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E-Filing Court Documents: the Possibilities and Progress of E-Filing in New York State

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I. INTRODUCTION

Electronic filing, or E-filing as it is commonly referred to, has been a hotly debated issue within the legal community in the computer age. E-Filing allows a party to submit documents to the court and opposing parties in an electronic format rather than in a traditional paper manner.¹ Courts country-wide, including several of those in New York State, have experimented with E-filing pilot programs having differing results.² This analysis shall explore the phenomenon of E-filing, its benefits, its drawbacks, and ultimately, whether New York State courts should adopt a full-scale E-filing program.

Before analyzing the possibilities of E-filing, it is important to get an understanding of E-filing's benefits and weaknesses. For starters, E-filing has beneficial implications for parties involved in litigation, courts, lawyers, the general public and the overall practice of law.³ The benefits of implementing an E-filing system include, but are not limited to; space savings, time savings, increased document access to parties and the

¹ ELIZABETH BACON EHLERS, ET AL., BUSINESS, LAW, AND THE INTERNET 3.1 (Ill. Inst. for Continuing Legal Educ. ed, 1st ed. 2002).

² *Id.* at 3.15. Colorado has launched a statewide E-filing program through a private company. Press Release, Colorado Judicial Branch, E-filing in Colorado Courts Reaches Major Milestone (June 17, 2002), available at <http://www.courts.state.co.us> (last visited Feb. 2, 2003). New York has implemented a pilot program called "Filing by Electronic Means" (FBEM). Illinois has permitted the use of electronic filing by authority of court orders for appropriate mass tort litigation.

³ Robert Plotkin, *Electronic Court Filing: Past, Present, and Future*, 44 B. B.J. 4, 16 (2000).

public, long-term money savings, and improved work product.⁴ Imagine completing a pleading at 4:00 pm that must be filed in court by 5:00 p.m. Traditional paper methods of mail or personal delivery make this deadline hard to attain. E-filing capabilities would allow this document to be transmitted electronically, via e-mail or a World Wide Web browser, from the practitioner's personal computer to the court's file management system within seconds.⁵

Notwithstanding its many benefits, E-filing is riddled with setbacks, costs and skepticism, which has curtailed its widespread adoption. Proponents of E-filing point to initial cost concerns, privacy, security and confidentiality concerns, resistance from the bar, system uniformity concerns, and record permanency concerns as reasons why E-filing has not yet been fully embraced by the legal community.⁶ These concerns will be fully explored below.

Despite the fervent debate over the future of E-filing, litigation regarding the use of electronic filing and electronic documents has been scarce.⁷ The issue regarding what constitutes an "original document" when producing a duplication of an electronically filed record during a trial was explored in *People v. McFarlan*.⁸ This decision will be explored below, along with its possible impact on the future of E-filing in New York State.

⁴ Ehlers, *supra* note 1, at 3.4 – 3.8.

⁵ JAMES E. MCMILLAN, ET AL, A GUIDEBOOK FOR ELECTRONIC COURT FILING 3 (1998), available at <http://www.ncsc.dni.us/NCSC/TIS/TIS99/electr99/Guidebook/PDF/efiling.pdf>.

⁶ See, e.g., Tobe Liebert, *Electronic Filing: Is its Time Finally Here?*, 18 GPSolo 32,33 (2001).

⁷ See, *People v. McFarlan*, 744 N.Y.S.2d 287, 291 (N.Y. Sup. Ct. 2002) (court acknowledges that determination of what constitutes an "original document," with regards to an electronically reproduced photo array, is "generally a case of first impression.").

⁸ *McFarlan*, 744 N.Y.S.2d at 290.

Notwithstanding the debate over the benefits and costs of E-filing, does New York State even have the authority to implement a statewide E-filing system under the current Electronic Signatures and Records Act,⁹ or any other legislation? This is currently a pressing issue, especially in regards to the New York State Unified Court System's (UCS) electronic filing pilot program called Filing by Electronic Means (FBEM), which has currently been extended for limited use in Albany, Westchester, New York, Nassau, and Suffolk counties.¹⁰

As the aforementioned issues are explored further, the ultimate question will be determined: should New York State courts adopt a statewide mandatory electronic filing system?

II. AUTHORITY TO IMPLEMENT E-FILING IN NEW YORK

A. The Electronic Signatures and Records Act

The purpose of the New York State Electronic Signatures and Records Act (ESRA) is to “establish standards and procedures governing the use and authentication of electronic signatures and the utilization of electronic records by or with government entities in New York State.”¹¹ The ESRA exemplifies New York's recognition of the “importance of technology” and overall “need to build a foundation for its acceptance, implementation and use by State agencies, local government, the private sector and citizens.”¹² The ESRA is designed to ensure that those voluntarily using electronic

⁹ N.Y. TECHNOLOGY LAW § 540.1-540.6 (McKinney 2002).

¹⁰ Amy S. Vance, *E-Filing Court Documents in New York State: A Progress Report*, 44 N.Y.ST.B.A. ST B. NEWS TECH. Issue 7, 20 (2002).

