

**HOUSE OF DELEGATES**  
**Agenda Item #5**

**RESOLUTION OFFERED BY TASK FORCE ON E-FILING**

WHEREAS, the Task Force on the Electronic Filing of Court Documents was created and charged with collecting data on the e-filing initiatives and programs throughout the United States, analyzing the best practices from each, and making recommendations to the Office of Court Administration regarding whether and how e-filing might best be implemented within the New York State courts; and

WHEREAS, the Task Force has conducted surveys of New York attorneys, the New York County Clerks and the Chief Clerks of New York Surrogate's Courts, and has studied the electronic filing program of the United States Courts, and has studied the filing programs and pilots of other state courts, and has extensively studied the currently authorized pilot of Filing By Electronic Means (FBEM) conducted in New York State courts; and

WHEREAS, electronic filing of court documents offers significant advantages over paper filing including savings of costs and time to clients and attorneys, savings of storage costs to the court system, minimalization of misfiling of documents, access to filed documents at any time from a remote location, and uniformity of filing procedures, among other advantages; and

WHEREAS, attorneys within New York who have participated in mandatory electronic filing in Federal Court or in New York State Supreme Court under the FBEM pilot program have by significant majority indicated an overall positive experience; and

WHEREAS, the FBEM pilot has been successful where employed, but is seriously underutilized due to the requirement that all participants to an action under the pilot affirmatively opt into electronic filing; and

WHEREAS, the Task Force has issued a report, analyzing the electronic filing of court documents and making recommendations regarding the full scale implementation of an electronic filing system;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby endorses the report and recommendations of the Task Force on Electronic Filing of Court Documents; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such steps as they may deem warranted to implement this resolution, and to affirmatively take such steps to ensure a fully implemented electronic filing system, including but not limited to (1) support for implementation of electronic filing in the Supreme Court and Surrogate's Court in each county as the county becomes ready to undertake it, and in the Court of Claims, (2) support for the authority of the Chief Administrator of the Courts to plan and direct future expansion of

electronic filing in New York, and (3) support for the provision of resources to the Office of Court Administration and the Offices of the County Clerks to properly enable electronic filing, and to consider the creation of an entity within the Association to collaborate with the Office of Court Administration and the New York State Legislature in order to ensure such implementation.

**REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON E-FILING OF  
COURT DOCUMENTS**

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## **EXECUTIVE SUMMARY**

The New York State Bar Association (“NYSBA”) Task Force on E-Filing of Court Documents (the “Task Force”) was formed in June 2005, and began meeting in August 2005. Its mission was to analyze the current status of e-filing initiatives (that is, the filing and availability of litigation documents in electronic form via the Internet) throughout the United States, gather data from various constituencies within the bar and courts of New York State, and formulate recommendations as to whether and how e-filing should be implemented within the New York State Court system.

The Task Force met throughout late 2005 and 2006, both in whole and within subcommittees covering different types of courts (supreme and county, specialized, appellate and federal). Each subcommittee made its recommendations regarding the courts it studied, which the Task Force discussed as a group. Additionally, surveys were prepared for and administered to County Clerks, surrogate's court clerks, and practicing attorneys (who were reached both through e-mail and offline surveys) throughout the state, and the results discussed and analyzed. The Task Force gave special attention to the experience of New York attorneys with mandatory e-filing within the federal courts within New York, the experience with the Filing by Electronic Means (“FBEM”) pilot project in New York state courts, the current functioning of clerks and the courts, the technological challenges and costs faced by attorneys in moving to e-filing, and the

potential security and identity theft issues with regard to the availability online of sensitive and personally identifiable information.

Based on its work, the Task Force has developed recommendations both for New York courts overall, as well as specific recommendations for individual types of courts, all of which are collected in SECTION IX of this Report. These recommendations are guided by five overarching principles which would maximize the benefits of e-filing. These principles are: 1) That any system of e-filing must be more than a mere depository of documents, but must also be the source of information for attorneys and other users; 2) That e-filing methods must be uniform for all counties throughout the state; 3) That any e-filing system must not be duplicative of a paper filing system; 4) That there must be massive training of court personnel and attorneys; and 5) That any transition to e-filing within a particular court or county must not begin until that court or that county is totally equipped to deal with it.

Consistent with these principles, the Task Force recommends that OCA consider extensive expansion of e-filing within Surrogate's Court. Although the e-filing pilot within Surrogate's Court has not yet become operational, the Task Force concluded that Surrogate's Court provides a very favorable environment for e-filing, based upon the Task Force's findings that all filing in Surrogate's court is a function of the Unified Court System, only; that Surrogate's practice is primarily forms based; and that the Surrogate's Courts within the state are in the process of converting to a compatible Windows-based



database system. As the system becomes e-filing capable in each of the 62 counties, and following extensive training and a suitable transition period, the Surrogate's Courts should convert to a mandatory e-filing system.

E-filing in Supreme and County Courts presents greater difficulties due to the fact that responsibilities for filing are shared by the court system and the elected (or, in the five counties of New York City, appointed) County Clerks. As a result, conversion to an e-filing system in Supreme and County courts requires both funding and training for each of the 62 County Clerk's offices. The Task Force recommends that any expansion of e-filing within Supreme and County Courts be accompanied by suitable funding and training.

The Task Force recommends that when it is possible to proceed with the full scale establishment of an e-filing system, following a suitable period of transition (12-18 months), e-filing should be mandatory in order to maximize the efficiencies and benefits it provides. Facilities for e-filing should be placed in every courthouse, although the Task Force recommends against requiring or permitting pro se litigants to e-file (similarly to the federal e-filing system). Public access should be granted for e-filed documents, subject to limitations for sealed and sensitive matters. Provisions should be made for the handling of original documents where needed (for example, wills in Surrogate's Court), and for large exhibits where technological limitations may impede their efficient uploading and downloading.

The Task Force also discussed the technological requirements for users of e-filing. In

addition to recommending both transitional and ongoing technical support for and at courthouses and clerk's offices, the Task Force has included minimum requirements and technology best practices for attorneys in the Appendix to this report. The appendix to the report also includes the surveys conducted by the Task Force, previous New York reports on e-filing, as well as information from other state and federal e-filing regimes.

The Task Force urges the State Bar House of Delegates, and then the Courts of the State of New York, to adopt these recommendations in order to facilitate an effective and fair implementation of an e-filing system for the New York state courts.

## **INTRODUCTION**

The Task Force was created by President A. Vincent Buzard.<sup>1</sup> The Task Force, which had its initial meeting in August 2005, was charged with collecting data on the e-filing initiatives and programs throughout the United States, analyzing the best practices from each, and making recommendations to the Office of Court Administration ("OCA") regarding whether and how e-filing might best be implemented within the New York state courts.

### ***A. Methodology***

The Task Force recognized that a diverse and extensive body of information on e-filing exists throughout the country. As a result, the Task Force was initially broken into various subcommittees for the purpose of studying the e-filing and technological

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<sup>1</sup>The Members of the Task Force and their practice settings are set forth in APPENDIX 1.

experiences of various courts. These subcommittees included “Federal/Commercial” (chaired by Rick Geiger), “Other Supreme/County” (chaired by Charles Siegel), “Surrogate’s/Specialized” (chaired by David Goldfarb) and “Appellate” (co-chaired by Linda Margolin and Scott Karson).

Additionally, the various state jurisdictions with e-filing rules were divided among the task force members. Other study by the Task Force included demonstrations by OCA, the Federal Court (EDNY) and private vendors and review of e-filing manuals and reports by various districts of the Federal Court system, OCA and OCA appointed committees, and private vendors (particularly reports prepared by Lexis-Nexis and Westlaw). As the body of material grew and the scope of the issues widened, the Task Force recognized that it would require the services of a Reporter. The Task Force was very fortunate to have convinced Professor Jonathan Ezor of Touro College Jacob D. Fuchsberg Law Center to act as the reporter and is grateful for his assistance.

As it proceeded with its study, the Task Force recognized certain principal issues that required comment. These are set forth in SECTION II, below. The Task Force also recognized that in discussing these various e-filing issues with practitioners and with court personnel, strong opinions often emerged without consensus. As a result, the Task Force decided to conduct a survey of three constituencies: Chief Clerks of Surrogate’s Court, County Clerks and Attorneys.

### ***B. Surveys***

Surrogate’s Court: The Surrogate’s Court clerks were surveyed because of the Task

Force's early recognition of the aptness of Surrogate's Court for e-filing (see recommendations at SECTION VIII and SECTION IX). Before formulating any recommendations, however, the Task Force felt it was necessary to gauge the amenability of the Chief Clerks of Surrogate's Court to e-filing. The Task Force, in consultation with OCA's e-filing staff, formulated the questions, as the Task Force wanted to ensure that OCA was comfortable with the questions asked of its employees. Survey results are located at APPENDIX 2.

County Clerks: The Task Force recognized that implementation of e-filing in the Supreme and County Courts requires the active and meaningful participation of the County Clerks' offices (see SECTION VIII and SECTION IX). **The opinions and needs** of this constituency are key to any recommendation for **Supreme and County Courts**. The questions were formulated exclusively by the Task Force, recognizing that there might be some issues revealing friction between the County Clerks and OCA, a recognition which was borne out by the survey results (see APPENDIX 3).

Attorneys: The Task Force was diverse in geography, practice setting and technological advancement. However, the Task Force felt it needed a broader input from practitioners in developing its recommendations. As a result, it surveyed a broad range of attorneys, including non-members and attorneys for which NYSBA had no e-mail address. The questions were formulated by the Task Force and results are found at APPENDIX 4.

