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# E-Filing: Mastering the Tech-Rhetoric

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## E-Filing: Mastering the Tech-Rhetoric

**T**he Legal Writer interrupts our regularly scheduled program — the multi-part series on writing civil-litigation documents — to discuss a hot topic: electronic filing, or e-filing. As technology advances, all lawyers need to know about e-filing. The topic is also critical because the New York State Unified Court System is moving toward mandating e-filing throughout the state.

Twelve years ago, when New York introduced a voluntary pilot project to test e-filing,<sup>1</sup> it appeared unlikely that e-filing would take off. The first case was e-filed on November 22, 2000.<sup>2</sup> By 2002, only 300 lawyers had registered with the New York State Courts Electronic Filing System (NYSCEF). High implementation costs,<sup>3</sup> privacy and confidentiality concerns,<sup>4</sup> and the computer hesitancy, and in some cases illiteracy, of senior lawyers<sup>5</sup> explained the initial reluctance. But the undeniable advantages of e-filing, including the rarity that documents submitted electronically would be lost or misfiled,<sup>6</sup> the ability of lawyers to file materials at any hour,<sup>7</sup> and the benefit of practically instant accessibility,<sup>8</sup> have led to technological advances. At the end of 2009, more than 200,000 cases and more than 500,000 documents<sup>9</sup> had been filed, and more than 13,000 lawyers had registered with NYSCEF.<sup>10</sup>

Substantial changes have occurred in the area of e-filing. On September 1, 2009, Chapter 416 came into effect, significantly altering the e-filing landscape.<sup>11</sup> Chapter 416 made e-filing no longer a pilot program.<sup>12</sup> E-filing is now required in certain commercial

cases in Supreme Court, New York County,<sup>13</sup> and in commercial and tort cases in Supreme Court, Westchester County.<sup>14</sup> As of June 2011, all commercial cases, including breach of contract actions, must be commenced electronically in Supreme Court, Westchester County.<sup>15</sup> The e-filing system is currently optional for tort, commercial, and tax certiorari cases in 15 counties of the Supreme Court.<sup>16</sup> Two other counties, Broome and Erie, permit e-filing Supreme Court cases.<sup>17</sup> The system is also available in New York City Civil Court no-fault actions,<sup>18</sup> probate and administrative proceedings in five counties of the Surrogate's Court,<sup>19</sup> and the Court of Claims.<sup>20</sup>

New York's Appellate Division, First Department, requires practitioners to file ten copies of a brief or appendix, and one of those copies must be a PDF: "Effective July 1, 2010, pursuant to amendments to rule 600.11, each party perfecting or answering an appeal shall file, in addition to the requisite number of paper copies, one searchable PDF copy of the brief via e-mail. Effective September 1, 2010, each party filing an appendix (or record on appeal) shall file, in addition to the requisite number of paper copies, one searchable PDF copy of the appendix (or record on appeal)."<sup>21</sup> The Second, Third, and Fourth Departments do not provide for e-filing. Although the Fourth Department's rules provide that "submission to the Clerk's Office by electronic means will be accepted,"<sup>22</sup> e-filing is not yet in place. The Fourth Department allows litigants to file a companion CD-ROM of the records, appendices, and briefs if the

litigants consent to filing a CD-ROM.<sup>23</sup> The CD-ROM must be identical to the printed record. The benefit of submitting a companion CD-ROM is that you can use hyperlinks, explained later in this article.

To expand mandatory e-filing, further legislative action is required:<sup>24</sup> "Although Chapter 416 envisions voluntary e-filing, the new legislation gives OCA [Office of Court Administration] authority to make e-filing mandatory in certain cases, but the authority for mandatory e-filing is temporary and will expire absent further legislative action on September 1, 2012."<sup>25</sup>

Lawyers should expect, however, that voluntary e-filing will become mandatory e-filing before September 2012. Chief Judge Jonathan Lippman recently stated that he hopes for a "digital courthouse."<sup>26</sup> The Chief Judge said that "he will seek authority to require all state courts to implement mandatory electronic filing" in all New York state courts.<sup>27</sup> He believes that mandatory e-filing will take about 12 to 18 months to implement.<sup>28</sup> E-filing has many benefits, he explained, including efficiency and saving New Yorkers money.

