



June 13, 2011

The New York State Association of Criminal Defense Lawyers is a statewide membership organization of both private and public defense attorneys. Many of our attorneys practice in the Family Court as well. This memo is intended to be informational regarding our concerns about the current proposed e-filing legislation. Many of our members also practice in Federal Court and regularly use the Federal PACER system.

The proposed legislation gives OCA broad discretion to promulgate rules and regulations for the use of the new e-filing system. Our concerns about the legislation derived from our belief that some of the issues that are left for administrative determination are not appropriate for such action. We believe, rather, that some very important issues ought to be considered by the legislature and made part of the legislation itself. Some issues that are of grave concern to us are described below. Given the lack of details on how the e-filing system would work, there are likely additional issues currently unforeseen.

Mandatory nature of e-filing

The OCA proposal makes e-filing in the criminal courts mandatory. There are some significant practical concerns that come into play if this passes, one of which is that some practitioners may not have access to the technology that will allow them to provide their documents electronically. For example, the PACER system requires the users to file documents in two formats—PDF and OCR—so that the documents are text searchable. Many private practitioners may not have the capacity to convert documents into various formats.

In addition, and not insignificantly, the public defense and legal aid offices around the state could end up incurring significant expenses related to this type of administrative requirement. Institutional defense offices will have an increase in supply costs as they print out the "papers" that are now served on them by the prosecutors or provided by the court. This includes motion papers and discovery documents. In addition, it is likely that the criminal court complaint, rap sheet and other documents currently served in hard copy at the arraignment may also only be available in digital format. Defense offices, both private and public, will incur thousands of dollars of expenses that they currently do not bear and for which they are not budgeted. While this cost may seem relatively small, it is important to remember that indigent defense offices are already underfunded. Every dollar that is spent on paper and toner can only come from direct client services, possibly reducing the number of attorneys and resulting in increased caseloads. In addition, in order to properly format documents so they can be served via the e-filing system, many defense offices will need to have administrative staff that can provide this service—and that will divert that staff from other tasks or will force offices to hire additional



staff.

Safety concerns/public access issues

The legislation is not clear enough regarding what will and what will not be required to be filed within the e-filing system. It is also unclear and undetermined which documents will be available to the public and which will not.

In the "e-filing summary" it states that an attorney may mark documents "secure" and prohibit public viewing of a document. To the extent there is a way for an attorney to mark papers as "secure", we are concerned that there are no standards for District Attorneys and defense attorneys to use when deciding to mark something as secure. We are also not convinced that this part of the legislation is drafted in a way to keep information properly shielded from the public.

It is important to note that just because something is currently "public" does not mean it makes sense for it to be publicly available on the internet. Currently court documents which are considered public are available only if a person requests a copy from the court clerk and pays any necessary copying charge. Furthermore, in most jurisdictions across the state, court documents are only available when the case has concluded and the court has transmitted the legal documents to the court clerk for filing. Under the proposed e-filing system, court documents would be instantly available to the public through the internet. There is a significant difference between something that is available to someone who appears in a court building, asks for a particular document on a particular case and the anonymous, easily searched and easily re-transmittable records on the internet.

Many criminal cases derive from serious matters that have involved violence, gangs, drug dealers or violent family members. Many times the complainants and victims are known to each other. Other times, defendants are in jail with people who they know or have had dealings with. The concern and care that is given to the level of information that is available to the public is of utmost importance. Without a clear delineation as to what documents are required to be filed and what protective measures all parties are required to comply with, the e-filing system could be the cause of additional violence.

Here is an example—two high school students are in a dispute. One, or both of them are arrested—the complaint is published as a public document—anyone can now post it on Facebook or other websites that are easily spread to the entire school. Both of them could now be in danger, both physically and psychologically, as can the people who posted and transmitted the information. The availability of information in today's world needs to be understood in a different way than it was when the rules regarding private and public records were promulgated. Thus, we cannot just follow the rules that already exist.