### ***C. Development of Recommendations***

The Task Force decided that any recommendations regarding e-filing in the Federal Court

were beyond its charge and scope. Additionally, the Task Force felt that it could perform a helpful function to NYSBA members to develop a set of both minimum requirements and best practices for attorneys to participate in e-filing in any courts in which it is available. As a result, the subcommittees were altered for the purpose of formulating recommendations. The “Surrogate’s/Specialized Courts” and “Appellate” subcommittees remained intact. The “Federal/Commercial” subcommittee was eliminated, the “Supreme/County” subcommittee was expanded to include commercial parts, and a new subcommittee on “Best Practices” was created. The recommendations regarding each of these specialized areas were developed by the subcommittees, but all recommendations in this report are the recommendations of the Task Force as a whole.

## **SECTION I. DEFINITIONS AND ASPECTS OF E-FILING**

### ***A. An Introduction to E-Filing***

Electronic filing (or e-filing) is a process that recognizes both the pervasiveness and power of computers and the Internet in modern legal practice. Given that almost every legal document is created on a computer, and that most attorneys and parties are utilizing electronic mail to communicate, integrating these methods into the court system can improve efficiency by removing the need to print and store paper versions of the documents or to visit courthouses to retrieve them. Depending on the e-filing method,

the filed documents may be searched and indexed in a database for ease of access, retrieval, and review. Converting to e-filing can significantly reduce the amount of space needed by courts and attorneys for storage of filings, and the use of off-site backups can protect against loss of files due to natural or man-made disasters.

There are also significant financial benefits as well for all aspects of the judicial system. Switching to e-filing reduces postage and duplication costs, since documents can be copied and transmitted via e-mail or download rather than paper. An e-filing system can be automated to a greater extent than a paper-based platform, allowing the same number of court employees to handle a greater number of cases and respond more quickly to attorney and judicial requests for information without increasing workload. For attorneys and litigants, e-filing reduces production and transmission costs for papers and related documents, and lowers travel and service costs for parties far from the courthouse. In some jurisdictions where e-filing has been established and supported by the bar, attorneys given access to the e-filing system adopt it readily.<sup>2</sup>

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<sup>2</sup> For example, in his June 2005 report on the FBEM (Filing by Electronic Means) pilot in New York State (discussed *infra* on page 28), Chief Administrative Judge Jonathan Lippman writes,

The use and acceptance of FBEM has been much greater in New York City, where its strong endorsement by the City's tax certiorari bar and the City Tax Commission as the most efficient way to do business has been extremely helpful. Last year, 62% of all tax certiorari cases filed in New York City were filed electronically. The commercial bar also has been using the FBEM system more frequently, especially since many of the law firms now use e filing in their litigation in the federal courts which require that new cases be electronically filed. In fact, between February and mid April of this year, the New York County Commercial Division saw an increase in the filing of FBEM cases of 37%.

E-filing encompasses a number of different elements. It may include:

- Filing documents in their original word processing format (e.g. Microsoft Word; WordPerfect)
- Creating and filing scanned images of paper documents as well as digitally created files, using software such as Adobe Systems Incorporated's Acrobat (whose files are known as PDFs, for Portable Document Format)
- Establishing an online docketing system through which all filings (both paper and electronic) may be tracked (such as the current PACER system used by the Federal court system)
- Converting all filings to a common electronic text format for ease of searching and indexing (as in the case of the SEC's EDGAR system)
- Initiating an action through electronic notice to the court and other parties
- Serving other parties for an ongoing action via electronic notice

Making electronic versions of documents available for downloading by attorneys, parties, and/or the general public

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Chief Administrative Judge Jonathan Lippman, "Report on the Unified Court System's Filing By Electronic Means Pilot Program 1999-2004" (June 6, 2005), p. 5. The report in its entirety is contained in APPENDIX 5.

Depending on the needs of the court, the types of parties and matters involved, and the prevalence and character of pro se litigants, some or all of the above elements may be adopted as part of an e-filing regimen. E-filing systems may be managed by the court, a third-party vendor, or by a combination of the two.

### ***B. The New York State Court System***

To date, there is no courtwide e-filing structure for the New York State court system. This system, under the overall management of OCA, is made up of a number of different types of courts, covering both civil and criminal matters:

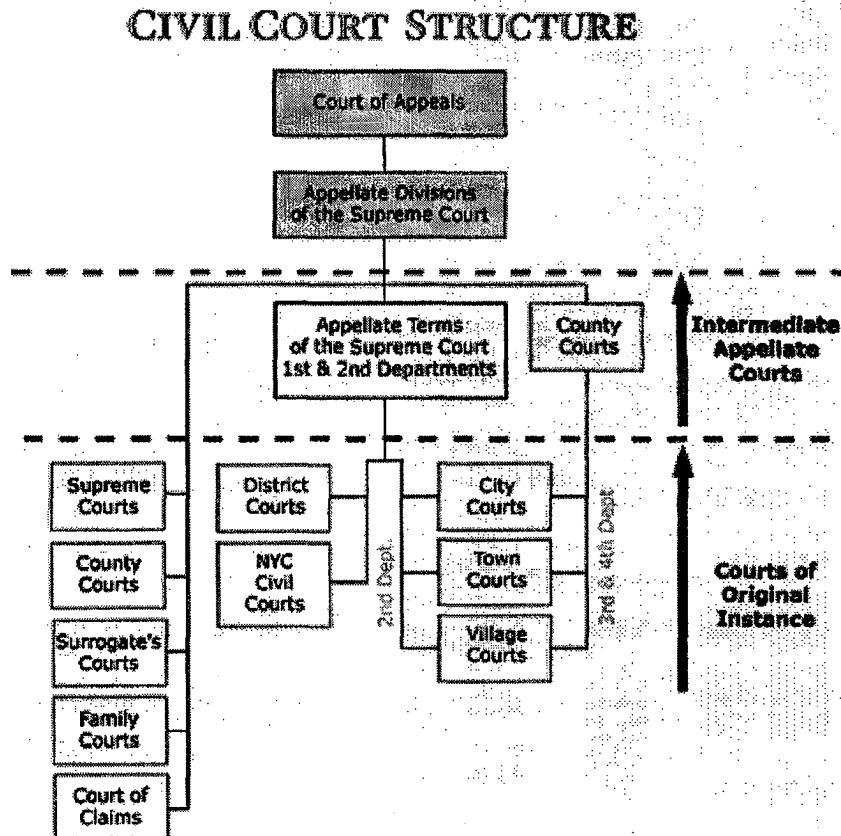


Figure 1 Civil Court Structure, from <http://www.courts.state.ny.us/courts/structure.shtml>



## CRIMINAL COURT STRUCTURE

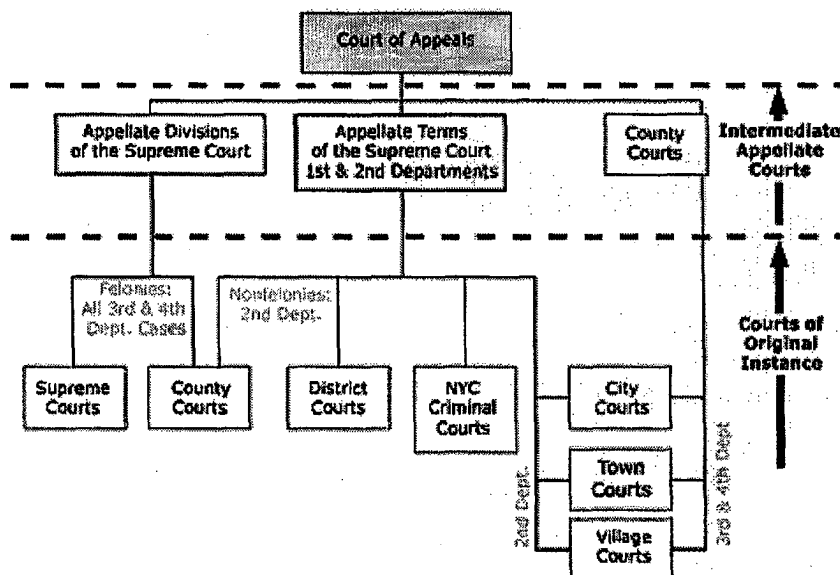


Figure 2 Criminal Court Structure, from <http://www.courts.state.ny.us/courts/structure.shtml>

Today, each of these courts may have its own filing requirements and procedures, arising out of the particular procedure act governing the court and rules of individual judges.

These courts also operate parallel to the four United States District Courts in New York (Northern, Southern, Eastern and Western Districts), along with the associated bankruptcy courts, adding to the complexity of filing methods faced by New York practitioners.

### ***C. The Task Force on E-Filing***

Chief Judge Judith Kaye, in her 2005 State of the Judiciary Report, highlighted the importance of continuing the growth of e-filing:

I am particularly pleased to report gains in our Filing by Electronic Means (FBEM) project, first authorized by the Legislature in 1999. FBEM allows

litigants to commence certain types of lawsuits electronically and then continue to exchange papers online. Since its inception, we have provided training to the bar and court staff, and worked to simplify the system. Last year, filings doubled, and we are hopeful that this trend will continue. As the experiment has expanded to new localities and courts, we have established a resource center that can assist in the smooth introduction of FBEM to the bench and bar. With the most recent extension of the authorizing statute sunseting in September, we will be working with the Legislature to extend and further expand this important project. This is, after all, the 21st century—our courts must reflect it!<sup>3</sup>

In accordance with Chief Judge Kaye's mandate, the members of the Task Force met regularly from the autumn of 2005 through 2006 to study and formulate their findings and recommendations on e-filing. Through vendor presentations, detailed discussions with constituencies, research into other jurisdictions, and overall and subcommittee meetings, the Task Force has created a set of detailed, workable recommendations which should apply to any e-filing system in the New York State courts.

#### ***D. Critical Aspects of E-Filing***

During its discussions, the Task Force identified a number of aspects of e-filing that required special attention. Any e-filing effort must adequately deal with these aspects in order to be truly successful. The issues identified by the Task Force include:

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<sup>3</sup> Chief Judge Judith S. Kaye, The State Of The Judiciary 2005, found at <http://www.nycourts.gov/admin/stateofjudiciary/soj2005.pdf>.

