

E-filing Primer for Matrimonial Attorneys
By Joel R. Brandes

The New York State Courts Electronic Filing (NYSCEF) System permits the service and filing of litigation papers with the County Clerk or the Court by a registered user, by electronic means on its website at www.nycourts.gov/efile. The advantage of being a NYSCEF user is that attorneys can serve and file papers at any time. A case can be initiated or post-commencement modification or enforcement proceedings can be filed at any hour of any day, even when the courts are closed.

The CPLR excludes matrimonial actions from mandatory e-filing. (CPLR 2111(b)(2)(A)). However, last year, the Chief Administrator of the Courts adopted rules for consensual e-filing in matrimonial actions. The Rules, which were effective June 1, 2020, provide that on consent, documents may be filed and served by electronic means in matrimonial actions in the Supreme Court in authorized counties subject to certain conditions. The consensual e-filing rules in 22 NYCRR § 202.5-b apply. The conditions are that (a) no papers are available to the public; (b) existing personal service requirements in the domestic relations law, family court act, or civil practice law and rules are not abrogated; (c) unless otherwise directed by the court, forensic evaluation reports in custody, visitation and other matters concerning children may not be filed electronically; and (d) service of the initiating documents in post-judgment applications must be effectuated in hard copy and accompanied by a notice regarding the availability of electronic filing in post-judgment matrimonial proceedings on a form approved by the Chief Administrator. Proof of hard copy service must be filed by electronic means. (See AO/116/20, Appendix B, effective June 1, 2020; AO/247/20, Appendix B, effective October 21, 2020.)

Matrimonial actions are defined in Appendix B as those actions set forth in CPLR § 105(p) and Domestic Relations Law § 236 where: the action is contested, and addresses issues including, but not limited to, alimony, counsel fees, pendente lite, maintenance, custody and visitation, child support or the equitable distribution of property; or the action is uncontested; or the action is a post-judgment application that either (1) addresses an underlying matrimonial action that was commenced electronically, or (2) is electronically initiated with the purchase of a new index number. A "party" or "parties" means the party or parties to the action or counsel and the attorney(s) for the minor child(ren).

The case law dealing with the e-filing system is sparse. As far as we know, very few matrimonial lawyers have participated in the e-filing system. In the article, we focus on the rules regarding the service and filing of process and papers in e-filed matrimonial actions.

CPLR 2111, enacted in 2015 authorizes the chief administrator of the courts to promulgate rules authorizing the commencement, filing and service of papers by electronic means. CPLR 2110 defines "electronic means" by reference to CPLR 2103 (f)

as any method of transmission of information between computers or other machines designed for the purpose of sending and receiving such transmissions, and which allows the recipient to reproduce the information transmitted in a tangible medium of expression. (CPLR 2103 (f)(2)).

While CPLR 2103 (b)(7) authorizes the service of papers upon an attorney by electronic means, this service is only authorized where and in the manner authorized by rules of the chief administrator. Unless the rules provide otherwise, the transmission must be upon the party's written consent. No party may be compelled, directly or indirectly, to participate in consensual e-filing under the consensual system. (22 NYCRR.202.5-b (b)(2)(ii)).

A plaintiff may commence any action in the Supreme Court, in any county where e-filing has been authorized, by electronically filing the summons or summons and complaint, with the County Clerk through the NYSCEF site. (22 NYCRR 202.5-b (b)(1)). The plaintiff must serve the defendant with a notice of e-filing, in a form approved by the Chief Administrator, with the initiating documents. (22 NYCRR 202.5-b (b)(2)(ii)).

Jurisdiction must be obtained over the defendant. The documents commencing an action must be served in hard copy in accordance with Article 3 of the CPLR and must contain signatures as required by Article 3. (22 NYCRR 202.5-b (f)(1)). However, they may be served by electronic means if the defendant agrees to accept electronic service. (22 NYCRR 202.5-b (f)(1)). A defendant served with process by electronic means must, within 24 hours of service, provide the serving attorney with an electronic confirmation that the service has been effected. (22 NYCRR 202.5-b (b)(2)(ii))

A defendant served with the notice of e-filing must promptly record his or her consent electronically on the NYSCEF site or file with the court and serve on all parties of record a declination of consent. The consent to e-filing must state that the defendant agrees to the use of e-filing in the action and to be bound by the filing and service provisions in the consensual rules. However, the filing of a consent to e-filing does not constitute an appearance in the action under CPLR 320. (22 NYCRR 202.5-b (b)(2)(ii)).

After the commencement of an e-filing case, service is made by a party or participant, through NYSCEF, on other e-filers, such as the attorney for a child, who have consented. When a document is filed through NYSCEF in a consensual case in which other attorneys have consented, the transmission of the document to NYSCEF automatically causes service to occur on the other participating attorneys. The NYSCEF system immediately transmits an email message to them reporting that a document has been received by NYSCEF, and containing a link to the document. That transmission constitutes service. The time to respond to an e-served document is the same as when personal service is made in hard copy. (see <https://iappscontent.courts.state.ny.us/NYSCEF/live/faq.htm>, The Filing Process, FAQ 15 (last accessed December 18, 2020)).

