§ 10.40 Chief administrator to prescribe forms and to authorize use of electronic filing.

1. The chief administrator of the courts shall have the power to adopt, amend and rescind forms for the efficient and just administration of this chapter. Such forms shall include, without limitation, the forms described in paragraph (z-1) of subdivision two of section two hundred twelve of the judiciary law. A failure by any party to submit papers in compliance with forms authorized by this section shall not be grounds for that reason alone for denial or granting of any motion.

2. (a) Notwithstanding any other provision of law, the chief administrator, with the approval of the administrative board of the courts, may promulgate rules authorizing a program in the use of electronic means ("e-filing") in the courts of New York having criminal jurisdiction for: (i) the filing with a court of an accusatory instrument for the purpose of commencement of a criminal action or proceeding, and (ii) the filing and service of papers in pending actions and proceedings. Provided, however, the chief administrator shall consult with the county clerk of a county outside the city of New York before the use of electronic means is to be authorized hereunder in the supreme court or county court of such county, afford him or her the opportunity to submit comments with respect thereto, consider any such comments and obtain the agreement thereto of such county clerk.

(b) Participation in this program may be required or may be voluntary as provided by the chief administrator, except that it shall be strictly voluntary as to any party to an action or proceeding who is not represented by counsel unless such party, upon his or her request, chooses to participate.

(c) (i) Where participation in this program is to be voluntary: (A) filing an accusatory instrument by electronic means with the court for the purpose of commencement of an action or proceeding shall not require the consent of any other party; nor shall a party's failure to consent to participation in an action or proceeding bar any other party to such action or proceeding from filing and serving papers by facsimile transmission or electronic means upon the court or any other party to such action or proceeding who has consented to participation;

(B) all parties shall be notified clearly, in plain language, about their options to participate in filing by electronic means;

(C) no party to an action or proceeding shall be compelled, directly or indirectly, to participate;

(D) where a party is not represented by counsel, the court shall explain such party's options for electronic filing in plain language, including the option for expedited processing, and shall inquire whether he or she wishes to participate, provided however the unrepresented litigant may participate in the program only upon his or her request, which shall be documented in the case file, after said party has been presented with sufficient information in plain language concerning the program.

(ii) Where participation in this program is to be required:

(A) such requirement shall not be effective in a court in a county unless, in addition to consulting with the county clerk of such county and obtaining his or her agreement thereto if the court is a supreme court or county court, the chief administrator shall:

(1) first consult with and obtain the agreement of the district attorney and the criminal defense bar of such county, provide all persons and organizations, or their representative or representatives, who regularly appear in criminal actions or proceedings in the criminal courts of such county with reasonable notice and opportunity to submit comments with respect thereto and give due consideration to all such comments, and consult with the members of the advisory committee specified in subparagraph (v) of paragraph (u) of subdivision two of section two hundred twelve of the judiciary law; and

(2) afford all those with whom he or she consults pursuant to item one of this clause the opportunity to submit comments with respect to the program, which comments, including but not limited to comments related to unrepresented litigants, he or she shall consider and shall post for public review on the office of court administration's website; and

(B) as provided in paragraph (d) of this subdivision, no party who is not represented by counsel nor any counsel in an affected case who opts out of participation in the program shall be required to participate therein.

(d) Where the chief administrator requires participation in electronic filing as provided in paragraph (b) of this subdivision, he or she shall

afford counsel the opportunity to opt out of the program, via presentation of a prescribed form to be filed with the court where the criminal action is pending. Said form shall permit an attorney to opt out of participation in the program under any of the following circumstances, in which event, he or she will not be compelled to participate:

(i) Where the attorney certifies in good faith that he or she lacks appropriate computer hardware and/or connection to the internet and/or scanner or other device by which documents may be converted to an electronic format; or

(ii) Where the attorney certifies in good faith that he or she lacks the requisite knowledge in the operation of such computers and/or scanners necessary to participate. For the purposes of this subparagraph, the knowledge of any employee of an attorney, or any employee of the attorney's law firm, office or business who is subject to such attorney's direction, shall be imputed to the attorney.

Notwithstanding the foregoing provisions of this paragraph: (A) where a party is not represented by counsel, the clerk shall explain such party's options for electronic filing in plain language, including the option for expedited processing, and shall inquire whether he or she wishes to participate, provided however the unrepresented litigant may participate in the program only upon his or her request, which shall be documented in the case file, after said party has been presented with sufficient information in plain language concerning the program; (B) a party not represented by counsel who has chosen to participate in the program shall be afforded the opportunity to opt out of the program for any reason via presentation of a prescribed form to be filed with the clerk of the court where the proceeding is pending; and (C) a court may exempt any attorney from being required to participate in the program upon application for such exemption, showing good cause therefor.

(e)(i) Nothing in this section shall affect or change any existing laws governing the sealing and confidentiality of court records in criminal proceedings or access to court records by the parties to such proceedings, nor shall this section be construed to compel a party to file a sealed document by electronic means.

(ii) Notwithstanding any other provision of this section, no paper or

document that is filed by electronic means in a criminal proceeding shall be available for public inspection on-line. Subject to the provisions of existing laws governing the sealing and confidentiality of court records, nothing herein shall prevent the unified court system from sharing statistical information that does not include any papers or documents filed with the action; and, provided further, that this paragraph shall not prohibit the chief administrator, in the exercise of his or her discretion, from posting papers or documents that have not been sealed pursuant to law on a public website maintained by the unified court system where: (A) the website is not the website established by the rules promulgated pursuant to paragraph (a) of this subdivision, and (B) to do so would be in the public interest. For purposes of this subparagraph, the chief administrator, in determining whether posting papers or documents on a public website is in the public interest, shall, at a minimum, take into account for each posting the following factors: (A) the type of case involved; (B) whether such posting would cause harm to any person, including especially a minor or crime victim; (C) whether such posting would include lewd or scandalous matters; and (D) the possibility that such papers or documents may ultimately be sealed.

(iii) Nothing in this section shall affect or change existing laws governing service of process, nor shall this section be construed to abrogate existing personal service requirements as set forth in the criminal procedure law.

3. For purposes of this section, the following terms shall have the following meanings:

(a) "Consent of the criminal defense bar" shall mean that consent has been obtained from all provider offices and/or organizations in the county that represented twenty-five percent or more of the persons represented by public defense providers pursuant to section seven hundred twenty-two of the county law, as shown in the most recent annual reports filed pursuant to subdivision one of section seven hundred twenty-two-f of the county law. Such consent, when given, must be expressed in a written document that is provided by a person who is authorized to consent on behalf of the relevant public defender organization, agency or office; and

(b) "Electronic means" shall be as defined in subdivision (f) of rule twenty-one hundred three of the civil practice law and rules; and

(c) The "filing and service of papers in pending criminal actions and proceedings" shall include the filing and service of a notice of appeal pursuant to section 460.10 of this chapter.