- **Access Methods and Restrictions:** What kind of access controls will be placed on documents e-filed with the court? How will sensitive information (e.g. Social Security numbers, financial information, names of minors) be segregated to maintain confidentiality? How will the system address sealed cases and records? Will the general public have access to e-filings and, if so, where and how? What about non-attorney parties?
- **Security:** How will the integrity of stored files be maintained, both physically and electronically? How will viruses and other malicious files be kept out of the system? What provisions will be made for natural disaster and other disruptions to access? How will the system be protected from intentional or accidental damage?
- **Training, Instructional Manuals and Help Desk:** How will attorneys and court employees be trained in the use of the system, and at what cost? If pro se litigants will be participating in an e-filing system, how will they receive training? Who will be responsible for drafting instructional materials, focused on the particular needs of the New York State courts and their users? How will ongoing technical support be handled, both at the courthouse and remotely for e-filers?
- **E-Service Generally:** How will large documents be handled? What about those filings and exhibits that are not easily scanned? Who will be responsible for any courtesy copies requested by the court? Will clerks be available and trained to assist pro se litigants with both technology and procedural issues related to e-

filing?

- **Commencement and Summons Service:** Should parties be able to commence actions via electronic (i.e. non-paper) filing? Should they be able to acquire initial jurisdiction by electronic service? What about service on non-attorneys or those who have not yet used the e-filing regime, who may not have registered e-mail addresses? If electronic service is permitted, how will proof of service be indicated?
- **Motion Practice and Other Interlocutory Papers:** How will motions and interlocutory papers be handled? What about those interlocutory papers which do not currently get filed with or otherwise furnished to the court?
- **Payment:** What kind of payment methods will be included within an e-filing regime? Are the clerks able to accept credit cards (the most common online payment method), and are there other methods that might be easily implemented? What about parties (particularly pro se litigants) who may not have credit cards or bank accounts? What about division of payments among different parties (court clerks, County Clerks, vendors if used)? How will security be guaranteed for payment information?
- **Downloading/Copying Charges:** Will there be additional charges for downloading or printing documents, similar to those currently assessed for photocopying at courthouses? If so, what will those charges be and how will they

be collected?

### ***E. Definitions***

As e-filing can encompass many different technologies and features, the following definitions will be a helpful resource:

#### **Key Terms:**

**Electronic Access:** Using the Internet or a court-based computer terminal to obtain calendaring information, images or the full text of documents.

**Electronic Filing:** Sending digital versions of documents through a computer network to a court or clerk.

**Electronic Service:** An electronic transmission of documents to a party, attorney or representative in a case, constituting service of papers.

#### **Additional Definitions:**

**Acrobat:** The Acrobat software from Adobe Systems Incorporated, which creates PDF files (see below) that can be read with formatting intact on any computer.

**Acrobat Reader:** The free reader software for PDF files, available for download at <http://www.adobe.com>.

**Download:** To directly receive a file from another's computer via the Internet.

**E-Signature (Electronic Signature):** A means of indicating an individual's verifiable

signature within an electronically created document.

Encryption: Software-based scrambling of a file to prevent unauthorized access.

FAQ: Frequently Asked Questions.

FBEM (Filing by Electronic Means): The current New York state e-filing pilot project (discussed in SECTION VI of this report, beginning on page 28).

PACER (Public Access to Court Electronic Records): The federal e-filing system.

PDF (Portable Document Format): The type of file created using Acrobat (see above).

Upload: To directly send a file from a user's computer to another via the Internet.

## **SECTION II. MAJOR ISSUES OF E-FILING**

The Task Force began its analysis of e-filing in the state courts by identifying three questions, the answers to which would give direction to the Task Force's efforts and deliberations. These questions were:

- 1) Whether it was desirable and/or legal to contract with a third-party, profit-making institution to provide an electronic filing system. It was noted that the federal system is funded by the proceeds from the PACER system.
- 2) Whether the state system should incorporate the existing federal electronic

filing system (described in SECTION IV, below).

- 3) The manner in which the Task Force should seek input from practitioners, the courts and County Clerks.

Within each subcommittee, members looked at the current functional and documentary requirements of their designated court system, and made recommendations for e-filing for that court, based on the following common questions:

- 1) Mandatory v. Voluntary
  - a) If mandatory, who may opt out?
  - b) If mandatory, length of grace period?
  - c) If mandatory, accommodations offered to attorneys and others?
- 2) Extent to which e-filing can be uniform throughout the state
- 3) Cost Issues:
  - a) Whether costs should be incurred to client for e-filing (e.g. Lexis-Nexis, Schram's system)
  - b) Whether cost-saving by court due to e-filing should be passed on to consumer by lower filing fee

- 4) Large Firm/Small Firm/Pro Se issues regarding cost of technology in order to e-file
- 5) Security/Privacy of documents or parts thereof
  - a) How is access restricted?
  - b) If self-select level of security, are there any limits?
- 6) Electronic Signatures, Treatment of “Originals” and Exhibits that do not lend themselves to electronic format
- 7) E-service issues
  - a) Can E-service be substituted for hard copy service?
  - b) Service of interlocutory vs. commencement documents
  - c) Service upon participating and non-participating lawyers
- 8) Database issues - Whether there is a repository of documents only, or other information regarding status of applications, etc.

The entire Task Force discussed the Subcommittees’ recommendations regarding individual courts, and collated them into a single set of overall recommendations for e-filing, which may be found below in SECTION IX of this report.

### **SECTION III. ISSUES OF ACCESS AND SENSITIVE**



# INFORMATION

## *A. The Abrams Commission Report*

In April 2002, Chief Judge Kaye appointed the Commission on Public Access to Court Records (“Abrams Commission”) to study and make recommendations on the issues of privacy and public access to electronic records. In February 2004, the Abrams Commission issued its report,<sup>4</sup> which was comprised of six recommendations. These recommendations and the minority report (which disagreed with one of the recommendations) are summarized below.

1. Public court cases should be accessible in electronic form on the Internet without across-the-board limitations

If the records are public in nature, they should be as accessible to the public online as they currently are on paper. Records that are sealed should not be publicly accessible online. Online records should be available free of charge, or at most for a nominal fee that does not exceed the actual cost to provide such records.

(The minority report was concerned with privacy issues and inadvertent or improvident disclosures, and proposed a lag or delay between e-filing and public access to address any issues, such as objections to public disclosures of the information.)

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<sup>4</sup> The report, in its entirety, is contained in APPENDIX 6.

2. Public court case records should not contain certain personal identifiers

If public court case records reference certain personal identifying information, they should be redacted by attorneys or pro se litigants. Examples include Social Security and financial account numbers, names of minor children, and dates of birth. The courts should liberally grant requests of protection from disclosure.

3. Priority should be given to the availability of court orders and judicial opinions on the Internet; the availability of other materials will be on a pilot basis

In implementing Internet access to case records, priority should be given to the online availability of dockets and judicial opinions of all courts. With respect to other case records, including pleadings and other papers filed by the parties, UCS should begin making such records available remotely over the Internet in those state courts that already permit electronic filings.

4. Principles should be applied prospectively

Earlier created court case records (other than judicial opinions) that may be placed on the Internet may contain personal information. Rules should be adopted to comply with the recommendation to protect this information.

5. UCS should provide education to practicing attorneys, litigants and judges regarding the public access to court records over the Internet

6. Nothing in these recommendations and conclusions should be understood to bar

any motion currently permitted under law for protective relief

## ***B. OCA Implementation of Abrams Commission Report***

### Presumption of Openness and Public Access, Unless Good Cause Exists to Restrict Access

Pursuant to Part 216 of the Uniform Rules for the New York State Trial Courts, a presumption of openness and public access applies to court records, absent any statutory provisions, court orders, or other applicable rules restricting access to the records. 22 N.Y.C.R.R. § 216.1. An exception applies if good cause has been shown and the determination of good cause is made after balancing the interests of the public and the parties.

At the time of the Commission's Report in February 2004, court documents were available to the public in paper form at the courthouse or at the County Clerk's office. The UCS E-Court initiative also provided some information online, such as certain trial court index information, judges' calendars, information about future court appearances, and selected decisions. E-Courts provided Supreme Court civil decisions from 28 counties and Supreme Court criminal and other criminal court decisions from 13 counties. The Law Reporting Bureau screened all decisions posted online for compliance with the statutory requirements requiring anonymity for persons named in text. On

discovery of non-compliance, the Bureau would consult with the authoring judge to make the correction and then repost the decision. The UCS had engaged in an electronic filing pilot in selected jurisdictions, permitting the electronic filing of certain cases in Commercial Division, Court of Claims and tax certiorari cases when all parties agree to participate.

#### State of Judiciary 2005 Report: UCS Acts on Recommendations

In the State of Judiciary 2005 Report, Chief Judge Kaye reported that the UCS began to immediately act on the Committee's recommendations and prioritize the implementation. First, access to court calendars and docket information at the E-Courts section were increased, through expanded coverage of the Future Court Appearance System for civil cases, and introduction of online access to criminal calendars in some locations. This action is consistent with the Committee's third recommendation. UCS also planned to add Family Court calendars and more categories of judicial decisions online on their Web site, starting with Queens County Supreme Court and Supreme and County Court in the Sixth Judicial District.

UCS intended to implement the guidelines recommended by the Committee in protecting the privacy and security of individuals (second recommendation). Certain sensitive materials, such as Social Security numbers, financial account numbers, names of minor children and dates of birth, are excluded from filing materials in both paper and electronic forms. The recommendation suggested the use of abbreviated versions of the personal identifiers, yet it was not specified in the 2005 Report whether this sensitive

material would be completely excluded or allowed on an abbreviated basis.