An e-filing attorney may also use hard copy service, if preferred. Attorneys not participating in e-filing must serve and be served in hard copy. (Id)

After the commencement of an e-filed action documents may be electronically filed and served, only upon a party or parties who has consented to e-filing. (22 NYCRR 202.5-b (b)(2)(i)). E-filing of papers does not constitute service where the e-filing occurs before the defendant has consented to e-filing. (Rickerson v Porsch, 63 Misc. 3d 1204(A), 114 N.Y.S.3d 184 (Sup Ct, 2019)).

Where a party has not consented to e-filing he must serve and be served with documents, and file documents with the court and the County Clerk, in hard copy. When an e-filing party serves a document in hard copy on a non-e-filing party, the document served must have full signatures of all signatories, and proof of service must be filed electronically. (22 NYCRR 202.5-b (b)(2)(i)).

When a registered user who is a signatory to a document files a document electronically under his ID and password it constitutes "signing" for purposes of 22 NYCRR Part 130. (See <https://iappscontent.courts.state.ny.us/NYSCEF/live/faq.htm>, The Filing Process, FAQ 18.)

Any document is also considered signed if it bears the physical signature of the person and is scanned into an electronic format that reproduces the signature, or if the signatory has electronically affixed a digital image of his or her signature to the document. (22 NYCRR 202.5(b)(7)(e)). A hard copy of the document should be signed and the document should be scanned into PDF format and filed with NYSCEF.

An attorney registering with NYSCEF must provide it with an e-mail service address at which the service of papers (referred to as interlocutory documents) may be made on a party through notification transmitted by the NYSCEF site. All users are responsible to monitor their registered e-mail address and promptly notify the Resource Center in the event of a change of a service address. (22 NYCRR 202.5-b (f)(2)(i)).

An e-filing party causes service of interlocutory papers, such as a motion, to be made upon another party participating in e-filing by filing the document electronically. When it receives an interlocutory document, the NYSCEF site automatically transmits an electronic notification to all e-mail service addresses in the action. Each party receiving the notification is responsible for accessing the NYSCEF site to obtain a copy of the document. (22 NYCRR 202.5-b (f)(1)(ii)). Transmission of this notification constitutes service of the document. An affidavit of service does not need to be filed. However, service will not be effective if the filing party learns that the transmission did not reach the e-mail address of any person to be served.(22 NYCRR 202.5-b(f)(2)(ii)).

CPLR 2214(c) provides that in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously e-filed with the court, but may make reference to them, "giving the docket numbers on the e-filing system". The failure to "giv[e] the docket numbers on the e-filing system" corresponding to a previously e-filed affidavit of service, will result in the document not be

considered by the Court. (*Eastern Funding LLC v San Jose 63 Corp.*, 98 N.Y.S.3d 444, 445 (2 Dept., 2019)).

A party may utilize other methods of service of papers permitted by CPLR 2103(b)(1) to (6). (See CPLR 2103 (b)(7)). If one of the other methods is used, proof of that service must be filed electronically. (22 NYCRR 202.5-b (f)(1)).

In an action subject to e-filing, the County Clerk files the orders and judgments electronically and enters them. (22 NYCRR 202.5-b (h)(1)). The Clerk's filing stamp is proof of the entry and the date and time of entry. When an order or judgment is entered, the NYSCEF site will transmit a notification of the receipt of the entry to the e-mail addresses of the parties. This transmission of the receipt of the entry does not constitute service of notice of entry by any party. A party must serve notice of entry of an order or judgment on another party by serving a copy of the order or judgment and written notice of its entry.(22 NYCRR 202.5-b (h)(2)). However, a party may serve an order or judgment and written notice of its entry electronically by filing them with the NYSCEF site which will cause transmission by the site of notification of the receipt of the documents, which will constitute service by the filer. (22 NYCRR 202.5-b (b)(2)(ii)).

Conclusion

Consensual e-filing by both attorneys in a matrimonial action after jurisdiction is acquired makes the stressful practice of matrimonial law less stressful. It eliminates the need to physically sign, serve and file a paper copy of a motion, order, judgment, affidavit of service or notice of entry. Submitting an order to show cause for pendente lite relief to the court for signature, and its service on your adversary once it is granted, is effortless. Service of net worth statements, discovery demands and other papers, as well as their receipt is instantaneous, and you no longer have to run to Federal Express before it closes to meet a service deadline. A matrimonial action that was commenced in hard copy form may be converted to a NYSCEF case by filing a Form EF-10 Stipulation and Consent to e-filing via the Electronic Document Delivery System at <https://iapps.courts.state.ny.us/nyscef/SpecialDocumentTransferHome?id=41>. This is an opportunity that should not be missed.

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