFS AND RECORD MATERIAL
IN COURT OF APPEALS**

The Court of Appeals has invited comments on whether, and how, it might move toward the electronic filing of appellate briefs and records. The invitation states that the Court is considering whether to adopt rules that would require the filing of briefs and records by email, as a supplement to the filing of paper documents.

The New York State Bar Association's Committee on Courts of Appellate Jurisdiction is pleased to respond to this invitation.¹ The State Bar Association represents 77,000 New York attorneys, and this Committee is a constituent part of the Association made up of attorneys with extensive experience in the state's appellate courts. Our members are very familiar with electronic filing in the federal courts, at the New York state trial court level and in alternative dispute resolution processes, and are very much interested in proposals to expand the current range of email filing. We are grateful for this opportunity to be heard. We add that the views here expressed are those of the Committee, and unless adopted by the Bar Association's House of Delegates, are not the views of the Bar Association. Neither are they necessarily the views of any entities by whom the Committee's members may be employed.

To begin, we understand the Court to be inviting comments about the broad sweep of possible email filing rules. No specific rules are offered for analysis. We urge the Court to allow a second round of comments on the language of particular rules before they are adopted, and are confident that the Court has in mind to invite such comments.

¹ Principal drafters of this report were Hon. Mark R. Dwyer, Warren S. Hecht and Carolyn G. Nussbaum.

That said, we offer this statement: it is past time for the creation of a system of email filing of appellate briefs. Paper has its place, and the “follow-up” service and filing of briefs printed on paper should remain the norm. But the instantaneous electronic transmission of briefs among attorneys and to the appellate courts is a huge boon to the courts, litigants, and the environment. The process is so simple that even those among us who are computer-phobic are able to transmit briefs electronically. Electronic delivery of briefs will create no reason for the appellate courts to fear infection by computer viruses.

Issues do exist concerning the reliability of the delivery of attachments via email, due to technical transmission issues with spam filters and size limitations on recipients’ mailboxes. We believe any issues with respect to the transmittal of briefs as an email attachment are manageable. However, we are extremely hesitant to endorse any requirement that records and appendices also be served or filed by email.

Part of our hesitation is based on how difficult it can be to prepare records for email filing: scanning documents to permit their transmission requires specialized equipment and can be complex. Conversion of typed briefs into PDF documents is cheap and easy. But a requirement to scan documents into a record often would oblige practitioners to employ outside vendors and to incur significant expense. Moreover, even fundamental aspects of documents such as their pagination can be affected. The process would be more complex and expensive still, were there to be an obligation to create a searchable ‘OCR’ PDF record. If accuracy is to be assured, the process is very labor intensive.

And part of our hesitation is based on how difficult the transmission process itself can be. At present, typical email “in-boxes” cannot readily accommodate a message containing more than about 200 pages of material. The emailing of a lengthy record might therefore require segmenting the record into numerous parts, requiring potentially repetitive scanning and creating considerable inconvenience to the sender and the recipient.

There is an alternative to reliance on standard email delivery. Some federal trial courts utilize “e-filing,” in which scores of documents in particular cases are placed on a server under the control of the court and are accessible by interested parties like any Internet document. This system eliminates issues about the reliability of transmittal and about limitations on computer capacity, though it would not resolve difficulties the parties face in preparing records for email delivery. In any event, the establishment of such a system would seem an undue burden on an appellate court, given the relatively short duration of the filing periods in particular cases and the relatively small numbers of documents filed in each case. However, if the Court deems the investment worthwhile, we do not oppose the creation of an Internet-based system for filing appellate briefs, but we reiterate our concerns about the challenges in preparing records for posting on a court’s server as well as for email delivery.

We therefore urge the Court to take only a half-step. We support a requirement for email service and filing of briefs as a supplement to the service and filing of paper copies of the briefs. But until the technology advances, we oppose mandating email service and filing of records and

appendices. It would be reasonable to permit parties the option of filing records with the Court by email; in some cases the record or the appendix will be short. But the Court's rules should not at this time require email filing of records and appendices nor require that attorneys accept email service of records and appendices.

If the Court nonetheless decides that electronic filing of records and appendices should be required, we recommend inclusion of an alternative to email transmission. The Court could mandate an appellant to present the Court with a compact disc containing the record or the appendix and to present a copy of that disc to each respondent. That would of course still require the appellant to endure the trouble and expense of creating a digital or paper version of the record. But it would at least eliminate the problems that follow from emailing large documents.

Finally, any system of email filing of records and appendices should allow a party, upon demonstration of hardship, to request permission to file only paper copies of the record or appendix.

We add five other observations:

1. Life is complicated enough. We urge that the five principal appellate courts in New York adopt uniform procedures for email filing. When this Court promulgates rules, we recommend that the Court also urge the Appellate Divisions to conform their rules to those of this Court. That would be especially important were there ever to be an obligation to create a digital record or appendix. It would be extremely wasteful should parties have to prepare a record one way in an intermediate appellate court - on paper, perhaps - and then recreate the record in a different way when the case reaches the Court of Appeals.

2. Public access to litigation documents should be encouraged. Of course, in particular cases the legitimate rights of the parties may require filing under seal. But the email filing of briefs will make broad dissemination easy and thus be beneficial to the public – and to the bar. The United States Supreme Court, for example, makes briefs available on the Internet, and this Court could do the same. Publication of records and appendices on the Internet seems much less important.

3. Any system of email filing of briefs should be accompanied by plain ethics rules forbidding attorneys from accessing “metadata” to guarantee the confidentiality of attorney work product and of client communications.

4. As noted, we do not believe at this time that the Court should mandate the email filing of records and appendices or require that respondents accept email service of them. We also oppose any potential rules requiring email transmission of motions and leave applications. Should numerous documents be emailed among the parties in a case, many of them not anticipated by recipients, confusion could well result. The briefing process is straightforward, and emailing only the briefs will not confuse litigants or counsel.

5. The rules should specify either that email service of a brief is complete upon transmission, or preferably, require that the filer obtain email verification of delivery to address uncertainty created by a non-delivery that is not apparent to the sender.

We appreciate the opportunity to offer these observations, and look forward to the culmination of the process now underway.

A handwritten signature in blue ink that reads "Betty W. Ellerin". The signature is written in a cursive style with a large initial 'B' and 'E'.

Hon. Betty Weinberg Ellerin
Chair
Committee on Courts of Appellate Jurisdiction