Also in following the Committee's recommendation (third recommendation), UCS planned a pilot project in Broome County, in collaboration with the courts and the Broome County Clerk, to create electronic copies of documents in the case file.

In accordance with the fifth recommendation, UCS offers an online user manual that covers the overview of Filing By Electronic Means (FBEM) system and the applicable rules, as well as a step-by-step guide for filing.<sup>5</sup> In the FAQ section, one may contact the staff of the court in question for training. The New York County Supreme Court also provides attorneys a free two-hour training session, worth two CLE credits.<sup>6</sup>

UCS adopted neither the majority nor the minority view regarding access to e-filed documents. Instead, UCS permits the filer to determine the level of file security, which could limit public access to the file from remote locations. Access to all e-filed documents, regardless of the security designation by the filer, is permitted at the courthouse, unless the document or file is sealed pursuant to statute or court order. Currently, UCS allows the public to search for cases, claims and documents<sup>7</sup> and offers a

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<sup>5</sup> N.Y.S. Unified Court System – Filing By Electronic Means, accessed April 9, 2006, “<https://iapps.courts.state.ny.us/fbem/mainframe.html>”. The manual is included in APPENDIX 7.

<sup>6</sup> N.Y.S. Unified Court System – Filing By Electronic Means, accessed April 9, 2006, “<https://iapps.courts.state.ny.us/fbem/mainframe.html>”.

<sup>7</sup> N.Y.S. Unified Court System – Filing By Electronic Means, accessed April 9, 2006, “<https://iapps.courts.state.ny.us/fbem/mainframe.html>”.

subscription service, CaseTrac, which allows the subscriber to subscribe to track cases and be notified by e-mail when any changes have occurred with the case.<sup>8</sup>

## **SECTION IV. THE FEDERAL EXPERIENCE**

### ***A. Overview of the Task Force's Federal Subcommittee***

One subcommittee of the Task Force reviewed the existing e-filing regime present in the federal courts in New York State. This system was extremely relevant to the Task Force's inquiry, since it is in use and familiar to those New York attorneys with federal litigation practices. As a result, the Task Force, and particularly the federal subcommittee, considered suggesting that OCA adopt the federal e-filing system, so that those attorneys practicing in both state and federal courts would not need to learn and support two e-filing systems. Additionally, by adopting the federal approach, OCA could benefit from any benchmarking done and lessons learned by the federal courts.

### ***B. History Of Implementation Of E-Filing In The Federal Courts***

E-filing, which is now mandatory in virtually every federal court in New York State<sup>9</sup>, was introduced to attorneys in stages over several years.

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<sup>8</sup> N.Y.S. Unified Court System, Electronic Courts, CaseTrac, accessed April 9, 2006, "<https://iapps.courts.state.ny.us/caseTrac/jsp/ecourt.htm>".

<sup>9</sup> See, for example, the Case Management/Electronic Case Files (CM/ECF) Web site for the Northern District of New York at <http://www.nynd.uscourts.gov/cmecf/>.

### **1. First Stage**

The process began with the introduction by court clerks of the PACER<sup>10</sup> system. At the outset, it enabled attorneys to view only court dockets over the Internet. Attorneys were able to confirm the filing of documents, see what documents others had filed, verify the scheduling of motions, and check court calendars. Each clerk's office maintained its own database, which could be accessed through PACER. The ease of use of the PACER system encouraged attorneys to become familiar with obtaining court information from the Internet.

### **2. Second Stage**

The next stage evolved as court clerks began scanning filed documents, storing them electronically, and linking them to the corresponding references on dockets. This enabled practitioners to view the actual file documents over the Internet. Once viewed, an attorney could save or print the documents. Access to the PACER system to view dockets was without charge, but viewing documents required attorneys to pre-register with the PACER system, submit a credit card number for billing purposes, and pay a fee, initially \$.07, but now \$.08, a page, to view and print a document. This relatively modest fee pays for the operation of the PACER system.

### **3. Third Stage**

The next step in the evolutionary process enabled attorneys to file and serve documents electronically from their own offices. This began with court clerks inviting a small number of local firms to establish links with a Web site which was established for each

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<sup>10</sup> PACER is an abbreviation for Public Access to Court Electronic Records; see [www.pacer.uscourts.gov](http://www.pacer.uscourts.gov) for more information on the system.

clerk's office. These firms tested the system for a period of several months. An educational program of approximately 3 hours in length was developed and attorneys were taught the electronic filing process from computers that were located in the clerks' offices. As these attorneys learned the system and glitches were resolved, the program was expanded on a voluntary basis to practitioners in each court. The program continued to expand as attorneys signed on and learned the benefits of e-filing first hand. When the numbers of attorneys e-filing reached a target level, e-filing was made mandatory by various courts at various times. Today, e-filing is mandatory, with few exceptions, nationwide throughout the federal court system.

#### **4. Paper**

As part of the adoption process, the federal courts required paper copies of documents to be served in conjunction with e-filing. This, of course, will continue where service is required on non-attorneys. The physical service of paper copies and electronic service of e-filed documents continues in some courts, but, in all four federal districts in New York State, the service of paper copies on attorneys who are part of the e-filing system is no longer required, and these attorneys are served only electronically. Anecdotal evidence indicates that this development has been a significant convenience and a cost savings to attorneys, especially in multi-party litigation.

#### ***C. EDNY Bankruptcy Court "Wish List"***

As part of its work investigating the federal experience, the Task Force met with Charles Langlois, Special Projects Manager for the Bankruptcy Court of the Eastern District of New York. Following the meeting, Mr. Langlois shared a "wish list" collected by the



Bankruptcy Court from attorneys using the system, which served as a resource for the Task Force in formulating its recommendations for the implementation of e-filing in the state courts. This list can be found in APPENDIX 8.

#### ***D. Possible Hurdles to Adoption of the Federal System***

In its discussions, the Task Force considered whether or not it was possible for OCA to simply adopt the federal system, and the Task Force identified potential hurdles to such adoption by OCA. The first impediment was whether the software used by the federal courts is available for licensing by OCA, and if so, at what cost. There was also the question of whether the software and systems used by the federal courts would properly work with the computer systems used by the state courts.

Beyond the technical issues, the courts included within OCA may be more diverse in subject matter than the federal courts. The federal system may lack the technological flexibility to deal simultaneously with the specific requirements of the various state courts (e.g. Surrogate's Court, Family Courts, city and town courts, etc.). Finally, while those attorneys currently practicing in federal courts are familiar with the system, other attorneys and pro se litigants in New York would require extensive training in order to use it.

#### ***E. Conclusion***

As of March 2006, it is estimated that more than 15,000 New York attorneys practice in the federal court system and participate in e-filing. These include practitioners with civil and criminal cases in district and bankruptcy courts. Additionally, New York attorneys

may have actions pending in federal courts in other parts of the country. In order to access the file in these actions, the attorney need not travel to a remote courthouse; he or she may read or print any document from any computer with internet access.

Nonetheless, anecdotal information, as evidenced by the “wish list,” indicates that there are some shortcomings in the federal e-filing system. The Task Force considered these issues and its recommendations for e-filing in New York State courts reflect learning from the federal experience.

## **SECTION V. E-Filing In Other States**

A number of states and smaller jurisdictions throughout the United States have implemented mandatory e-filing regimes. Other states, like New York, have pilots or voluntary programs. The Task Force researched these, as a guide to what New York might and might not wish to follow. Information about these other states as of January 2006 can be found in APPENDIX 9 to this report.

## **SECTION VI. THE FBEM (FILING BY ELECTRONIC MEANS) PROGRAM**

### ***A. Pilot***

In addition to the federal system described in SECTION IV, New York already has an existing pilot e-filing system, known as FBEM (Filing by Electronic Means). This pilot program, authorized in 1999 by the Legislature and launched in 2000, is an optional test program focusing on three aspects of e-filing: filing initiating papers; e-service of process upon adversaries; and e-service of interlocutory papers. At its inception, the FBEM program included three case types (commercial actions, tax certiorari proceedings, and actions in the Court of Claims) and three counties (Monroe, New York, and Westchester).

Today, FBEM is authorized:

.... in commercial, tort and tax certiorari cases in Albany, Monroe, Westchester, New York, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Erie, Niagara, Essex, Onondaga and Sullivan counties; in Broome county, all cases in supreme court may be eligible for filing by electronic means treatment; cases in the Court of Claims as designated by the Court of Claims and the New York State Attorney General's Office; and cases in the Surrogate's Court in Erie County. The Erie County Surrogate's Court will be using a type of automated filing function for probate cases, but it is not yet set up to receive a full FBEM case.<sup>11</sup>

The current FBEM system is entirely voluntary. While anyone may commence an action through FBEM, in order for another attorney or party to be included within the system for

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<sup>11</sup> FBEM Web site Manual and FAQs, located at <https://iapps.courts.state.ny.us/fbem/mainframe.html>.

that particular case, he or she must file a consent form.<sup>12</sup> If any party or attorney to an action does not consent, the action will not continue as an e-filing action.

In June 2005, Chief Administrative Judge Jonathan Lippman drafted the most recent report on the progress of the FBEM pilot program. In this report, Judge Lippman detailed the development and expansion of the FBEM pilot, including some of the operational and other issues the program faced. He wrote,

This is not where we hoped to be at this point in our experiment. We had in fact hoped to have seen many more cases e-filed, so that the State would have more of a track record upon which to measure success and to provide more assurance that further expansion of the experiment is in the public interest. It is essential to note, however, that in all the states nationwide in which e-filing has not been made mandatory, acceptance of electronic filing has been slow. Attorneys are by their nature somewhat risk adverse, and it takes a great deal of education, training, and collaboration to get them to lay aside a century's [sic] old dependence upon paper filing in litigation and to try e-filing. In addition, some have expressed concerns for the privacy and security of their documents when they are e-filed, which concerns have been alluded to above. Although the UCS has worked hard to allay these concerns, it remains clear that, regardless of the efficacy of the safeguards put in place, it will take more time for the bar to feel truly comfortable.<sup>13</sup>

### ***B. How to File Under FBEM<sup>14</sup>***

In order to file documents on the FBEM system, a person must be a registered and authorized filing user by submitting a written application form. A registered user is

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<sup>12</sup> Consent to FBEM, located at [https://iapps.courts.state.ny.us/fbem/forms/FBEM\\_consent.pdf](https://iapps.courts.state.ny.us/fbem/forms/FBEM_consent.pdf).

