Maine State Bar Association

MAINE BAR JOURNAL

Volume 35 | Number 1 | 2020

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New Year, New You:

A Focus on Attorney Wellness and Community Engagement

Greetings fellow Association members and stakeholders. I am humbled and honored to be your MSBA 2020 president. During my yearlong tenure as president, I will focus on advocating for your interests, attorney wellness, and the effective delivery of legal services.

As I write this, MSBA staff and faculty are gearing up for the 2020 MSBA Annual Bar Conference. Hopefully, you will have had the chance to join me for this event at the end of January. The Annual Bar Conference featured a plenary on Maine's new eFiling system, along with CLEs on law practice management, civil process, cannabis law, and attorney wellness.

There are a number of important events taking place this year – including the MSBA's annual Law Day contest and school visit programs, the Maine High School Mock Trial Competition, the 2020 Judge John R. Brown Admiralty Moot Court Competition, the MSBA Summer Bar Meeting, and the New England Bar Association's Annual Meeting. These events complement my two-pronged focus as your 2020 MSBA president: attorney wellness and youth outreach.

If you attended the Annual Bar Conference, you probably heard me talk about my interest in lawyer well-being and mindfulness. And you may also know about the ABA's Resolution 105. Sponsored primarily by the Working Group to Advance Well-Being in the Legal Profession, Resolution 105 supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, law students, and judges. The Working Group also sets forth recommendations in "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change." The Working Group provides a Well-Being Pledge, a Well-Being Template for Legal Employers, and a Well-Being Toolkit for Lawyers and Legal Employers.

Inspired by Resolution 105, I took a look at the Well-Being Toolkit. The authors explain the reasons why it's important for legal employers to focus on lawyer well-being: it's good for business, it's good for clients, and it's the right thing to do. The toolkit explores healthy workplaces and the dimensions of lawyer well-being, and it provides ideas for well-being activities, education, and worksheets. One of the suggested activities – practicing mindfulness – caught my attention. Four months ago, I undertook a cross-country bicycle trip to raise awareness for veterans; I also made it my personal journey for improved mindfulness. From September 21 to October 29, 2019 I rode 2842 miles and blogged about my thoughts and experiences at https://thaddeusdayveteranattorneyjourney.com; I hope that similar experiences have allowed you to practice mindfulness. Practicing mindfulness is practicing your focus on the present moment, a significant challenge with the daily distractions we face. Our mindfulness is the key to our professional satisfaction and mental health. I encourage you to review the materials generated with ABA Resolution 105 and well as our MSBA CLEs to enrich and strengthen your professional practice.

I am also mindful of the potential our youth bring to our communities at large, and the legal community. One way toward meeting the challenges of rural access to attorneys is to spark an interest in lawyering with our youth in local communities. This year I am advocating a two-pronged approach on Law Day, May 1.

I am asking you, as members of our bar, to go your local high or junior high school and tell the students about what you do and about the legal profession. Our staff can help you with presentation ideas. Contact Deputy Executive Director Heather Seavey at hseavey@mainebar.org or 207-622-7523, extension 1226.

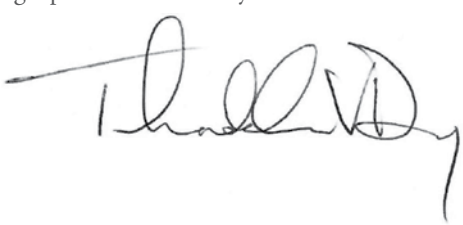
Our second prong is to follow on with our Law Day essay and poster contests launched last year by Immediate Past President Eric Columber. Stay tuned for an announcement this month, and please spread the word. This year's theme is, "Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100." You can learn more at www.mainebar.org/page/lawday or by contacting Membership Services Coordinator Karen Staples at kstaples@mainebar.org or 207-622-7523, extension 1221.

Other opportunities for youth to learn about the legal system include the Maine High School Mock Trial Program. The Mock Trial Program is supported by the MSBA and Husson University, and needs additional financial and professional support. This is a terrific opportunity for high school students throughout the state to learn about our legal system. Please consider lending your support to this important program, either financially, or by volunteering – or both. For more information, contact MSBA Governor Ezra Willey at ezra@willeylawoffices.com or (207) 262-6222.