¹¹ N.Y. TECHNOLOGY LAW §§ 540.1 (a) (McKinney 2002).

¹² *Id.*

signatures or electronic records can do so with confidence that they “carry the same force and effect of nonelectronic signatures and records.”¹³ Flexible implementation of the ESRA is called upon to ensure that future technology complies with it and all other applicable statutes and regulations.¹⁴

The legislature’s intent behind enacting the ESRA was to “support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents.”¹⁵ The ESRA was meant to complement federal E-Sign legislation, 15 U.S.C. §§ 7001 – 7006, in facilitating the use of electronic signatures and electronic records to “promote the use of electronic technology in the everyday lives and transactions of such individuals and entities.”¹⁶

The plain language of the ESRA shows that the New York State Legislature is in favor of enhancing technology in government agencies, such as state courts.¹⁷ But more importantly, and aside from the separation of powers issue between the courts and the legislature, does the ESRA encompass E-filing within its scope? The ESRA states that, an "electronic signature" constitutes any “electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.”¹⁸ Electronic signatures are intended to have the same

¹³ See § 540.1 (b).

¹⁴ See § 540.1 (c).

¹⁵ N.Y. TECHNOLOGY LAW § 102 (McKinney 2002).

¹⁶ *Id.*

¹⁷ See § 504.1(a).

¹⁸ § 102 (3).

effect of traditional handwritten signatures.¹⁹ In contrast, “electronic *records*” constitute “information, evidencing any act, transaction, occurrence, event, or other activity produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.”²⁰

The prospect of using electronic records and signatures has led to “electronic filing” (E-filing), which is “the process of transmitting documents and other court information to the court through an electronic medium, rather than on paper.”²¹ E-filing involves the preparation of documents in the exact same manner as with today’s paper filing systems, but the method of delivery is by electronic means, and not by mailing or personal delivery of a hard copy to the court.²² It is said that electronic filing and storing of records involves electronic bits and bytes, as opposed to paper.²³

For the reason that electronic filing involves the use of electronic medium, rather than paper manifestations, in transferring and storing documents with the court, it is my conclusion that E-filing of documents within the court system does fall within the scope of the ESRA. Whether the courts must adhere to the ESRA is a question of the separation of powers between the courts and the legislature, and outside the scope of this current analysis.

¹⁹ *Id.*

²⁰ §102 (2).

²¹ McMillan, *supra* note 5, at 2.

²² *Id.* at 3.

²³ William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What is it? What are its Implications?*, 19 SCCHITLJ 181, 184 (2002).

Not only does E-filing fall within the scope of the ESRA, but government agencies should be empowered to adopt E-filing systems under its legislative framework. Under § 105 (1) of the ESRA, government entities are authorized and empowered, but *not required*, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means.²⁴ Courts need not use or accept electronic records under their own voluntary power.²⁵ The filing of electronic records cannot be required under ESRA, but New York State Courts have the option of adopting electronic record keeping and filing under the scope of the ESRA.²⁶ Several New York State courts have already adopted E-filing pilot programs, which are accessible through the Internet.²⁷

Traditionalists not ready to part ways with paper filing systems in exchange for E-filing need not panic under current legislation. Under the ESRA, a court must ensure that anyone using an electronic filing system can obtain paper hard copies of electronic records.²⁸ If used in court proceedings, electronic records will be given the same power and effect as paper records.²⁹ Most importantly, the ESRA will limit the use or acceptance of electronic records by courts on a voluntary basis.³⁰ Further guidelines for any court to adopt an E-filing system under the ESRA include assurance that those using

²⁴ Ehlers, *supra* note 1, at 3-4.

²⁵ *Id.*

²⁶ *See*, N.Y. TECHNOLOGY LAW § 540.1 (d) (McKinney 2002).

²⁷ *See*, New York State Unified Court System: Filing By Electronic Means, *available at* <http://fbem.courts.state.ny.us/ef/home.html>.

²⁸ N.Y. TECHNOLOGY LAW § 105(1) (McKinney 2002).

²⁹ §105(3).

³⁰ § 540.1(d); *see also*, Vance, *supra* note 10, at 7. (parties must submit consent before using FBEM, subject to approval or disapproval by the court).

it have access in electronic or paper form, court policy not to refuse to accept any hard copy or paper forms, and an inability to require the submission of a document electronically.³¹ Lastly, courts are afforded latitude in determining the most effective procedures for electronic recording, filing, using and storing electronic records, but this still must be done must be done within the existing statutory and regulatory requirements regarding privacy, confidentiality and records retention.³²

In summary, if adopted by the New York State court system, the ESRA will empower courts to voluntarily implement an electronic filing system. However, the legislation expressly rejects the notion that New York State courts may require or mandate the use of electronic filing in any statewide or even regional program.