<sup>13</sup> See Lippman Report, p. 6, discussed *supra* in Footnote 2.

<sup>14</sup> Filing By Electronic Means Manual, available in APPENDIX 7 to this report.

issued a Filing User identification and password. A Filing User who is an attorney need only register as a Filing User once, and may consent to FBEM and file on behalf of any party that attorney represents in any FBEM case. A self-represented person and an attorney admitted pro hac vice will be restricted by the FBEM system to filing documents on the case and index number in which the self-represented person is a party or the attorney is permitted to act as counsel.

Any case may be commenced by means of the FBEM system. If the action is commenced by e-filing, the user must serve the initiating papers in traditional paper form, along with a Notice Regarding Availability that informs the defendant/respondent of invocation of the FBEM system. Then, each party served with the Notice Regarding Availability must serve and file a consent form or serve and file a writing advising all parties that it does not consent to FBEM. On the consent form, the consenting party must indicate at least one e-mail address (and as many as three) as e-mail address(es) of record.

If the case is commenced by traditional means, any party may propose to convert the case to an FBEM matter by serving on all parties a Notice Regarding Availability. Then, each party served with the Notice Regarding Availability must serve and file a consent form or serve a writing advising all parties that it does not consent to FBEM. In all cases, a conversion to FBEM requires the consent of all parties.

Once an action has become subject to FBEM by virtue of the consent of all parties, all papers will generally be served and filed electronically, unless it is not practical or possible to do so. Additionally, the court may require previously filed paper documents

to be e-filed. All papers to be e-filed are filed electronically on the FBEM Web site. On the day of filing, the filer must also forward an electronic Notice of Filing to all e-mail addresses of record. The Notice identifies the title of the paper filed, the date filed, and the number of the document on the electronic docket. Then, recipients access the Web site to obtain a copy of the paper filed. Alternatively, a Filing User may use normal CPLR service of paper documents, but the documents served in hard copy should be filed electronically with proof of service.

All documents filed on the FBEM system must be in Portable Document Format (“PDF”). Any dispositive order must be signed by the judge and will be scanned into the FBEM system. Judges may make allowances for e-filing and e-signing of non-dispositive orders. Entry of an order or judgment (except for the purpose of starting a party’s time to appeal) is done by e-mail transmission by the clerk. It is not necessary for the Filing User to formally sign any document which is e-filed; however, the signature page of any document signed by someone other than the Filing User must be scanned and e-filed. There are some additional special rules for filing of tax certiorari proceedings.

### ***C. Current Availability of FBEM***

As of the date of this report, the FBEM system covers certain courts within the following counties: New York, Monroe, Westchester, Kings, Queens, Richmond, Suffolk, Nassau,

Albany, Bronx, Erie, Broome, Essex, Niagara, Onondaga, and Sullivan, as well as the Court of Claims for the Albany District.<sup>15</sup>

#### ***D. Other OCA Electronic Programs***

On July 6, 2006, the Unified Court System announced a new pilot for making court records available to the public online, beginning in Manhattan and Broome County. According to the announcement, Manhattan would make available “a “virtual” file of civil cases in Supreme Court, including pleadings, preliminary conference and other case-management orders, requests for judicial intervention, notes of issue, orders to show cause and notices of motion.” Additionally, case activity information would be provided. The Manhattan pilot was to begin in September. The Broome County pilot, beginning during the summer of 2006, will include the entire files for civil cases, although “[U]nlike the pilot in Manhattan, attorneys and members of the public will be required to register and use password to access court records.” The announcement also stated that Family Court calendars, Appellate Division briefs and Supreme Court activity notices would be made available online through the court system.<sup>16</sup>

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<sup>15</sup> FBEM Public Inquiry Page, available at <https://iapps.courts.state.ny.us/fbem/mainframe.html>.

<sup>16</sup> New York State Unified Court System, “New York Courts to Make “Virtual” Case Files Available on the Internet; Pilots to Begin in Manhattan and Broome County”, July 6, 2006, available online at [http://www.courts.state.ny.us/press/pr2006\\_15.shtml](http://www.courts.state.ny.us/press/pr2006_15.shtml).

A few other courts in New York have made inroads into electronic filing. The Onondaga County Surrogate's Court in the Fifth Judicial District has an online records search available to the public.<sup>17</sup>

## **SECTION VII. RULES OF E-FILING IN NEW YORK**

### **APPELLATE COURTS**

#### ***A. New York Court Of Appeals***

Presently, the rules of practice of the New York Court of Appeals permit e-filing on a fairly limited and essentially voluntary basis. Rule 500.2 of the Court's rules provides as follows:

##### **Section 500.2 Companion filings on compact disk, read-only (CD-ROM).**

(a) The court allows the submission of briefs, records or appendices on compact disk, read only memory (CD-ROM) as companions to the requisite number of printed briefs, records and appendices filed and served in accordance with this Part if all parties have consented to the filing of the companion CD-ROM brief and record or appendix. The court, by order on motion of any party or on its own motion, may require such filing by a party or amicus.

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<sup>17</sup> Access to the system is at <http://surrogate5th.courts.state.ny.us/public/>.



(b) The companion CD-ROM brief, record or appendix shall comply with the current technical specifications available from the clerk's office.

(c) The companion CD-ROM brief, record or appendix shall be identical in content and format (including page numbering) to the printed version, except that each also shall be word-searchable and shall provide electronic links (hyperlinks) to the complete text of any authorities cited therein, and to all documents or other material constituting the record on appeal. The disk and container shall be labeled to indicate the title of the case and the documents reproduced on the disk.

(d) Unless the court requires a greater number, 10 disks or sets of disks shall be filed, with (1) proof of service of at least one disk or set on each other party and (2) a copy of the parties' stipulation permitting, or the court's order directing, such filing.

(e) Unless the court requires otherwise, appellant's filing and respondent's filing, or a joint filing by appellant and respondent, are due 10 days after the final due date for filing appellant's reply brief (see section 500.12[d] of this Part).

The rule makes clear that filing of briefs by CD-ROM shall be in addition to the filing of the required number of briefs, records and/or appendices. Moreover, such filing is only permitted where the parties consent or where the Court orders that it be done.

The Clerk of the Court, Stuart Cohen, reported to the Task Force that to the best of his recollection, the Court had never issued such an order, and voluntary filing by CD-ROM is otherwise rarely done (only one or two cases per year).

Mr. Cohen reported that no expansion of e-filing in the Court of Appeals is imminent.

He noted that any such expansion would be problematic, because the bulk of the filings in

the Court of Appeals are not appeals but criminal leave applications (often filed by *pro se* litigants and prisoners who may not have access to the necessary technology) and motions for leave to appeal in civil cases.

### ***B. United States Court Of Appeals For The Second Circuit***

Local Rule 32(a)(1) of the United States Court of Appeals for the Second Circuit requires that every brief “filed by a party represented by counsel” must be submitted in PDF format *in addition to the required number of paper copies* “unless counsel certifies that submission of a brief as a PDF document is not practical and would constitute a hardship.” The brief is electronically filed by sending it to the Court as an e-mail attachment.

The full text of Local Rule 32(a)(1) can be found in APPENDIX 10.

Note that Local Rule 32(a)(1) permits e-filing of briefs only. Records, appendices, motions, etc. must still be filed in paper format. According to Roseann B. MacKechnie, the Chief Clerk of the Second Circuit Court of Appeals, the only exception to this is found in Immigration & Naturalization Service cases, where the government has – for about one year – been filing the record in PDF format.

Ms. MacKechnie advised that the practice currently followed in the Second Circuit, as embodied in Local Rule 32(a)(1), is currently being followed in most or all of the Circuit Courts, and no expansion of e-filing in the Circuit Courts is imminent.

### ***C. Appellate Division: First Judicial Department***

No rules currently exist in effect in the First Department permitting electronic filing of any kind. Deputy Clerk David Spokony advised the Task Force that electronic filing for briefs and records is not likely in the near future and there are no rules permitting such filing being studied at this time. He informed the Task Force that in those cases where the record evidence was electronic in format (i.e. supplied electronically by the parties to the lower court), the First Department has accepted an electronic record for that portion of the record. Mr. Spokony indicated that of the 3,000 appeals taken to the First Department each year, about 30 percent are criminal appeals in which providers of the record are virtually all "institutional providers," that is, District Attorney's offices or Legal Aid Society, with neither the facilities nor the financial resources to provide records on appeal in electronic form.

### ***D. Appellate Division: Second Judicial Department***

No rules currently exist in the Second Department permitting electronic filing of any kind. Chief Clerk James Pelzer was asked whether implementation of electronic filing for briefs and records was under consideration in any form. Pelzer advised the Task Force that although there has been some discussion of this as a future option, no movement toward electronic filing is being contemplated in the foreseeable future, until electronic documents become as convenient and portable and accessible to judges as paper documents. The court would not favor e-filing as anything more than supplemental

since it would have to print the documents for the different judges on a panel.

The Second Department recently announced that it will be making briefs on decided appeals available in electronic form on the Internet; this is possible because the briefs are being scanned and stored in that form by the court.