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In addition, a large number of criminal cases result in sealing—there are ACD cases, violations, Youthful Offender adjudications, drug court dismissals and other dispositions that are ultimately sealed. While some of these documents may be currently available to the public while the case is pending, the likelihood of someone going to the courthouse during the few months the case is pending (before it is sealed) is small compared to the likelihood of someone finding it on the internet during that same time period, posting the case documents somewhere on the internet where it can never really be sealed and for it to have an impact on someone's life that it should not have. In our opinion, the legislature ought to have a serious analysis of sealing in its entirety before requiring more public access to more records.

Because many of our clients are incarcerated, we are also concerned that posting the information in ways that would allow one inmate to know the charges of another might result in unnecessary violence in jails and prisons. It is important that the various local and state jail and prison systems be brought in for a meaningful discussion regarding access to information and what risks there are when inmates are able to access the details of other inmate's charges.

In addition, it is important to talk to prosecutors about victim and complainant safety when complaints, indictments and possibly discovery materials are filed electronically. While PACER is an example of limiting information to the parties, the number and type of cases that exist in Federal Court are completely different than state court. The resources the prosecutors and defense attorneys have in the federal system allow them the ability to scan documents, review them for issues regarding public access and make applications to the court when there are concerns. The sheer volume in the state courts, particularly in NYC, makes it almost impossible to limit access in ways that will protect victims, defendants, witnesses and even the lawyers and courts. To the extent that this would be worthwhile project, a great deal of time and attention will have to be paid to these safety concerns. We do not believe the legislature should delegate this consideration to OCA alone.

Ex parte applications.

These are motions or other applications that are done by one party without the knowledge of the other party. There needs to be a clear procedure delineated for these types of sensitive issues.

Jurors

The rules of evidence and court procedures are premised on the notion that jurors are mostly privy only to what they hear in court during the trial. The availability of information on the internet would likely have an impact on jury selection and jury deliberations.

Pro Se litigants and Personal Service



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Family Court has many custody/visitation cases where the parties proceed pro se. Many of these people are low income folks who do not own home computers. Although there is a way to opt out of the electronic filing system, this right would be hard to enforce and difficult for a pro se litigant to understand.

We believe e-filing ought to be voluntary and that any cases where there are pro se litigants ought to be excluded from e-filing.

In addition, provisions should be made for the courts to give computer access to parties who do not have access to computers, even if they do opt out of the e-filing. There may be information that was filed electronically even if there is an opt-out. For example, there may be other parties who did not opt out (or who have attorneys) and there may have been papers that were filed before such time as the pro se litigant opted out.

Many Family Court litigants are somewhat transient. Phone numbers and addresses change frequently, access to computers is available and then not available, computers break down and are never fixed, people are evicted from their homes and have their belongings put to the curb, etc. There are many mentally ill litigants in Family Court as well. Serious thought has to be given to who is going to be responsible for making sure the pro se litigant continuously knows his or her rights and that the decisions he or she is making about e-filing make sense and are fair. What happens if a case originates as an electronic filing, but can't be continued electronically?

Pro se litigants also have a tendency to want to express emotions and opinions in court that are tangential to the litigation and perhaps can be damaging to the overall family situation, even possibly dangerous. It is important that procedures are in place to make sure that such statements are not posted to the court e-filing website.

We also have serious concerns about access to information by pro-se criminal defendants. While there are few such defendants in criminal court, there are also no special clerks or others to assist them. They are also likely to be in jail where their access to technology is severely limited.

There are many instances where personal service on a parent, grandparent or other respondent is required by law in Family Court. In criminal cases, orders of protection must be served as well. We are concerned that these documents may make their way into the e-filing system despite proper service. We are also very concerned that parents and defendants may see their rights to personal service eroded in a new system. In particular, when children are removed, when parents are accused of neglect or abuse, when cases are restored to the calendar, or when there are ongoing permanency planning issues, it is important that any electronic filing statute make provisions for how service will occur.