B. Other Authority for Adopting E-Filing

Other authority for the implementation of E-filing in New York State courts lies within the power of the New York Legislature to enact E-filing friendly legislation, and the power of the courts to adopt amendments to court rules. An example of this is New York CPLR § 304, which was first amended under chapter 367 of the laws of 1999, and gave authority to the New York State Uniform Court System (UCS) to explore the possibilities commencing actions by E-filing in New York.³³ The Chief Administrative Judge's authority for implementing FBEM is found in the Uniform Civil Rules for The

³¹ § 540.5.

³² § 540.1(g).

³³ See, Vance, *supra*, note 10, at 7; see also, MARK DAVIES, 1 WEST MCKINNEY'S FORMS § 2:202, 8 (2003); NEW YORK CIVIL PRACTICE LAW AND RULES 304 (McKinney 2003)

Supreme and County Courts § 202.5-b.³⁴ More evidence of a willingness to adopt E-filing in limited circumstances is seen in the Chief Administrative Judge's authorized expansion of FBEM by chapter 110 of the laws of 2002.³⁵ Further analysis of this authority and progress of the FBEM pilot program will be explored later on.

III. *PEOPLE V. MCFARLAN*: ITS IMPACT ON E-FILING IN NEW YORK STATE

Despite discussion regarding E-filing's benefits and costs, litigation regarding the use of electronic documents and electronic filing has been scarce.³⁶ *People v. McFarlan* provides one illustration, in the context of a computer programmed photo array submitted to and stored by the court in a criminal prosecution, of possible future litigation regarding the use of electronic records in the New York court system.

A. The McFarlan Decision

McFarlan involved the use of a computer programmed and stored photo array that was shown to a witness, and eventually led to the arrest of a pickpocket.³⁷ The original printout of the photo array was lost by law enforcement agents, and a new printout of the identical computer recorded array was introduced at trial.³⁸ The defendant argued that the lost "original" photo array created a presumption that the new photo array printout was impermissively suggestive.³⁹ The defendant sought sanctions for the reason that the

³⁴ See, Davies, *supra* note 33 at 9; see also, 22 NYCRR § 202.5-b; Administrative Order of the Chief Administrative Judge of the Courts, available at <http://fbem.courts.state.ny.us/ef/mainframe.html> (last visited Mar. 20, 2003).

³⁵ See, Vance, *supra* note 10, at 20.

³⁶ See, *McFarlan*, 744 N.Y.S.2d at 291.

³⁷ *Id.* at 289.

³⁸ *Id.*

³⁹ See, *McFarlan*, 744 N.Y.S.2d at 290..

prosecution failed to produce the original photo array from which the witness identified the defendant under the People's *Rosario* obligations.⁴⁰

The Supreme Court of New York County disagreed with the defendant's *Rosario* argument by holding that the "original" photo array was the photo array stored electronically in the computer's memory.⁴¹ This array, as long as it was not altered from the time it was electronically stored in the computer, constituted a valid electronic record "until such time it is retrieved by using appropriate commands to the computer."⁴²

Further, the *McFarlan* court addressed concerns regarding the growth of electronic records and electronic storage usage within the legal system.⁴³ The court called for a general rearticulation of the law to explain what constitutes a writing and an original document in the current age of electronic files.⁴⁴ The court cited a consensus in recent proposed and enacted legislation that stated within the "pre-computer concept of 'writing' the term 'record' should now be substituted to accommodate this new reality."⁴⁵ In further comment on this issue, the court analyzed the effect of an electronic record under Part 540.5(a) in the regulations of New York's Electronic Signature and Records Act, stating that the purpose behind the ESRA was to "ensure that persons who

⁴⁰ *Id.*; see, *People v. Rosario*, 213 N.Y.S.2d 448 (1961). (the People must make available to the defense writings in their custody regarding a prosecution witness' testimony in order to enable the defendant to conduct his defense with the benefit of having possession of any exculpatory material. Failure to do so results in a sanction imposed by the court).

⁴¹ *McFarlan*, 744 N.Y.S.2d at 290.

⁴² *Id.* at 290-91.

⁴³ *Id.* at 291.

⁴⁴ *Id.*

⁴⁵ *Id.*

voluntarily elect to use ... electronic records can do so with confidence that they carry the same force and effect of non electronic ... records.”⁴⁶

B. Impact of the McFarlan Decision

Although not directly aimed at solving issues regarding E-filing in New York, *People v. McFarlan* might have an impact on the future acceptance of electronic records in the New York State legal system. The *McFarlan* court appears to support the use and continued advancement of computer technology and electronic records in the this court system. Not only does the court uphold the use of hardcopy manifestations of electronic records as “original” documents, it continues this philosophy by stating that it would be “absurd” that only a manifestation in human readable form could be considered an “original document.”⁴⁷ This court seems comfortable in recognizing that a printout or physical manifestation of an originally electronically stored record that is “identical and conveys the full recoverable information,” as its paper manifestation should be afforded the same validity as the original paper document itself.⁴⁸

Nevertheless, the impact of *McFarlan* may not be too far reaching. Most commentary within the *McFarlan* decision regarding an electronic record as an “original” document occurs in dicta, and is unnecessary to the ultimate outcome of the case. This undermines the precedential value of much of the court’s commentary. However, the decision does show the court’s favorable stance towards using electronic records in both criminal and civil matters, as well as allowing the use of identical printouts of

⁴⁶ *McFarlan*, 744 N.Y.S.2d at 291; *see also*, N.Y. COMP. CODES R. & REGS. tit. 9, §540.1(b) (2003).