### ***E. Appellate Division: Third Judicial Department***

No rules currently exist in the Third Department permitting electronic filing of any kind. Chief Clerk Michael J. Novack indicated that the topic of e-filing of briefs and records has not been a subject raised for discussion, and that there is no proposed rule for such filing. Mr. Novack stated that while he can foresee that attorneys might be required to file electronic copies of briefs in addition to paper copies in order to facilitate the ability of the courts to store such items and to make them available to the public, he did not see a near-term future for e-filing to replace paper, for the same reasons as given in the Second Department.

### ***F. Appellate Division: Fourth Judicial Department***

Rule 1000.3(h) of the Appellate Division, Fourth Department mirrors Rule 500.2 of the New York Court of Appeals, in that it permits but does not require (absent order) filing of briefs, records and appendices by CD-ROM, but only in addition to the filing of the

required number of printed brief, records and/or appendices.

The full text of Rule 1000.3(h) is as follows:

(h) Companion filings on interactive compact disk, read-only memory (CD-ROM).

(1) Companion filings on CD-ROM.

(i) The submission of records, appendices and briefs on interactive compact disk, read-only memory (CD-ROM) as companions to the required number of printed records, appendices or briefs in accordance with this section is allowed and encouraged provided that all parties have stipulated to the filing of the companion CE-ROM.

(ii) The court may, by order on motion by any party or sua sponte, require the filing of a companion CD-ROM.

(2) Technical specifications. The companion CD-ROM record, appendix or brief shall comply with the current technical specifications available from the Office of the Clerk.

(3) Content. The companion CD-ROM record, appendix or brief shall be identical in content and format (including page numbering) to the printed record, appendix or brief, except that each may also provide electronic links (hyperlinks) to the complete text of any authorities cited therein and to any other document or other material constituting a part of the record.

(4) Number. Ten disks or sets of disks shall be filed with proof of service of one disk or set of disks on each party to the appeal, together with a copy of the stipulation of

the parties to the filing of the companion CD-ROM or the order of the court directing the filing of the companion CD-ROM.

- (5) Filing deadline. Unless otherwise directed by order of the court, a companion CD-ROM shall be filed no later than 10 days after the printed record, appendix or brief is filed.

## **SECTION VIII. RECOMMENDATIONS REGARDING OCA IMPLEMENTATION AND EXPANSION OF FBEM**

### ***A. Treatment of Various Courts in this Report***

In making its recommendations, the Task Force separately examined courts of limited jurisdiction (“Specialized Courts” - See SECTION IX.B), courts of general jurisdiction (“Supreme and County Courts” - See SECTION IX.C) and appellate courts (see SECTION IX.D). While conclusions and recommendations for these different courts were often the same, the Task Force felt that separate consideration for each was in order.

The primary reason to treat these courts differently lies in the manner in which a case is commenced in the respective court. In Supreme and County Courts, actions (or proceedings) are commenced by filing a summons and complaint (or a petition) with the “Clerk of the Court.” The “Clerk of the Court” is defined by the New York Constitution,

Article VI, §6(e) as the County Clerk. The County Clerk is an autonomous office, which provides many other functions apart from judicial proceedings. While County Clerks in the five counties of New York City are appointed by judicial officers, the County Clerks in the remaining 57 counties are elected by the public. To further complicate the issue of filing, the Civil Practice Law and Rules (CPLR), which governs civil actions and proceedings in Supreme and County Courts, has numerous filing provisions, some of which explicitly require the filing with the "Clerk of the Court," while others do not so specify. As a result, in many counties papers are often filed in places other than the County Clerk's offices. Additionally, practice also varies from county to county as to the provision of papers for motions to be heard by individual justices; some counties have motion support offices, while other counties require that papers be furnished directly to the justice's chambers. Finally, fees for filing with the County Clerk, as set forth in CPLR Section 8020, are paid to the County Clerk. As a result, e-filing in Supreme and County Courts presents difficulties based upon the dual jurisdictions in the filing process of both the court system and the office of the County Clerk.

In contrast, cases are commenced in courts of limited jurisdiction by filing with the clerk of that court. The office of the clerk of a court of limited jurisdiction is part of the Unified Court System, and any fee required by the practice code governing that court is paid into the Unified Court System. For this reason, OCA has significantly more control over all aspects of e-filing in courts of limited jurisdiction.

Other reasons to consider different recommendations for these different courts lies in the dockets of each of the courts. For example, in 2005, statewide, 172,104<sup>18</sup> new contested cases were filed in Supreme Court. These cases primarily include matrimonial cases, simple and complex personal injury cases, commercial and other contract cases, tax certiorari proceedings, guardianship proceedings, and Article 78 proceedings, but can also include proceedings under numerous other provisions (e.g. Environmental Law, Judiciary Law, Election Law, Eminent Domain, Navigation Law, etc.). A case's disposition goals ("standards and goals") vary from 23 months to 30 months based upon the complexity of the case. Many cases remain pending beyond standards and goals. At the end of 2005, 210,955 contested cases were pending in Supreme Court; of these, 49,537 were pending beyond standards and goals.

In addition to contested matters in Supreme Court, many uncontested matters were brought in Supreme Court. For 2002,<sup>19</sup> 422,022 new civil filings were made in Supreme Court, of which 189,921 were new contested cases, 179,468 were ex parte applications and 52,633 were uncontested matrimonial actions.

New filings for 2005 in Surrogate's Court totaled 148,338.<sup>20</sup> Typically, about 30% are petitions for probate, 20% are accounting/trust cases, 17% are guardianship matters, 11% are voluntary administrations, 10% are administrations, and the remaining 12% are

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<sup>18</sup> Does not include uncontested matrimonial cases or ex-parte applications. These statistics are not yet official and were provided by OCA.

<sup>19</sup> This is the last year for which there was available a full analysis of the dockets of each of the courts. See "Twenty-Fifth Annual Report of the Chief Administrator of the Courts for Calendar Year 2002," which is contained in APPENDIX 11 to this report.

<sup>20</sup> Unofficial, as provided by OCA.



miscellaneous, including estate tax matters and adoptions.<sup>21</sup> Most of the proceedings brought in Surrogate's Court are subject to a forms-based filing. They also do not pend for as long a period of time as is typical in Supreme Court. In fact, OCA does not have standards and goals requirements for Surrogate's Court, and does not keep statistics on the number of cases pending at the end of the calendar year.

Many proceedings in Family Court are also forms-based. The number of new filings in Family Court in 2005 is much larger (678,408). Of these cases, about half are support-related, about one-quarter are custody and visitation cases, and the remaining matters include child protection, termination of parental rights, juvenile delinquent and PINS cases, and family offenses.<sup>22</sup> These cases move much more quickly than in Supreme Court; OCA has set standards and goals at 180 days from filing to disposition. At the end of 2005, there were 156,754 cases pending, of which 14,123 were pending over standards and goals. Finally, many of the parties to these proceedings are self-represented.

## ***B. Treatment of Various Courts in the Unified Court System's***

### ***FBEM Pilot***

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<sup>21</sup> See "Twenty-Fifth Annual Report," n. 2, at page 22.

<sup>22</sup> See "Twenty-Fifth Annual Report," n. 2, at page 20.

The FBEM Pilot was created in 1999. At the beginning, the test court, county and type of action proposed by OCA and enacted by the legislature were limited to Supreme Court and the Court of Claims in New York, Monroe and Westchester Counties in actions in the special commercial parts, actions brought in the Court of Claims, and proceedings under Article 7 of the Real Property Actions and Proceedings Law (tax certiorari proceedings). While subsequent enabling legislation has expanded the types of cases and the counties in which FBEM may occur, there has been little or no participation in FBEM outside New York County commercial and tax certiorari cases.<sup>23</sup>

The pilot program legislation has also permitted participation in FBEM in counties and in courts where there was no technology in place in order for the **electronic filing to occur**. For example, pilot legislation expanded FBEM to **Supreme Court in Erie County in 2002**. However, FBEM in Erie County Supreme is not yet possible. While enabling legislation has now expanded the number of counties in the pilot program to 16, **use of the FBEM site is limited to six counties**.

For the first time, in 2004, the pilot program was expanded to include a court other than Supreme Court or the Court of Claims. The pilot was extended by enabling legislation that year to Surrogate's Court in Erie County. However, use of FBEM in Erie County Surrogate's Court is not yet possible; the court underwent a conversion of its data management software from DOS-based DB Master to Windows-based UCMS in April, 2006. While OCA is actively pursuing this pilot, local personnel estimate that e-filing

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<sup>23</sup> See Lippman Report, discussed supra in Footnote 2.

may be two years away. It is not known when other counties, many of which have not yet converted to a Windows-based system, will be technologically ready for FBEM.

As one example of the growth of e-filing where it is has been available, according to the New York State Supreme Court's December 2005 status report on e-filing,

[i]n the filing season for 2005, 19,681 tax certiorari cases were initiated using the filing by electronic means system in New York City. This means that 82 % of the tax certiorari cases filed in New York City in 2005 were commenced by e-filing....Approximately 43,000 cases of all eligible types have been filed electronically to date.”<sup>24</sup>

By comparison, for the same period in the previous year, “14,434 tax certiorari cases were initiated using the filing by electronic means system. Of these, 7,368 were filed in New York County. 62 % of the tax certiorari cases filed in New York City in 2004 were commenced by e-filing.”<sup>25</sup>

### ***C. Future Expansion of FBEM Pilot***

The Task Force sees the greatest potential for early success in creating a statewide e-filing system with Surrogate's Court. Surrogate's Court is particularly well suited for e-filing because: (a) OCA has exclusive jurisdiction over the filing process in Surrogate's Court; (b) OCA has exclusive jurisdiction over the fees paid in Surrogate's Court; (c) technological changes and training necessary to implement these changes may be planned

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<sup>24</sup> [http://www.nycourts.gov/supctmanh/news\\_&\\_announcements.htm](http://www.nycourts.gov/supctmanh/news_&_announcements.htm)

<sup>25</sup> Id.

and provided by OCA; and (d) the types of cases filed in Surrogate's Court are limited in number and filing in these proceedings is already forms-based. These reasons will be further amplified in SECTION IX.B below.