As lawyers gravitate toward electronic filing in state courts, the practice has become widespread at the federal level.<sup>29</sup> E-filing has been required in all New York federal district courts since 2004 and in the Court of Appeals for the Second Circuit since January 2010.<sup>30</sup>

The trend is obvious. Courts are rapidly requiring electronic filing, and lawyers are becoming more and more

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willing to disassociate themselves from the past and enter the modern age. To help Luddite lawyers, the New York State Unified Court System Web site now has an e-filing manual and a “Frequently Asked Questions” section.<sup>31</sup>

New York’s e-filing system is easy to use. To take part, one must be a “registered and authorized filing user,” a title granted after completing and submitting an online form.<sup>32</sup> Following initial registration, licensed New York

**Your e-document will be judged by how well readers understand you.**

lawyers gain an identification name, password, and access to e-filing in every court participating in the system.<sup>33</sup> For service of interlocutory documents, users must provide a primary e-mail address where documents may be served; the e-mail address may be the party’s e-mail address or the attorney’s e-mail address if the party is represented.<sup>34</sup> Documents may be filed on the NYSCEF Web site day or night.<sup>35</sup>

Taking into account this trend toward technology in the courtroom, lawyers can help online readers, specifically judges, rule for their clients. Today, lawyers rely on hypertext, portable document format (PDF) files, and bookmarks — terms once reserved for professors offering interactive learning courses — to create effective e-documents.

This column explores how to use the electronic tools to write persuasive, user-friendly e-documents.

### **Know Whom You’re Writing For — Plan and Organize Accordingly**

Write for your readers. Be kind to them. Before you create a document that can be e-filed, plan its layout and content. Your e-document will be judged by how well readers understand you. Basic editing and drafting rules apply.

Logical paragraphs, sturdy sentences, and focused persuasion yield effective results.

Give your readers a clear and accessible organizational plan. Cognitive-process experts stress the importance of “chunking” information together and displaying it in coherent, “self-contained” steps.<sup>36</sup> This is because the human mind can “process only about three to four chunks of information at a time.”<sup>37</sup> Chunking also allows for white space on the page, allowing the reader to focus on the text and giving the human eye time to relax before moving to the next topic. Don’t bore readers with non-essentials. Use a concise and direct style, with short paragraphs, to accommodate the limits of a computer screen; label the topics with headings and subheadings.<sup>38</sup>

Consider whether the document can be read in an online environment. Some judges will print your materials. Most will read them on their computers.

Screen readers quickly lose concentration and focus. Accommodate your readers by ensuring your e-documents are usable — meaning easy to read.<sup>39</sup>

Seven usability tools apply to e-documents:<sup>40</sup>

- **Enable skimming.** Accommodate impatient and busy online readers by helping them skim through documents. Use short summaries and topic sentences. Carefully sculpted headings and topic sentences that introduce paragraphs allow skimmers to grasp your legal arguments quickly. Online readers glance at documents, hoping to find bullet points, outlines, and numbered lists. A reader’s attention is always attracted to lists. They provide easy and organized ways to process information.<sup>41</sup>
- **Omit needless words.** Screen readers can’t, or won’t, absorb lots of words. Every word counts in an online setting. Cutting half your words will make your content more prominent. It’ll also shorten the route your reader must take to get to your content.<sup>42</sup>