⁴⁷ *McFarlan*, 744 N.Y.S.2d at 292.

⁴⁸ *Id.* at 292.

electronically stored records as permissible evidence at trials.⁴⁹ The court views the electronic storing of records, and a print out or screen display of records in the criminal arrest, prosecution, and possible conviction of a defendant to be constitutionally permissible when done under the scope of New York's current ESRA legislation.⁵⁰

Despite clear conflicts between the ESRA and federal E-sign legislation (15 U.S.C. § 7001 *et seq.*), the *McFarlan* court reserves judgment on whether the provisions of the ESRA commented on are preempted by federal E-sign legislation.⁵¹ The court does state that regardless of preemption, the issue of whether an electronic record constitutes an “original document” would be the same result under either the ESRA or E-sign legislation.⁵²

Overall, *McFarlan* seems to bring New York State courts a step closer to embracing the use of electronic records and electronic file storage, at least in matters relating to criminal evidence. As the court notes in its decision, “this is generally a case of first impression.”⁵³ The decision in *McFarlan* which favors the use of electronic records and printouts might well be seen as a victory in the eyes of supporters of statewide electronic filing, and be used by them in stating a case towards implementing statewide E-filing.

⁴⁹ *McFarlan*, 744 N.Y.S.2d at 292.

⁵⁰ *Id.* at 292 –93.

⁵¹ *Id.* at 294.

⁵² *Id.*

⁵³ *Id.* at 291.

IV. BENEFITS AND SETBACKS TO E-FILING IN NEW YORK

A. *Benefits of E-filing*

The advantages of E-filing are even more widespread than may appear at first glance.⁵⁴ Attorneys, clients and the court system alike are in a position to gain from the adoption of E-filing by state courts in New York.⁵⁵ Advantages of E-filing include, but are not limited to space savings, time savings, money savings, and increased access to court documents.

Space Savings

E-Filing Reduces the cost and physical space required to file and store traditional paper documents.⁵⁶ Furthermore, E-filing has the capability to greatly reduce storage needs and staff requirements.⁵⁷

How does E-filing accomplish such space savings? The answer is that most of the need for paper filing space in the courthouse is eliminated by the implementation of electronic file management systems to replace traditional paper file management systems.⁵⁸ New courtroom space that may be used for paper filing has been estimated to run approximately \$300 per square foot to build and \$15 per square foot to rent annually around the country.⁵⁹ E-Filing eradicates the need for much of the space used in storing

⁵⁴ M. Sean Fosmire, *Who Benefits from Electronic Filing?*, at <http://www.llrx.com/extras/filing.htm> (Apr. 17, 2000).

⁵⁵ Ehlers, *supra* note 1, at 3.4; Fenwick, *supra* note 23, at 205.

⁵⁶ Plotkin, *supra* note 3, at 16.

⁵⁷ Liebert, *supra* note 6, at 29.

⁵⁸ McMillan, *supra* note 5, at 16-7 (court file management includes creating files, pulling and filing case jackets for court events, placing new documents in file folders, maintaining indexing systems, monitoring the location of files, purging files, microfilming, and archiving).

⁵⁹ *Id.* at 17.

paper files in the courthouse.⁶⁰ Courts can even electronically scan new or old paper documents into the electronic storage system by the date that such documents were received.⁶¹ This further serves the purpose of cutting down on space and eliminating the wear and tear of paper documentation.⁶²

Time Savings

The amount of time spent by court staff in searching for and handling case management may be greatly reduced by the implementation of an E-filing system.⁶³ Additionally, perhaps the biggest advantage of E-filing is the capability to give immediate notice of a filing to the court with none of the delays present in traditional mailing.⁶⁴ E-filing offers parties the ability to search, analyze, copy and paste, and archive documents electronically instead of by paper filing.⁶⁵ E-filing greatly benefits attorneys living far from state courthouses by allowing them to upload court documents to the court's electronic filing system via e-mail or Internet.⁶⁶ At the time a document is uploaded it is incorporated with a "date stamp," which verifies the exact date and time the document was received by the court.⁶⁷ This feature saves the attorney traveling time and

⁶⁰ *Id.*

⁶¹ McMillan, *supra* note 5, at 17.

⁶² *Id.*

⁶³ Plotkin, *supra* note 3, at 16.

⁶⁴ Jennifer L. Reichert, *Filing Court Documents Electronically*, Association of Trial Lawyers of America, 37 JAN Trial 26, 27 (2001) (interview with Jim McMillan, director of the Court Technology Laboratory at the National Center for State Courts in Williamsburg, Virginia).

⁶⁵ Fosmire, *supra* note 54, at 2.

⁶⁶ Fosmire, *supra* note 54, at 1.