In contrast, FBEM in Supreme Court presents some difficulties, but also presents the greatest opportunities. The difficulties are based upon the facts that (a) there is dual jurisdiction over the filing process in Supreme Court, shared by OCA and by the County Clerk; (b) there are two potential payees for fees paid for filing in Supreme Court; (c) each County Clerk operates autonomously, and technology changes, training, and staffing present issues that OCA may not be able to solve; and (d) the variety of cases and types of filings may make e-filing more difficult.

Some of the challenges of FBEM in Supreme Court underscore the benefit that a comprehensive e-filing regime could provide to Supreme Court practice. FBEM could become a single-filing system, as long as it was uniform throughout the state. For example, with paper filing, a practitioner bringing a motion on a case in Supreme Court would have different filing requirements in different counties, requiring the practitioner to consult with local attorneys before filing the motion, or risking misfiling. An FBEM system, with a single entry point eliminates that problem. Both the difficulties and advantages of e-filing in Supreme and County Courts will be further amplified in SECTION IX.C below.

## **SECTION IX. RECOMMENDATIONS REGARDING E-FILING IN NEW YORK COURTS**

The Task Force makes the following recommendations as a structure for an ideal fully implemented e-filing system. There are many paths which may be taken, to get from the current status of e-filing in New York state courts to such a system structured in accordance with these recommendations. There have been many thoughtful and constructive suggestions on how this may best be accomplished, including among others: limited mandatory pilots in State Supreme Court; additional pilot counties where both the County Clerks and the Court personnel have requested inclusion in the current pilot; moving toward a mandatory e-filing system on a county by county basis; and increased training and encouragement of attorneys to choose e-filing. The Task Force does not favor any one path over another, recognizing that moving from the current status of e-filing in New York state courts to a successful universal e-filing system will take the concerted efforts of the legislature, courts and lawyers. The Task Force recommends full cooperation among the stakeholders in order to effect a fair and efficient e-filing system without undue delay.

### ***A. Recommendations Applicable to All Courts of Original***

#### ***Jurisdiction***

- 1. Any e-filing system within the State of New York should be more than a repository of documents.**

An e-filing system should permit access to comprehensive dockets, to allow the end user to obtain information regarding future court dates, court decisions and any and all information that can be obtained at the courthouse.

**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.**

This recommendation is intended to address the methodology of e-filing, and the desire for a standardized interface and central portal for efficiency. To the extent that there are local rules with regard to form, content and timing of filing, this recommendation does not address those rules.

**3. There should be no fees imposed additional to those mandated for any other method of filing.**

If there were mandatory e-filing in the New York state court system, there would likely be attendant cost savings to the courts. It is the position of the Task Force that any cost savings ultimately be passed on to the consumer.

In contrast, third-party vendors provide e-filing assistance in certain jurisdictions outside New York. The services provided by these vendors require the user to bear related fees, primarily in the form of subscription rates or per-use charges. In the event OCA permits third-party vendors to perform e-filing services in New York, the use of said vendors

should be voluntary and not mandated, to avoid obligating the end-user to incur expenditures beyond set filing costs.

**4. All methods of payment should be permitted, including credit cards, debit cards, checks, e-checks, cash and a replenishment system.**

Where payment is made subsequent to the filing, documents will not be deemed filed until the payment is received. The Task Force recommends a uniform statewide rule as to what constitutes receipt of payment.

**5. E-filing should be mandatory.**

Of the 2,810 attorneys who responded to the NYSBA survey,<sup>26</sup> all but 46 have access to a computer workstation for the practice of law. All but 39 of them use the Internet as part of their professional activities. Approximately 44% of them have filed documents by electronic means in either the state or federal courts. Of the 1,290 attorneys who have indicated that they have previously filed documents by electronic means, 1,093 indicate an overall positive experience with only 197 indicating an overall negative experience.

The Task Force has concluded, due to limited participation in the FBEM pilot, that attorneys would not participate in an e-filing system unless it were mandatory. At the

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<sup>26</sup> The full survey results may be found in APPENDIX 4.

same time, based upon the survey results, the Task Force concludes that once required to use e-filing, attorneys see the benefit of it.

From the filer's standpoint, cost issues would not preclude implementation of a mandatory statewide e-filing system. Over time, technology has developed to the point that what was cost prohibitive ten years ago, currently is an affordable cost-of doing-business, including but not limited to, software to create a PDF file, a desktop computer with Internet capabilities sufficient to e-file, and the cost of high speed Internet connection. The aforementioned items serve multiple purposes, in addition to their use for e-filing.

From the Task Force's perspective, while the FBEM experience is instructive in terms of the technical aspects (commencement, fee paying, etc.) and some of the issues it may have faced during implementation, the fact that it has been limited to specific courts and counties and not been mandatory even there means that it is difficult to generalize to a statewide implementation. The Task Force would encourage the continuation and expansion of the FBEM pilot, including the incorporation of the recommendations and best practices contained within this report.

Given all of the advantages that e-filing provides, the Task Force concludes that a mandatory system is beneficial.

Recognizing that there needs to be a period of education and acclimation, the Task Force recommends that the following accommodations accompany our recommendation that e-filing be mandatory:



a. **E-filing should be voluntary during a 12-18 month grace period, prior to mandatory participation.** This grace period should be measured from the time that FBEM is 100% available to accept e-filing in any court in which it is to be implemented. During the voluntary time period, attorneys and parties can familiarize themselves with the system and the system's rules and regulations. Moreover, the voluntary transition phase will allow end-users sufficient time to upgrade their computers and obtain any necessary software.

b. **The Unified Court System should provide scanning and e-filing at every courthouse facility.** Local bar associations should consider maintaining at their facilities the tools to assist their members in accessing and utilizing the state's e-filing system.

c. **NYSBA should facilitate discounts on minimum required equipment.<sup>27</sup>**

**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.**

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<sup>27</sup> Minimum equipment and best practices are described in APPENDIX 11.

In order to ensure that the e-filing system is not made duplicative by the requirements of paper service, all attorneys must be able to accept service of papers through an e-mail address. The Task Force recommends a rule similar to General Order #22, Section 3 of the USDC, Northern District of New York.<sup>28</sup> Only self-represented parties would be served by paper.

**7. Pro se litigants would be neither required nor permitted to participate in e-filing unless certain concerns are addressed.**

The Task Force was concerned with potential abuse of the system by overly litigious self-represented parties. In addition, there is the lack of assurance of the authenticity of executed documents filed by pro se litigants in comparison to documents filed by attorneys under ethical and disciplinary court rules. Ultimately, it may be appropriate to accommodate self-represented parties should these concerns be addressed.

**8. Any action or proceeding should be able to be commenced by e-filing, but any required jurisdictional service must be made by traditional means on any party who has not yet appeared in that action or proceeding. All subsequent service would be done by e-service by the court on every party who has appeared.**

This recommendation regarding e-service does not affect jurisdictional service, which would continue to be done pursuant to Article 3 of the CPLR. In order for the e-service

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<sup>28</sup> "If a Filing User's e-mail address, mailing address, telephone or fax number change, they shall immediately update this information within their CM-ECF user account. Detailed instructions are available in the Northern District of New York's CM/ECF Users Manual."

The CM/ECF Users Manual is contained in APPENDIX 13 to this report.

to be accurate, it would be done by the court (in a similar manner to e-service by federal courts) to the required e-mail address of the attorney who has appeared. In order for the court to have a record of all appearances in the action or proceeding, the CPLR would need to be amended to require filing of a notice of appearance or a pleading or any other document which constitutes an appearance under the CPLR.

**9. Attorneys would be required to maintain all original documents.**

Documents would be e-filed with the “/S/” symbol indicating that the original document is signed by the attorney. If an attorney e-files a scanned document with a signature, it would be assumed that the attorney has the original signed document. In the event that a particular document in its original form must be provided to the court (e.g. a will), the document will be both e-filed and submitted to the court within a specified period of time.

**10. A document e-filed under an attorney’s user number should be deemed to be certified by the attorney as required by Part 130 of the Rules of Chief Administrator of the Courts.**

Rule 130-1.1(a)<sup>29</sup> requires a signature by an attorney which is deemed a certification that the filing is non-frivolous. The rule should be amended to include e-filing under the attorney’s user number as equivalent to the attorney’s signature.

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<sup>29</sup> 22 NYCRR 130-1.1a.

**11. All e-filed documents should be accessible to the public, subject to certain limitations.**

- a. **Cases which are sealed should continue to be accessible only to the court, parties and counsel of record.**
- b. **Users should be required to partially redact personal data such as Social Security numbers, date of birth, etc. from all documents. If such information is necessary to a case or controversy, the document should be filed under seal.**
- c. **E-filers may designate that a document includes inherently sensitive subject matter. Documents with such a designation should not be available from remote locations to anyone other than the parties and counsel of record, but should be available at the courthouse. Such a designation should be subject to review by the assigned judge upon the application of any person.**

**12. Parties should be encouraged to file exhibits in excerpted form to allow for efficient electronic filing and access.**

This is particularly true under current technology where unabridged exhibits may be

extremely large files. The Task Force recommends a rule similar to General Order 22, Section 4.4 of the USDC, Northern District of New York.<sup>30</sup>

### ***B. Recommendations regarding Specialized Courts***

**1. The Surrogate's Court should be converted to e-filing. Other specialized Courts such as the Family Court and Landlord & Tenant Court (Housing Court) should not be converted to e-filing at this time. E-filing under the authorized pilot in the Court of Claims should be expanded and the court should be converted to e-filing.**

The Task Force felt the Surrogate's Court was particularly suited for e-filing. It is a court of limited jurisdiction handling a finite number of different proceedings. It maintains its own records. Most of its proceedings and files are public records. On the other hand, Family Court and Landlord & Tenant Court would present some unique problems; among them would be the size of the docket, the number of pro se litigants and in the Family Court, the confidential nature of most of its proceedings.<sup>31</sup>

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<sup>30</sup> "4.4 Attachments and Exhibits.

