

MEMORANDUM

TO: Mr. Jeffrey Carucci
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Via E-Mail

FROM: Appellate Courts Committee, New York County Lawyers Association

RE: Comments on Electronic Filing

DATE: December 12, 2022

This memorandum, submitted by the Appellate Courts Committee of the New York County Lawyers Association, offers comments for inclusion in the Office of Court Administration's ("OCA's") annual report to the Legislature, the Governor, and the Chief Judge evaluating our State's electronic filing system, including the New York State Electronic Filing System ("NYSCEF"). We appreciate the opportunity to offer input.¹

In December 2017, all four departments of the Appellate Division adopted uniform rules on electronic filing (the "Rules"). *See* 22 NYCRR § 1245 et. seq. And in 2020, the Appellate Divisions First and Second Departments went "all digital," no longer requiring paper filing of any documents. Instead, in the First Department, papers are filed on NYSCEF and in the Second Department papers are filed on either NYSCEF or a portal.

The Appellate Courts Committee of the New York County Lawyers Association applauds the Unified Court System's efforts to expand electronic filing. Electronic filing drastically enhances the efficiency of the court system and prevents the arduous

¹ These comments have been approved by NYCLA's Appellate Courts Committee and approved for submission by NYCLA's President. They have not been reviewed by NYCLA's Executive Committee and do not necessarily represent the views of its Board.

process of travelling to a courthouse to file paper. Digital filing also saves resources and is environmentally friendly. Still, the current e-filing system can be improved. These comments propose several e-filing reforms that could dramatically improve the efficiency of our appellate system.

In proposing these reforms, we do not operate on a blank slate. Many of the reforms proposed below have already been previously proposed, in one form or another, in bar-association letters and reports.² Now is a perfect opportunity to adopt them.

A. Compilation of the Record on Appeal

The current system for providing the record to assigned counsel is inefficient, costly, and delays cases by years. Digital reform can fix this problem.

In First Department cases where counsel is assigned (a vast majority of criminal cases and a significant number of civil cases in that Department), the record that the court provides to assigned counsel is often incomplete, thus forcing assigned counsel to spend considerable resources compiling a complete record.³ Relevant transcripts are often not provided. Papers filed with the trial court are often absent from the record, meaning that counsel must dig through the paper court file to assemble a complete record. And hearing and trial exhibits are, as a matter of established practice, *never* part of the provided record and are instead only provided upon a request to the party who introduced them, which often takes months to fulfill. Even worse, these exhibit requests are fulfilled at the taxpayer's expense as District Attorneys' Offices and other state agencies must spend resources scouring old files for exhibits that were admitted into evidence years earlier.

Even once the record is complete, it still can take years after judgment is imposed for the court system to provide it. It often takes at least a year for counsel to be assigned

² See Exhibit A, which attaches the following materials: NYCLA Statement, *Electronic Filing and Service During the Current Pandemic* (March 25, 2020); New York City Bar Association, Criminal Justice Operations Committee, Criminal Advocacy Committee, and Criminal Courts Committee, Letter to O.C.A. and Presiding Justices of the First and Second Departments, *Delays Associated with Compiling the Record on Appeal in Criminal Cases* (March 5, 2020); NYCLA, Appellate Courts Committee, Letter to the Presiding Justices of the Appellate Courts, *Proposals for Reform of Appellate Procedures in the First and Second Departments* (July 3, 2018); NYCLA, Appellate Courts Committee, Letter to the Clerk of the Court of Appeals, *Electronic Service of Applications for Leave to Appeal in Criminal and Civil Appeals* (July 13, 2018).

³ The situation is even more challenging in the Second Department. There, the record is not provided at all; instead, assigned counsel must compile the record from scratch on his/her own.

post-judgment. At that point, the court orders the provision of the transcripts/record to assigned counsel, a process that routinely takes another year. So, for instance, appellate counsel may not receive a viable record on appeal from a May 2021 judgment until May 2023 or even later. This delay hurts individuals seeking appellate relief. And it hurts the government's interests because, if a judgment is reversed, new proceedings must take place many years after the initial proceeding, thus injecting the risk of absent witnesses, stale memories, and outright loss of evidence.

To improve this inefficient system, we propose the following changes:

- the OCA CRIMS record sheet, which lists all of the court appearances in criminal cases, should be filed on NYSCEF so appellate counsel can have easy access to information that will allow for a determination of the record's completeness;
- transcripts should be uploaded onto NYSCEF so the parties can have easy access to them;
- subject to appropriate exceptions for exceptionally voluminous, confidential, or sealed materials, every document or material filed in the trial court and/or contained in the court file should be filed on NYSCEF, including jury notes, *in limine* motions, and substantive email correspondence with the trial court (such as requests to charge, which are often done through email); and
- a copy or photograph of each exhibit should, if possible, be made part of the record and placed on the NYSCEF file.