⁶⁷ *Id.*

costs of overnight delivery services, as well as saves the court valuable time in validating when documents are received.⁶⁸

Increased access to documents

Electronic storage and filing makes documents more efficiently available to counsel, court personnel and the public through an Internet web browser.⁶⁹ This efficient access to documents is not present in traditional paper filing systems.⁷⁰ Once filed electronically, a properly designed E-filing system will allow immediate and universal access online to interested parties faster than access by mail delivery.⁷¹ Overall, this is beneficial to lawyers and court personnel because of the ability to access documents electronically without leaving their offices, resulting in the elimination of many paper records in law firms and court storage facilities.⁷²

Money Savings

E-filing reduces the costs of printing, copying, mailing, courier services, travel and storing of paper documents.⁷³ As discussed above, E-filing also eliminates much of

⁶⁸ Reichert, *supra* note 64, at 27 (Shawnee County District Court in Topeka, Kansas found that it took approximately 9 hours to process 100 court cases, which took less than 9 minutes to process electronically).

⁶⁹ Fosmire, *supra* note 54, at 2.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² McMillan, *supra* note 5, at 18.

⁷³ Plotkin, *supra* note 3, at 16.

the paper filing costs associated with traditional paper case management.⁷⁴ Such money savings for courts and attorneys will eventually trickle down to money savings for clients and the public.⁷⁵ Cost savings may even extend to *pro se* litigants by reducing the overall costs of court filing and by simplifying the process of filing.⁷⁶ However, this also leads to the problem of equal access to computers, which supporters of E-filing believe may be combated by use of public computer kiosks, libraries, and community resource centers.⁷⁷

B. Obstacles and Problems with implementing E-filing

Despite the above articulated benefits of E-filing, such technology has not been fully adopted for many legitimate reasons. Obstacles and other problems associated with E-filing include initial implementation costs, privacy, security and confidentiality concerns, fear of the unknown, resistance from the bar, statewide uniformity concerns, and record permanency concerns.

Initial implementation costs

A commonly shared concern in the legal community is that E-filing technology is too expensive to implement.⁷⁸ In fact, this may be the biggest challenge to courts in determining whether to implement E-filing operations.⁷⁹ Courts must purchase or

⁷⁴ McMillan, *supra* note 5, at 24.

⁷⁵ Fosmire, *supra* note 54, at 2.

⁷⁶ Plotkin, *supra* note 3, at 16.

⁷⁷ *See id.*

⁷⁸ Jerry Lawson, *Six Bum Raps Against E-Filing* (Jan. 3, 2000), available at <http://www.llrx.com/extras/6bum.htm>.

⁷⁹ Ehlers, *supra* note 1, at 3.9.

upgrade to proper computer hardware and software⁸⁰, install this new technology, train personnel on using the technology, and provide continued financial support for administrating and maintaining the system.⁸¹ It will be difficult for courts to fund such activities on the limited budgets that they currently operate on.⁸²

It is true that up front costs will be incurred in automating current court systems so that they may receive electronic information.⁸³ However, over the long run, the initial investment in E-filing will be recovered through much reduced expenses, mainly in court labor costs.⁸⁴ Faced with these future money savings, local governments may be persuaded to raise the funds needed to implement an E-filing system.⁸⁵ Courts could even adopt marginal filing fees in order to offset the initial investment capital needed to implement E-filing technology.⁸⁶

Privacy, security and confidentiality

Some argue that E-filing will make public access to confidential documents too easy and inexpensive.⁸⁷ Important confidential information such as social security numbers, bank account numbers, birth dates, and even credit card numbers may be

⁸⁰ See *id.* at 3.1. It has been found that as early as 1998, 95% of large firms and 63% of mid size firms already had Internet access (citing, Kyle Christiansen, *Electronic Filing: Efficient Court Documentation Services Are on the Way*, 13 NBA Mag. 37, 38 (1999)).

⁸¹ Ehlers, *supra* note 1, at 3.9.

⁸² *Id.*

⁸³ Lawson, *supra* note 78, at 4.

⁸⁴ *Id.*

⁸⁵ Ehlers, *supra* note 1, at 3.9.

⁸⁶ *Id.*

⁸⁷ *Id.* at 3.13.

present on court documents.⁸⁸ E-filing subjects such documents to vulnerability that was not present in traditional paper filing systems.⁸⁹

Privacy and security concerns over E-filing are genuine, but courts may combat them by protection through encryption technology used while transmitting and accessing electronic documents, as well as charging user fees, or requiring log-on identification and passwords to enter the system.⁹⁰ Such security measures can be used to effectively restrict access to anonymous users, as well as to protect documents under protective court order.⁹¹

As a security measure, encryption technology available today has the power to render messages “unintelligible except to the authorized recipient.”⁹² PDF technology (portable document format developed by Adobe, Inc.) is easily obtained and produces documents in a format that is not easily altered.⁹³ If a single character is changed within an electronic court document, a validation program will be able to detect it in PDF form.⁹⁴ In addition to PDF technology, digital signatures, which have been authorized for use in legitimizing Internet business transactions under federal E-sign legislation since

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Ehlers, *supra* note 1, at 3.13

⁹¹ *Id.*

⁹² Liebert, *supra* note 6, at *33.

