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LITIGATION REVIEW



Electronic Case Filing Coming to a Courthouse Near You

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Imagine the day when you are able to satisfy the statute of limitations deadline by pressing a button on your home computer and electronically filing your summons and complaint late at night, long after the clerk's office has closed. Imagine further, serving and filing your motion papers with the click of a button behind your easy chair, accessing a complete court file without ever leaving the office, or receiving an e-mail notifying you as soon as an order has been rendered in your case or a document filed by your adversary.

Our colleagues in the bankruptcy bar have not had to use much imagination to appreciate the benefits of electronic case filing, which has been available in the bankruptcy courts in some form for quite some time. For other civil litigators in the state and federal courts of New York, contemplating electronic access and filing of litigation papers has been largely relegated to their imagination, however. Not for long.

Beginning Dec. 1, 2003, the U.S. District Court for the Southern District of New York will implement electronic case filing (ECF) in civil cases, including mandatory ECF for certain designated judges. [1] In order to participate in the mandatory ECF program in the Southern District, attorneys must register and become ECF "Filing Users." [2] The Southern District

warns: "Early registration is essential; otherwise, there may be a lengthy delay in your receipt of a password." [3] The user log-in and password serve as the Filing User's signature for all purposes, including Rule 11 of the Federal Rules of Civil Procedure, so receiving a password in time to be eligible for the program is essential.

In the U.S. District Court for the Eastern District of New York, the ECF user's guide indicates that Judges Frederic Block, Raymond J. Dearie, Nicholas G. Garaufis, John Gleeson, Sterling Johnson Jr., Charles P. Sifton, David G. Trager and Jack B. Weinstein, sitting in Brooklyn, and Judges Denis R. Hurley Sr., Joanna Seybert and Leonard D. Wexler, sitting in Central Islip, are all participating in that district's ECF program, in which case all documents must be filed electronically. [4]

While the state court system is clearly well behind the federal courts in implementing an electronic filing program, the New York State Filing By Electronic Means (FBEM) system is, in fact, already available in certain cases, and the Office of Court Administration expects significant expansion in the near future. Thus, with the launching of electronic filing in certain assigned civil cases in the federal courts and the expected expansion in the state courts, litigators practicing in both federal and state courts are well advised to become familiar with the procedures and registration requirements of both court systems sooner rather than later.

Pilot Program

The state's FBEM system arose from a law passed in 1999 authorizing certain "pilot programs" permitting the use of fax transmissions and electronic means to file court papers. [5] That law was extended past its initial expiration date to continue the pilot programs through July 1, 2003, and, as recently amended, through Sept. 1, 2005. [6] Thus, at the current time, FBEM is authorized in the following types of cases and locales in the state courts:

Bn Claims in the Commercial Divisions of Albany, Monroe, New York, Westchester, Nassau and Suffolk counties;

Bn Tax certiorari claims in Monroe, Westchester, New York and Suffolk counties; and

Bn Cases against the State of New York in the Court of Claims designated by the Attorney General and the Court of Claims. [7]

While the law authorized FBEM in the counties and cases noted above, to date, only New York County has actually implemented the program and accepted electronic filings. According to Amy S. Vance, deputy counsel to the OCA, who also serves as counsel to the Chief Administrative Judge's Advisory Committee on Civil Practice and is responsible for providing legal oversight for implementing the FBEM program, New York County case filings are now going "like gangbusters," with 7,000

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cases already filed, including about 6,400 tax certiorari cases filed at the end of October.

In Nassau County, the Administrator of the FBEM pilot program in the Supreme Court Commercial Division is Frank Schellace, who also serves as a Special Referee in that part. Mr. Schellace expects "technical problems that have been identified" to be resolved by the end of the year and that electronic filing in the Commercial Division in Nassau County will be up and running in January 2004. Mr. Schellace reports that both Justices Leonard B. Austin and Ira B. Warshawsky enthusiastically await the launching of FBEM in their parts. Ms. Vance notes that Suffolk County is also primed to accept FBEM cases in the Commercial Division and tax certiorari cases by January 2004.