- **Don’t force your readers to think.** Don’t let readers work too hard. Effective e-documents identify each step of an argument and explain assumptions. To facilitate the reader’s experience, e-writers should “connect the dots” to “make the logical structure intuitive.”<sup>43</sup>
- **Make it simple.** Avoid synonyms. An argument that uses the same words for the same things is easier to follow. Less is more in e-documents. Satisfy readers. Writers will meet their readers’ expectations by following standard writing formulas, relying on normal capitalization, and structuring rudimentary sentences.<sup>44</sup>
- **Use white space.** Online readers need breaks. Writers should provide ample white, or blank, space throughout their document. Space gives the brain and eyes a much-needed rest. This can be achieved through wide margins, indenting, and space between paragraphs.<sup>45</sup>
- **Put the most important content in the top left of the page.** Online readers’ eyes gravitate toward the top left of the page.<sup>46</sup> According to eye-tracking studies, screen readers process information in an F-shaped pattern, “looking down the left side for structural cues and then focusing on headings and first sentences of paragraphs.”<sup>47</sup> Writers should place the most important headings and information there.<sup>48</sup>
- **Test your document.** Test your document by having those who know nothing about your case read it.<sup>49</sup> Ask them whether it’s difficult to read or comprehend. Determine whether any questions linger or remain unanswered. Your readers, who don’t know your case like you do, should walk away feeling that your arguments are clear.

### **Making e-Files Readable**

Online writers must consider the relationship between their readers and the

online device. Readers must be able to adapt to the functionality of new technology, and writers should ensure that this transition is seamless. Factors like screen-type and operating system are beyond the writer's control. Other things aren't. Good e-writers always think about the reader's navigational needs.

You'll help your readers by choosing a good font. Writers should use standard, easily read symbols and avoid difficult-to-read characters. The Seventh Circuit recommends Century, a typeface designed for books.<sup>50</sup> The Supreme Court and the Solicitor General also use Century.<sup>51</sup>

### E-Filing in PDF is Cheap and Easy

Courts require e-filing in PDF.<sup>52</sup> To file through the NYSCEF, software is required to convert documents from word processed files to PDFs.<sup>53</sup> Using PDF doesn't take great skill or expertise: "the technical requirements for creating and reading PDF files are minimal."<sup>54</sup>

Courts prefer PDF to Word or WordPerfect documents due to the security needs of legal documents.<sup>55</sup> PDF preserves a document's formatting, integrity, and pagination.<sup>56</sup> PDF files can be secured by using passwords, thereby avoiding unauthorized changes or alterations.<sup>57</sup> Authors can even prevent their readers from cutting and pasting words into separate documents.<sup>58</sup> PDF allows writers to add digital signatures to verify a document's authenticity.<sup>59</sup>

E-filing with PDF is cost-efficient. Another benefit is "the consistent accessibility of PDF files from any computer."<sup>60</sup> But the biggest advantage to PDF is a reader's ability to interact with the document. PDF files can be made "key-word searchable" so that readers can seamlessly make their way through the document by inserting any word of interest.<sup>61</sup>

The Adobe Reader is available to download for free online.<sup>62</sup> Adobe Reader has links to software to convert word-processed documents to PDF. Documents converted to PDF from

a word-processing program are key-word-searchable. To add other material to your brief a scanner might be useful for converting paper documents into high-quality e-files.<sup>63</sup> Essentially, these files are digital photographs of the paper documents; they are not word-searchable. Some of the more sophisticated programs, including the Adobe Acrobat Pro series, will recognize text using optical character recognition (OCR) software. If the image is crisp and clean the OCR will work well. But poorly scanned paper briefs can result in the document's appearing "grainy" in PDF format, making it difficult to use the OCR function and for readers to navigate.<sup>64</sup>

### Make PDF Work for You and Your Reader

To create easily navigable documents for your reader, take advantage of PDF's generous tools. Don't be afraid to overuse, even saturate, the document with anything that'll grab your reader's attention.

Through PDF's "navigation pane," you can include a table of contents, commonly referred to as "bookmarks."<sup>65</sup> Bookmarks are effective: "the reader can click on different levels of the table of contents and be taken to that point in the document."<sup>66</sup>

Another tool is "thumbnails." Slightly different from bookmarks, thumbnails allow readers to view "graphical representations of each page in the document."<sup>67</sup> These tools give writers full rein over documents and allow writers to determine exactly where their readers should focus their attention.