⁹³ See Reichert, *supra* note 64, at 28; see also, Joel Rothman, Esq., *E-Filing Appeals with Adobe Acrobat* (Oct. 2, 2000), available at http://www.llrx.com/features/efiling_a.htm.

⁹⁴ Reichert, *supra* note 64, at 29.

2000, may be used to verify the authenticity of who signs a document transmitted to the court.⁹⁵

Concerns in the areas of privacy and security also arise regarding the reliability of electronic records. What if the court's E-filing computer system crashes? This is another fear that is legitimately remedied by the nature of electronic filing.⁹⁶ Systems may be backed up daily with redundant disk systems that contain considerable backup tape capability to prevent any data loss.⁹⁷

Fear of the unknown and resistance from the bar

"A major problem to expanding electronic filing is the current level of computer illiteracy of attorneys."⁹⁸ Resistance from attorneys is one of the most frequent obstacles to implementing E-filing.⁹⁹ Not all lawyers will feel comfortable using an electronic filing system, and imposing such a system may cause severe resistance from those rooted with the traditional rituals of paper filing.¹⁰⁰ Attorneys fear E-filing for much of the same reasons why many people are slow embrace technological change. Attorneys are comfortable with engrained methods of practicing law and unsure of how changes to the

⁹⁵ Liebert, *supra* note 6, at *31.

⁹⁶ Reichert, *supra* note 64, at 28.

⁹⁷ *Id.*

⁹⁸ Lawson, *supra* note 78, at 1 (quoting one court clerk's opinion).

⁹⁹ Ehlers, *supra* note 1, at 3.10.

¹⁰⁰ Liebert, *supra* note 6, at *31.

system might adversely affect them.¹⁰¹ Adopting E-filing may compound this anxiety because of many attorneys' lack of computer knowledge.¹⁰²

The best way to overcome the fear and resistance described above is through E-filing education and support. Education and technical support will help attorneys that are currently hesitant about adopting a new E-filing system into a transition to practicing law in the "information age."¹⁰³

Statewide uniformity

Lack of uniform computer systems between courts is another obstacle to the implementation of E-filing.¹⁰⁴ Federal courts have shown that adopting a uniform computer system is feasible to resolve this problem.¹⁰⁵ However, state court computer systems may vary widely, even within the same state.¹⁰⁶ A national E-filing system will probably never be realized because of the diverse composition of our multi-jurisdictional legal system.¹⁰⁷ However, the problem of uniformity will be minimized if each system within a state is composed of certain essential basic system requirements; a court computer system able to accept, manage, and store filings in various computer forms,

¹⁰¹ Ehlers, *supra* note 1, at 3.10.

¹⁰² *Id.*

¹⁰³ Ehlers, *supra* note 1, at 3.10.

¹⁰⁴ *Id.* at 3.11.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Reichert, *supra* note 64, at 28.

methods of “authenticating” documents, lawyers with Internet based computer systems, and methods of security and “encryption.”¹⁰⁸

Also increasing the chance for uniformity within a state system is the prospect of XML, or Extensible Markup Language, which provides the technology for sophisticated navigation of large databases of electronic information existing in numerous different formats.¹⁰⁹ For more information on developments in XML technology visit the Legal XML web site at <http://www.legalxml.org>.

Record permanency

Some say that paper records in our legal system are irreplaceable.¹¹⁰ However, no E-filing rule currently considered allows for paper copies of documents to be completely eradicated.¹¹¹ Proponents of E-filing also voice concern over the life span of current electronic media used to store electronic records.¹¹² However, when electronic court documents are no longer regularly needed, they can be transferred to more long-lasting media for archiving.¹¹³ Such media includes compact disks, which are known to last at least 20 years, and high quality microfilm, which is already in use to store federal records electronically at the National Archives and Records Administration.¹¹⁴ Record permanency may also be ensured by future planning from systems administrators to

¹⁰⁸ Liebert, *supra* note 6, at *28-29.

¹⁰⁹ Ehlers, *supra* note 1, at 3.11.

¹¹⁰ See Lawson, *supra* note 78, at 2.

¹¹¹ *Id.*

¹¹² *Id.* at 3.

¹¹³ *Id.*

¹¹⁴ *Id.*

prevent the inevitable upgrading of computer systems from rendering electronic records inaccessible.¹¹⁵

V. NEW YORK STATE UNIFIED COURT SYSTEM FILING BY ELECTRONIC MEANS (FBEM) PILOT PROGRAM

“To build momentum for e-filing programs, pilot projects must be instituted.”¹¹⁶ The New York State Office of Court Administration has followed this rubric and implemented a pilot program for the use of electronic filing of court papers in several specified civil actions commencing in New York State.¹¹⁷ The FBEM pilot program was originally authorized for use in New York, Monroe and Westchester counties.¹¹⁸ Only tax certiorari cases were handled in Westchester County, while in Monroe and New York Counties, all commercial cases could be filed by electronic means.¹¹⁹ The service of process in a case filed by electronic means has continued in the traditional paper form in accordance with New York Civil Practice Laws and Rules § 361.¹²⁰ The FBEM program

¹¹⁵ Ehlers, *supra* note 1, at 3.12.