These reforms will greatly enhance the ease and efficiency of appellate practice.

B. The Court of Appeals Should Adopt Fully Digital Filing

Although the Appellate Divisions adopted fully digital filing during the Pandemic, the Court of Appeals has unfortunately not eliminated paper filing. Briefs and records, often collectively consisting of thousands of pages, must still be filed in paper copy, as must motions for leave to appeal. Fortunately, the Court has recently (effective January 2021) created a new e-filing portal which allows for parties to file electronic copies of motions for leave to appeal in criminal and civil cases. But while the Court has abandoned the cumbersome requirement that copies of the Appellate Division briefing must be filed in paper, it still requires paper copies of those motion papers and letters.

The Court of Appeals should eliminate any paper-filing requirements as doing so will enhance efficiency and save taxpayers and litigants the considerable expense of

printing, shipping, and delivering paper copies. In turn, the Court of Appeals should join the NYSCEF filing system so all papers can be filed and stored there.

At a minimum, the Court of Appeals should amend its rules to render a document timely filed if the digital copy is uploaded by or on a deadline. The Court's current rules pin the filing date to the date the paper copy is received by the Court in Albany. This rather arbitrary rule puts the parties at the mercy of the mail; in effect, it requires litigants – including government agencies, criminal defense providers, and nonprofits – to expend scarce resources on services that provide guaranteed, overnight delivery. Instead, as in virtually every other court, a document should be deemed filed when it is electronically submitted.

C. The Second Department's Technical Citation Requirements

E-filing works wonders for busy attorneys. But the imposition of hypertechnical and time-consuming e-filing rules wastes precious time. The Second Department's cumbersome citation rules for e-filed cases is an example that cries out for reform.

In the Second Department, filings must comply with a set of "Technical Guidelines." Among them are requirements that authorities cited within filings must be "Bookmarked" or "Hyperlinked." Under the Technical Guidelines, litigants who opt for bookmarking must: (1) compile all of the authorities cited into pdf files, (2) merge those files into one compendium, (3) annex that compendium to the filing, and (4) manually bookmark each cited authority. Those who opt for hyperlinking must, for each citation in the filing, manually create a hyperlink to the website where the source is located. For an average-length appellate brief, we have found that both methods require between two and a half to three hours to complete.

This requirement comes at a high cost for appellate practitioners and produces little benefit. For one, appellate counsel must purchase expensive pdf-writing software. In addition, counsel must spend valuable time complying with the intricacies of the Technical Guidelines rather than tending to clients' needs. Additionally, since institutional providers and government agencies have limited resources, including limited support staffs, formatting responsibilities often fall onto attorneys who must divert time and energy away from legal work in order to bookmark and hyperlink their filings. These requirements impose a heavy burden on solo practitioners as well.

In sum, we propose that technical citation requirements be eliminated, because they provide only a marginal benefit to the court at great cost to litigants. Instead, a table of authorities should suffice.

D. Improving Access to Transcripts

Ready access to electronic copies of transcripts is essential to good lawyering and the fair administration of trial-level and appellate justice. Nevertheless, in assigned-counsel cases, transcripts are still routinely delivered in paper copy to the courts and ultimately the parties. This makes little sense in the modern world, nor is it friendly to the environment. Transcripts should be provided in electronic copy because doing so is cheaper and far more efficient than printing out hundreds (and at times thousands) of pages and transporting those pages to the recipients. And once the court system receives a transcript for an appeal, it should immediately upload that transcript onto the NYSCEF system so that it will be available to all parties. This change will speed up the appellate process by many months.

Further, the court system should ensure that there are no price distinctions between PDF and paper copies of transcripts. PDF copies should never cost more than paper copies, as they currently do; if anything, they should be less expensive, as they do not require printing.

E. Rejected E-Filings

Courts routinely reject e-filings that do not comply with formatting and e-filing requirements. Often, the courts do not provide an explanation of where in the filing the defects appear nor a person to contact regarding their rectification. This can lead to practitioners spending considerable time identifying and fixing what often amount to minor formatting errors. OCA should err on the side of accepting filings that contain only minor formatting errors and should provide a help line to assist litigants in correcting defective filings.

Respectfully Submitted,

Appellate Courts Committee,
New York County Lawyers Association