### Hypertexting to Simplicity: The CD-ROM

Keeping things simple for the demanding, often-lazy online reader is the overarching theme of good e-filing. One way to cater to the lazy is to use hypertext in your documents. With

a click of a mouse, this technology immediately sends the reader, through hyperlinks, to a transcript, exhibit, or legal authority. It organizes a document in a way that cannot be achieved on paper.<sup>68</sup> Hypertexting ties loose ends by allowing readers to sift through piles of documents that, in paper form, would be tedious and messy. Thanks to hypertexting, gone are the days of "plunking down the brief to look up the case or dig through boxes for key documents."<sup>69</sup>

One medium often associated with hypertext is the CD-ROM. On a single CD, readers can access a brief, review the record, and consult the authorities cited.<sup>70</sup> A CD-ROM acts as a "placeholder" for paper submissions, requiring less storage space than multiple copies of paper briefs.<sup>71</sup>

CD-ROM briefs are particularly persuasive when combined with intelligent writing. Briefs submitted on CDs can be tailored to the judge's reading preferences, if you know them. Also possible are different fonts, organizational preferences, and audio/video options that allow the judge to listen to or watch a brief rather than read it.

The advantages of CDs and hypertexting cannot be overstated. Through their use, lawyers can now create interactive documents. If a reader wishes

Good e-writers always think about the reader's navigational needs.

to consult a case or statute cited in the brief, a simple click on the citation will suffice.<sup>72</sup> Through the New York State Unified Court System, lawyers can instantly send their readers to a supportive decision.<sup>73</sup> This simplicity gives lawyers a heightened assurance that their reader, no longer forced to sift through piles of paper, will consult their materials.

Lawyers considering submitting briefs on CD-ROM should not overuse the features available to them. CD-ROM users run the risk of seeing shocking or disturbing images or videos.<sup>74</sup> The editor should be care-

ful. Writers should also be conscious that the sophistication and complexity of technological material might overwhelm some readers.<sup>75</sup> Always ensure that material submitted in a hyperlink benefits your case.

### Be Conscious of the Information You Emit

Broadcasting easily accessible private information increases identity theft. E-filers must be aware of the information they upload. The Federal Rules of Civil Procedure limit disclosing private information. Only the last four digits of an individual's social-security number, taxpayer number, or financial-account number may be disclosed.<sup>76</sup> The Rules also specify that documents be redacted to include no more than an individual's year of birth or the initials of a minor's name.<sup>77</sup>

Rather than rely on redaction, New York court users must indicate whether the document to be filed contains "health information, a social security number, a credit card number, a bank account number, an individual's date of birth, an individual's home

information might remain accessible despite being highlighted in black, covered by a black box, or written in white, so as to disappear into the page.<sup>83</sup> Removing information and re-saving the file might not be enough. It's possible for deleted text to be retrieved from earlier versions of a document.<sup>84</sup> To avoid filing a document comprised of "hidden data,"<sup>85</sup> the court suggests that lawyers save documents under a new name after they delete private information or, better yet, that they invest in software designed to redact files.<sup>86</sup>

### Don't Re-Invent the Wheel: Good Writing is Still Good Writing

Electronic communication is here to stay. Whether the courts already require e-filed documents or are developing new rules to permit them, lawyers must adapt to this technological reality. In the not-so-distant future, all courtrooms will be digital. Lawyers will be expected to know how to file documents online. As a result, lawyers must know how to turn electronic documents into effective advocacy tools.

help you create a winning tech-rhetoric document of which you'll be proud.