¹¹⁶ Dave Glynn, *The Future of E-Filing for the Legal Community*, 2 GLEFILR 8 (Jan. 2001).

¹¹⁷ See FBEM User’s Manual, Section I at <http://fbem.courts.state.ny.us/ef/mainframe.html> (Apr. 6, 2000) (last visited Feb. 24, 2003).

¹¹⁸ *Id.* at section II.

¹¹⁹ *Id.*

¹²⁰ *Id.* at section IV.

was, and still is, strictly voluntary, and all parties involved must consent before electronically accepted proceedings may undertake.¹²¹

A. How does FBEM Work?

FBEM works by submitting documents in Portable Document Format (“PDF”), which is created by using software licensing through Adobe Systems Incorporated.¹²² Technical demands to use the system are rather minimal.¹²³ To participate in FBEM, a person first registers with the UCS as a “registered user.”¹²⁴ Licensed attorneys are registered as “filing users,” while all other users are registered as “public users.”¹²⁵ A registered user is issued a password and Personal Identification Number (PIN), which when used together, constitutes the user’s electronic signature.¹²⁶

To file a case electronically, a filing user drafts the needed documents using any customary word processing software.¹²⁷ Completed files are submitted via the Internet to the UCS website at <http://fbem.courts.state.ny.us>.¹²⁸ Through this Web site, the registered user may convert their documents to PDF form and then file them with the

¹²¹ *Id.* at section V; *see also* 4 ROBERT L. HAIG, NEW YORK PRACTICE SERIES: COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § A-5 (1995 & Supp. 2002).

¹²² *See* Vance, *supra* note 10, at 7; *see also* FBEM User’s Manual, *supra* note 117, at section XVIII. Adobe software is widely available. The Adobe Acrobat Reader, which permits the reading, but not writing of electronic PDF files, is freely downloadable from the Adobe Systems homepage at <http://www.adobe.com/products/acrobat/readmain.html>.

¹²³ Vance, *supra* note 10, at 7.

¹²⁴ *Id.*

¹²⁵ Jim Keane, *E-Filing Projects Around the Nation*, 4 GLEFILR 12, at *4 (Mar. 2001).

¹²⁶ Vance, *supra* note 10, at 7.

¹²⁷ *Id.*

¹²⁸ *Id.*

appropriate court.¹²⁹ Documents may be filed in this manner 24 hours a day, and are “filed” for the purposes of satisfying a statute of limitations once they are received by the UCS Web site.¹³⁰ FBEM may only be used to file a case once all parties give written consent.¹³¹ A fill-in-the-blanks consent form may be downloaded from the FBEM Web site. Under current system upgrades, registered users of FBEM may even deduct filing fees automatically from a credit card account, just as is done in conventional e-commerce.¹³² FBEM even offers a practice system for users to become accustomed to using the unfamiliar system.¹³³ Once filed, documents are available to the public unless sealed under court order.¹³⁴

B. What Authority is cited for allowing FBEM?

The original enabling legislation for the FBEM pilot program was chapter 367 of the laws of 1999, which amended New York Civil Practice Laws and Rules § 304.¹³⁵ This legislation authorized electronic filing in commercial cases in the Commercial Division of the Supreme Court of Monroe and New York counties, and tax certiorari cases in the Tax Certiorari Part of the Supreme Court of Westchester County.¹³⁶

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Vance, *supra* note 10, at 20.

¹³³ See FBEM Practice System available at <http://fbem.state.courts.ny.us> (last visited Feb. 5, 2003).

¹³⁴ Keane, *supra* note 125, at *4.

¹³⁵ Vance, *supra* note 10, at 7; see also NY CPLR § 367 (1998), as amended by A-7166A.

¹³⁶ Vance, *supra* note 10, at 7.

The FBEM pilot program has been extended until July 1, 2003 by chapter 110 of the laws of 2002.¹³⁷ This extending legislation expanded the FBEM program to include commercial claims in Monroe, Albany, Westchester, New York, Nassau, and Suffolk County Commercial Divisions of the Supreme Court, tax certiorari cases in Monroe, New York, Suffolk, and Westchester County Supreme Courts, as well as cases versus the State of New York in the New York Court of Claims.¹³⁸ As mentioned above, the chief Administrative Judge has given authority for courts to implement FBEM by Administrative Order amending § 202.5-b of the Uniform Civil Rules for Supreme and County Courts.¹³⁹ The New York State Legislature has most recently reauthorized the UCS pilot program for electronic filing of court documents until September 1, 2005 under chapter 261 of the laws of 2003.¹⁴⁰ The FBEM program has not expanded in scope since its 2002 extending legislation.¹⁴¹

C. Has FBEM been successful?

As of September 30, 2002, only 48 commercial cases have been electronically filed in the New York County Commercial Division through the FBEM program.¹⁴² However, a considerable number of attorneys have visited the UCS Web site and

¹³⁷ *Id.* at 20.