To encourage even those attorneys who are "technologically challenged," the state court system is designed similarly to the federal program and does not require any unusual or special "gadgets." Indeed, Ms. Vance notes that the hardware and software needed to participate in the state program are "so modest that most attorneys will already have all the technical wherewithal required in their offices" — a personal computer, an Internet browser, a scanner and Adobe Acrobat software, which would permit documents to be saved in the "portable document format" (PDF) so that they can be safely and securely transmitted over the Internet. Nevertheless, anyone who expects to participate in FBEM should not expect to rely upon a low-budget, single paper-feeding scanner that is incapable of scanning high volumes of documents in the time it takes to copy.

Steps and Training

Similar to the federal program, to participate in the state pilot program, an attorney needs to register with the Unified Court System as an authorized "filing user" and obtain an assigned password and personal identification number, which will constitute an electronic signature that is the equivalent of physically signing the paper being transmitted electronically. The New York State program differs in at least one material

respect from the federal system in that attorneys wishing to take advantage of electronic filing in the authorized cases must obtain unanimous consent of all parties in order to participate in the program.

A plaintiff is deemed to have consented to FBEM when the initial summons and complaint are electronically filed, while the defendant may signify consent by electronically filing responsive papers and checking the appropriate box for FBEM. The parties can also consent at any time during the pendency of an applicable case, even after hard copies of initial papers are filed manually.

Once registered and eligible to participate in the state pilot program, a filing user in an authorized case would be able to prepare court papers on a word processor just like any other case, convert them to PDF format and then simply submit them to the court through the FBEM Web site. [8] All papers can be electronically filed in this manner at any time of the day or night and be deemed filed when they reach the Web site. It is also expected that filing users will receive e-mail notification when any papers are filed or court orders are entered.

While those interested in the state program can obtain detailed information and forms online, [9] Ms. Vance strongly recommends that participants take advantage of voluntary training that will be provided by OCA, which is designed to provide hands-on guidance and answer questions that may arise from reviewing the manuals. CLE credit will be available for the training. Mr. Schellace also expects the Nassau County Bar Association's Academy of Law to offer training to help familiarize the bar with FBEM requirements.

Based upon all of the anticipated benefits derived from electronic filing, with access to documents at any location where a personal computer is available, it appears that widespread, statewide FBEM is only a matter of time. As has been the case with faxes, computers, the Internet and e-mail, before long, we are not likely to remember what life was like without electronic filing. Those who become familiar with the system in its infancy and get in on the

ground level are likely to enjoy an early advantage when FBEM becomes the way of litigation life.

Endnotes

1. Information concerning the Southern District's ECF program can be accessed through the Internet at www.nysd.uscourts.gov/cmecf/cmecfindex.htm. The court's press release regarding the implementation of the Dec. 1, 2003, electronic filing initiation can be found at www.nysd.uscourts.gov/newsroom/cmecf/ecfpres92203.htm
2. See the court's press release, with hyperlinks to specific subjects, including attorney registration requirements at www.nysd.uscourts.gov/newsroom/cmecf/ecfpres92203.htm
3. www.nysd.uscourts.gov/newsroom/cmecf/ecfpres92203.htm. The procedures for registering are set out at length at the court's ECF section on its Web site. See "Policies and Procedures" at www.nysd.uscourts.gov/cmecf/cmecfindex.htm
4. The online user's guide can be accessed under the Training section of the court's CM/ECF (Case Management/Electronic Case Filing) page located at www.nyed.uscourts.gov/CM_ECF/cm_ecf.html
5. Laws of New York, 1999, Chapter 367.
6. Laws of New York, 2002, Chapter 110 and Laws of New York, 2003, Chapter 261.
7. Laws of New York, 2002, Chapter 110.
8. The New York State Unified Court System's Filing by Electronic Means home page can be accessed at <http://fbem.courts.state.ny.us/ef/mainframe.html>
9. *Id.*