In the next issue, the Legal Writer resumes our regular scheduled topic: writing the answer. ■

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2. Paul H. Aloe, *Civil Practice*, 60 Syracuse L. Rev. 717, 719 (2010).
3. Marco B. Koshykar, *E-Filing Court Documents: The Possibilities and Progress of E-Filing in New York*, Syracuse Sci. & Tech. L. Rep. 1, 6 (Spring 2004).
4. *Id.*
5. *Id.*
6. William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What is it? What are its Implications?*, Santa Clara Computer & High Tech. L.J. 181, 203 (2002).
7. *Id.*
8. *Id.*
9. Pfau, *supra* note 1, at 9, col. 6.
10. *Id.*
11. *Id.* Chief Administrative Judge Pfau pointed to the three main changes that came with implementing Chapter 416: (1) "e-filing is no longer an 'experiment,' subject to a series of sunsets and requiring renewed legislative authority every two or three years," (2) "legislative approval is no longer required to expand the program; rather the court system is authorized to promulgate rules permitting voluntary participation in e-filing in additional counties and in more classes of cases," and (3) "the legislation provides for the establishment of a program of mandatory e-filing in certain jurisdictions in specific types of cases." *Id.* at 14, col. 5.
12. *Id.* at 14, col. 5.
13. *Important Notice to Commercial Practitioners: Mandatory Electronic Filing*, <http://www.nycourts.gov/suptctmanh/MEF-Notice%20to%20CD.pdf> (last visited Mar. 15, 2011) (noting those commercial cases for which e-filing is mandatory in the Supreme Court, Civil Branch, New York County).
14. N.Y. St. Courts E-Filing Sys., <https://iapps.courts.state.ny.us/fbem/mainframe.html> (last visited Mar. 15, 2011).
15. E-Filing in Westchester, [http://www.westchesterclerk.com/index.php?option=com\\_content&view=article&id=14&Itemid=8](http://www.westchesterclerk.com/index.php?option=com_content&view=article&id=14&Itemid=8) (last visited Mar. 15, 2011).
16. N.Y. St. Courts E-Filing Sys., *supra* note 14.
17. *Id.*
18. *Id.*
19. *Id.*

Keeping things simple for the demanding, often-lazy online reader is the overarching theme of good e-filing.

address, a minor child's name, or trade secrets."<sup>78</sup> If the answer is yes, access to the information will be restricted to the consenting parties, the clerk, and the court.<sup>79</sup>

Uncertain are the implications for lawyers who fail to redact documents through e-filing.<sup>80</sup> New York courts have yet to consider a valid malpractice claim against a lawyer responsible for unlawfully dispersing private information.<sup>81</sup> To avoid any dispute, lawyers ought to remain conscious, not only of e-filing's rules and regulations, but also the means by which they redact their documents.

The U.S. District Court for the District of New Jersey recently advised counsel of the futility of several commonly relied-on redaction techniques.<sup>82</sup> Among the concerns are that private

Electronic tools are only half the story. Good writing is still good writing, regardless of a writer's ability to adapt to new technology. Technology isn't the great savior. It should be approached with caution. Don't go overboard and include too much information in filings. Just because the technology exists doesn't mean you should use it. Overusing technology is risky: It'll make your documents difficult for your readers to read.

Mastering the online environment, coupled with strong legal-writing skills, will make it easy for the court to rule for you and to want to rule for you. The nuts and bolts of writing an e-document doesn't require lawyers to be tech-savvy. But understanding how important it is to use online tools — and especially how to use them — will