¹³⁸ *Id.*

¹³⁹ See FBEM Rules of the Chief Administrative Judge, *available at* <http://fbem.courts.state.ny.us/ef/mainframe.html> (last visited Mar. 20, 2003).

¹⁴⁰ Amy S. Vance, *Update: NY Court System's Electronic Filing Experiment*, 45 N.Y.St.B.A. State Bar News: Technology Issue 6 (2003).

¹⁴¹ Vance, *supra* note 140, at 6.

¹⁴² Vance, *supra* note 10, at 7.

registered as “users” on the FBEM system.¹⁴³ Currently, 302 attorneys have been issued user ID’s and passwords, which enables them to electronically file cases at any time.¹⁴⁴ The UCS Web site has had over 98,000 “hits” since its inception, illustrating a clear fascination in what FBEM can offer.¹⁴⁵

FBEM has generally been given positive and enthusiastic reviews by its users.¹⁴⁶ After using FBEM, attorney Paul Aloe, of the New York law firm Wachtel & Maysr, LLP, stated that the system will “revolutionize the way cases are handled.”¹⁴⁷ He further noted that once people used FBEM to file cases electronically, they “won’t be able to imagine doing it any other way.”¹⁴⁸ FBEM was also given positive reviews following the terrorist attacks on September 11, 2001.¹⁴⁹ Registered attorneys were still able to file time sensitive case documents through FBEM even when New York courts were closed.¹⁵⁰

The UCS believes that the FBEM system will continue to expand following more attorney contact with the system and continued one-on-one training and assistance.¹⁵¹ At last glance, multiple training sessions providing two CLE credits have been offered both

¹⁴³ *Id.*

¹⁴⁴ Vance, *supra* note 140, at 6.

¹⁴⁵ *Id.*

¹⁴⁶ Vance, *supra* note 10, at 20.

¹⁴⁷ Vance, *supra* note 10, at 20.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

at courthouses and in the workplace to aid in making attorneys more comfortable with the FBEM system.¹⁵² The UCS has also recently updated its software to better protect against identity theft and to safeguard sensitive personal information.¹⁵³ In all, the UCS remains confident that interest in electronic filing will continue to grow given its continued outreach, training, and one-on-one assistance to attorneys.¹⁵⁴

VI. SHOULD NEW YORK IMPLEMENT A MANDATORY STATEWIDE E-FILING PROGRAM?

As discussed above, New York State courts have the channels available to lobby for an expanded implementation of E-filing. The Chief Administrative Judge may amend The Uniform Civil Rules for Supreme and County Courts to expand voluntary filing by electronic means to more New York courts. Furthermore, the ESRA may be seen as a legislative granting of authority for courts to implement E-filing if it is adopted.

As illustrated by the Unified Court System's FBEM pilot program, members of the bar have reacted positively to E-filing and an expansion of this system is feasible and foreseeable. The future benefits of E-filing to the courts, attorneys, and the public, which include considerable space, time and cost savings, are just too great for New York courts to further resist. In the long run, the benefits of E-filing in New York will far outweigh the initial costs of implementing such systems. For this reason, it is foreseeable that voluntary E-filing will be more widely adopted in New York State within the near future.

¹⁵² Vance, *supra* note 140, at 14.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

While a voluntary E-filing system in New York is foreseeable, a mandatory E-filing system is highly unlikely. The absence of authority under the ESRA, or other laws of New York, for courts to require or mandate E-filing in the New York State court system will make a required statewide E-filing system a mere impossibility.

VII. CONCLUSION

In the debate over the implementation of E-filing in New York, it has been seen that there are many benefits and obstacles to departing from a traditional paper filing system. My prediction is that New York state courts should and will increase the scope of voluntary E-filing systems in the near future based on geographical location. This will most likely be accomplished by further expansions of the FBEM pilot program into other counties in Central and Western New York.

Apart from this foreseen expansion, any E-filing system adopted in New York must be fully voluntary based on the consent of all parties involved. Mandatory E-filing systems are highly unlikely to be implemented under current civil rules or the ESRA. Furthermore, sweeping statewide implementation of E-filing is unlikely to occur because of the initial start up expenditures required and the continued reluctance by some practitioners and members of the bar to embrace E-filing as a complete overhaul of today's paper filing system.

In addition to the cost - benefit reasons for implementing E-filing, the decision in *People v. McFarlan* shows the enthusiasm of New York State courts to adopt the use of computer records and storage in the judicial system. Future decisions embracing the judicial attitude towards technological advancement expressed by the *McFarlan* court are

foreseeable and likely to spur the implementation of E-filing on a larger scale within the state.

For the reasons illustrated in the above analysis, along with the Chief Administrative Judge's authority to permit voluntary and consensual E-filing systems by amending the Uniform Civil Rules for Supreme and County Courts § 202.5-b, it is foreseeable and reasonable for New York to adopt voluntary E-filing on a more widespread scale in the near future.