A Filing User must submit in electronic form all documents referenced as exhibits or attachments in accordance with the Court's CM/ECF Users Manual unless the Court otherwise orders. A Filing User shall submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under the Court's consideration. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under these Administrative Procedures do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may also timely file the complete document or additional excerpts that they believe are directly germane to the matter under the Court's consideration."

<sup>31</sup> Online forms are used in other jurisdictions. The Task Force recognizes the potential for use of such forms for Family Court and Landlord & Tenant Courts, as well as otherwise specialized courts. The Task Force recommends that development of such forms be considered.

E-filing is permitted in all cases in the Court of Claims under the current pilot, but filing under FBEM has not yet occurred. The Court of Claims is very well suited to e-filing: there are limited types of actions that can be brought in the court, the court maintains its own records and the defendants are all represented by the Attorney General. FBEM should be extended to the court, and e-filing encouraged, with efforts made to convert the court to an e-filing system.

**2. E-filing and case management should eventually be integrated.**

The Task Force recognizes that the New York courts including the Surrogate's Courts are in the process of converting to the Universal Case Management System (UCMS). Courts that have not converted to UCMS are using DB Master or CCIS as their case management systems. There is at least one other project involving making case information available to the public. In the Fifth Judicial District all proceedings in the Surrogate's Court that have gone to decree are online and accessible over the Internet. Members of the public need to obtain a login and have a valid e-mail address before accessing the system. Since there is no e-filing there, the documents (pleadings, orders, decrees, etc.) are scanned by the clerk's office at the courts. Most of the counties in the Fifth Judicial District integrate the online system with the existing DB Master system, but at least one county, Lewis, is integrated with UCMS.

The Task Force understands that it is the goal of the Office of Court Administration that any system of e-filing be integrated with UCMS. No matter what system of e-filing is

used there will have to be an interface with the case management system. This does not require one system that handles both case management and e-filing, but rather that the two systems can “talk to each other” and transfer data between the systems. Conversion software to link the two systems should be developed as soon as possible.

**3. An e-filing system in Surrogate's Courts can be implemented before all Surrogate's Courts are converted to the UCMS system.**

The Task Force feels strongly that e-filing can and should be implemented in the Surrogate's Courts independently of case management.

**4. Information from e-filing should be used to populate the Court's case management system.**

Eventually an interface or interfaces should be developed so that e-filing can be used to populate the data in the UCMS system.

**5. In Surrogate's Court, the original will and death certificate would be filed with the court.**

As per the general recommendation set forth in SECTION IX.A.9 above, a will would be

both e-filed and submitted to the court within a specified period of time. Electronic versions of the will would be filed along with the original. The means and method of certifying the original copy of the will would be left to the Surrogate's Court.

### ***C. Recommendations Regarding Supreme And County Courts***

Supreme and County courts present additional challenges not present in the Surrogate's Court and other specialized courts. This is due to two significant factors: 1) the broad range of civil actions and proceedings and criminal proceedings brought in these courts and 2) that filing of documents in civil actions and proceedings entails filings with both the County Clerk and with offices within the court's control.

#### **1. Any system of filing by electronic means must recognize the role of the County Clerk as custodian of the records of civil actions and proceedings.**

Under Article VI, §6(e) of the New York State Constitution, the clerk of the county is designated as the clerk of the Supreme Court. County Law §525 also designates the clerk of the county as the custodian of the records of all papers in civil actions and proceedings. The results of the survey of County Clerks demonstrated that this is a role that the County Clerks take most seriously.

The current system of filing by electronic means does not maintain this separate role for the County Clerks. The FBEM pilot designates the FBEM system as the keeper of all records, whether they are to be kept by the County Clerk or not. While some County Clerks may not be concerned by this, having been satisfied with the security of the FBEM



system, quite a few County Clerks are very concerned about it. Many have expressed resentment that their role as custodian of the records was not considered to their satisfaction when the FBEM pilot was established and when the pilot was enlarged to include their county.

Success of any statewide e-filing system within Supreme Court requires the full cooperation of the County Clerks, based upon their constitutional mandate. The current FBEM system should be adapted to acknowledge the role of the County Clerk. OCA has recognized the County Clerks' constitutional role and is currently working with the statewide County Clerk Association, in order to achieve a change to the FBEM software to acknowledge that role. OCA is to be commended for the considerable progress which has recently been made in the area. The Task Force recommends that these efforts be continued in order that the County Clerk's constitutional role be accommodated within an e-filing system.

**2. Funding for hardware, software and training of County Clerk personnel should be provided by the State of New York.**

County Law §525(2) provides that the county is responsible for the expense of all equipment and indexing in the filing of papers in actions and proceedings. Because of this mandate, counties make their own decisions as to their filing systems. As a result, the counties are at significantly divergent levels of technology. For example, in extremely small counties, County Clerk's offices have no computers, and are still hand indexing. In those counties, County Clerks who are faced with limited budgets have

made other expenditures a greater priority. In order to maximize the benefits of e-filing, it is important that every county be technologically capable of accepting filing by electronic means. As a practical matter, this will only be accomplished if the state provides the funds to do so.

### **3. County Clerk may certify e-filed document without original.**

The certification of records should be accomplished simply by the printing of a “hard copy” of an e-filed record, and comparing it to the electronic document. As long as the County Clerk’s role as the custodian of records is satisfied by adaptation of the FBEM software (see 1. above), the County Clerk should be able to certify the authenticity of the record.

### **4. All exhibits to motions should be excerpted.**

Under current practice, exhibits to motions in Supreme Court are often voluminous. This may be due to a variety of reasons, but is often based in part over concern that an excerpted exhibit may be considered prejudicial. Extremely large exhibits are a detriment to an e-filing system, particularly where the exhibits may not have been created as electronic documents and must be scanned in order to convert them to electronic documents. Consequently, excerpting of exhibits is to be encouraged. The Task Force recommends a rule similar to General Order #22, §4.4 of the USDC, Northern District of New York, which states in pertinent part:

A Filing User shall submit as exhibits or attachments only those excerpts

of the referenced documents that are directly germane to the matter under the Court's consideration. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under these Administrative Procedures do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may also timely file the complete document or additional excerpts that they believe are directly germane to the matter under the Court's consideration.

#### **5. Hospital and Medical records as exhibits should be automatically sealed.**

Because of the access that electronic records permit, there are serious privacy concerns where medical and hospital records are submitted in support of or in opposition to a motion. In order to respect these privacy concerns while permitting the electronic filing of these documents, the Task Force recommends that all medical and hospital records be accessible only by the parties (and attorneys) to that action or proceeding.

#### **6. Exception to e-filing for unscannable exhibits**

Where documents are either too large to scan, or cannot be reduced to a document, there should be an accommodation permitting filing by ordinary means (or allowing a large electronic document to be filed by DVD or CD-ROM). The Task Force recommends a rule similar to that General Order #22, §4.5 of the USDC, Northern District of New York, which provides in pertinent part:

A party who believes a document is too lengthy to electronically image, i.e., "scan," may contact the Clerk's Office for permission to file that document conventionally. If the Clerk's Office grants permission to

conventionally file the document, the Filing User shall electronically file a notice of conventional filing for the documents...Exhibits submitted conventionally shall be served on other parties as if they were not subject to these Administrative Procedures.

**7. Criminal actions before Supreme or County Court should be included in any e-filing system.**

Documents submitted by attorneys in criminal actions (including post-judgment proceedings) should be filed electronically in a manner similar to civil cases. Our recommendations regarding service of process, pro se filers, limitations on access to matters subject to privacy concerns, sealing of documents and files, etc. are equally applicable to criminal cases.

**8. Criminal actions must be commenced by traditional means. Documents submitted by non-attorneys should be filed by traditional means.**

Because a criminal action is commenced by the filing of an accusatory instrument, a task which, in many parts of the State, is carried out by police or other law enforcement personnel rather than attorneys, criminal actions should continue to be commenced in the traditional manner rather than electronically. Warrant applications, presentence and probation reports and other papers submitted to the court by non-attorney law enforcement personnel should be subject to traditional filing requirements as well.

### ***D. Recommendations Regarding Appellate Courts***

The information secured from the state appellate courts reflects the current reality in those courts: they are moving to electronic scanning and storage of appeals after they are decided, as a way of reducing the burden of archiving appellate papers, but sitting judges want paper to read and do not want to be tethered to computers in order to read briefs and records. The courts themselves do not want to bear the personnel and other costs of printing multiple copies of lengthy papers that have been filed in electronic form.

**1. Permissive e-filing of appellate briefs, records and motions should be the goal of the appellate courts.**

The Task Force expects that the bulk of civil appeals, and most if not all appellate briefs, will be filed this way once it is permitted. If the observations of the First Department Clerk hold true for the entire state, then criminal appeals will be filed electronically as the offices of prosecutors and institutional defenders modernize over time.

**2. The appellate courts should adopt rules permitting the filing of a record in electronic form when the components of the record were themselves filed electronically in the lower court.**

**3. Motion papers that are customarily filed in only a single copy form should be permitted to be filed electronically in lieu of paper in the appellate courts.**

This recommendation appears to the Task Force to allow streamlined appellate practice for practitioners while doing little violence to the way these courts currently conduct their business.

**4. The courts should not adopt any rules that would force attorneys and litigants to use the services of appellate printers, or place them at an unfair disadvantage with those whose resources permit them to do so.**

The Task Force was informed that certain appellate printers have made presentations to the appellate courts in New York State to show how electronic hyperlinked briefs, cases and records would work. The Task Force gathers from this information that at least some appellate printers in New York perceive an economic opportunity if the courts require or encourage e-filing.