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20. *Id.*
21. Supreme Court, Appellate Division First Department, Memorandum, <http://www.courts.state.ny.us/courts/ad1/EmailFilingRule6.pdf> (last visited Mar. 15, 2011).
22. Appellate Division, Fourth Department, Rule 1000.13(a)(4)(iii), <http://www.courts.state.ny.us/ad4/Court/Rules/AD4%20RuleBook%20May%202008.pdf> (last visited Mar. 15, 2011).
23. *Id.* 1000.3(h)(1) & (3), <http://www.courts.state.ny.us/ad4/Court/Rules/AD4%20RuleBook%20May%202008.pdf> (last visited Mar. 15, 2011).
24. Aloe, *supra* note 2, at 720.
25. *Id.*; Act of Aug. 31, 2009, ch. 416, 2009 McKinney's Sess. Laws of N.Y.
26. Joel Stashenko, *Efficiencies, Savings Seen in Mandatory E-Filing*, N.Y.L.J., Mar. 3, 2011, at 1, col. 3.
27. *Id.*
28. *Id.*
29. Joel Stashenko, *Court Rule Altered to Buttress E-Discovery; E-Filing Advances*, N.Y.L.J., Aug. 31, 2010, at 3, col. 2.
30. *Id.*
31. N.Y. St. Courts E-Filing Sys., *supra* note 14.
32. N.Y. St. Courts E-Filing Sys., *User's Manual for Supreme Court and Court of Claims Cases, Part 1: Overview of the System* 1, 4, <https://iapps.courts.state.ny.us/fbem/mainframe.html> (last visited Mar. 15, 2011).
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34. *Id.* at 11.
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38. *Id.*
39. Robert B. Dubose, *Legal Writing for the Re-Wired Brain*, St. Bar of Tex., Managing Your Law Practice CLE Special Events Program 1, 13 (June 11, 2010), [http://www.texasbar.com/flash-drive/materials/managing\\_your\\_law\\_practice/Special\\_ManagingYourLawPracticeCLE\\_LegalWritingRewiredBrain\\_Dubose\\_FinalArticle.pdf](http://www.texasbar.com/flash-drive/materials/managing_your_law_practice/Special_ManagingYourLawPracticeCLE_LegalWritingRewiredBrain_Dubose_FinalArticle.pdf) (last visited Mar. 15, 2010).
40. *Id.*
41. *Id.* at 13–15.
42. *Id.* at 15–16.
43. *Id.* at 16.
44. *Id.* at 16–18.
45. *Id.* at 18–19.
46. *Id.* at 19.
47. Martin Siegel, *What E-Filing Means for Appellate Attorneys*, 26 Tex. Law. 29 (Dec. 6, 2010).
48. Dubose, *supra* note 39, at 19.
49. *Id.* at 19–20.
50. Gerald Lebovits, *Document Design: Pretty in Print — Part 1*, 81 N.Y. St. B.J. 64, 64 (Mar./Apr. 2009).
51. Seventh Circuit, Requirements and Suggestions for Typography in Briefs and Other Papers 1, 5, <http://www.ca7.uscourts.gov/rules/type.pdf> (last visited Mar. 15, 2010).
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59. *Id.*
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64. Crist, *supra* note 36, at 83.
65. Crist, *supra* note 36, at 84.
66. *Id.*
67. *Id.*
68. *Id.* at 87.
69. Martin Siegel, *supra* note 47.
70. Crist, *supra* note 36, at 87.
71. *Id.* at 88.
72. Rothman, *supra* note 57.
73. New York State decisions are available online at <http://www.courts.state.ny.us/decisions/index.shtml> (last visited Mar. 15, 2011). The e-lawyer may link directly to opinions found there.
74. Crist, *supra* note 36, at 91.
75. Krause, *supra* note 63.
76. Fed. R. Civ. Pro. 5.2(a).
77. *Id.*
78. Uniform Rules for N.Y. St. Trial Cts. § 202.5-b(d)(3)(iii).
79. *Id.*
80. Shari Claire Lewis, *The Need to Redact Personally Identifiable Data from E-Filings*, N.Y.L.J., Aug. 17, 2010, at 6, col. 5.
81. *Id.*
82. U.S. Dist. Ct. for the Dist. of N.J., *Effective Personal-Identity and Metadata Redaction Techniques for E-Filing*, <http://www.njd.uscourts.gov/cm-ecf/RedactTips.pdf> (last visited Mar. 15, 2011).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
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- GERALD LEOVITS is a New York City Criminal Court judge in New York County and an adjunct professor at St. John's University School of Law and Columbia Law School. He thanks University of Ottawa judicial interns Corey Groper and Hayden Bernstein for researching this column. Judge Lebovits's email address is GLebovits@aol.com.