Finally, this year, the University of Maine School of Law is hosting the Judge John R. Brown Admiralty Moot Court Competition April 2-4. This is an interscholastic appellate advocacy competition funded primarily by the Houston law firm of Royston, Rayzor, Vickery & Williams L.L.P. and the Maritime Law Association of the United States. Opportunities are available for volunteer attorneys. Please contact Executive Director Angela Armstrong at aarmstrong@mainebar.org or (207) 622-7523.

Our goal is for the MSBA to actively "value add" to your legal practice. The MSBA will continue to provide education on wellness and mindfulness for you and your practice. We will continue to provide convenient access to timely information related to changes at the Judiciary Branch, including the rollout of state's electronic filing system. We will continue to keep your informed of legislative bills currently in the state's second session influencing the delivery of legal services, including the areas of criminal defense, probate administration, and court appearances by second-year law students. In addition, we will continue to provide valuable legal insights through this magazine.

I look forward to serving you and the Maine State Bar Association this year. Please make plans to attend our Summer Bar Conference June 24-26 in Bar Harbor and the New England Bar Association's Annual Meeting Oct. 22-24 in Portland. Don't hesitate to reach out to me or Angela if you would like to talk about how the MSBA can help support your legal practice or attorney wellness.



QUICK FACTS

Why do you belong to the MSBA?
I believe the MSBA has paid valuable dividends to attorneys and the practice of law. For example, our lobbying efforts to educate legislators about the practice of law has made a difference. Only a few years ago, attorneys were facing an initiative to implement a sales tax on legal services, and the MSBA was out in front of the issue. Thanks, in part, to the MSBA's efforts, there is no sales tax on the provision of legal services today.

What's the best thing about being an attorney?
Most of our clients choose the judicial process as their last resort to resolve a dispute. I find it rewarding to help clients navigate through the judicial process and guide them as they weigh the pros and cons of entering the court system.

What's the most challenging aspect of being an attorney?
It is challenging to manage client expectations, all the while keeping an eye on the cost-benefit for the client.

What is your proudest career moment?
I could say it was when we obtained a civil jury verdict, even after my client was removed from the courtroom in handcuffs. But, the proudest moment would be when we helped a father get his son from DHHS custody, after he learned to be a primary caregiver.

If you weren't an attorney, what would you be?
I was trained in undergraduate school to be an engineer; I worked as an HVAC applied systems engineer for York International and then Trane Company, before moving back to Maine for law school. I enjoyed my work for both companies. If I weren't an attorney, I would probably still be in the engineering field. I like to think there is some crossover between thinking like an engineer and thinking like a lawyer.

Do you have a motto?
Our office our motto is: "We do what we say, and we say what we do."

What is something most people don't know about you?
I recently rode my bicycle from San Diego to St. Augustine with my cousin for those veterans that cannot and for personal mindfulness. You can read my blog at www.thaddeusdayveteranattorneyjourney.com.

ANGELA P. ARMSTRONG is the Maine State Bar Association's executive director. She can be reached at aarmstrong@mainebar.org.

Maine Bar Leadership

MAINE STATE BAR ASSOCIATION (MSBA)

Happy New Year! A new year, a new decade…and with it, new MSBA leadership! I'm pleased to announce the MSBA Board of Governors (BOG) for 2020. Take a moment to reach out to your district representative or any of the officers—they would love to hear from you! Let your Governor know how we are doing, what we could do better, and what you'd like to see from your professional association.

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NEW ENGLAND BAR ASSOCIATION (NEBA)

I'm also pleased to announce that Virginia (Ginger) Davis became President of the New England Bar Association in late October 2019. NEBA is an organization comprised of the six bar associations of the New England states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. NEBA, incorporated in 1971, was formed to advance and promote the general welfare of the component state bar associations and of the individual members in those states.

Ginger will preside over the meetings of the NEBA Board of Directors, which has representation from all six bar associations. The Board holds two director meetings per year, and an annual meeting in the fall at which members of all associations are invited to attend. Responsibility for planning and hosting the annual meeting rotates between the six states. Maine will host the 2020 Annual Meeting at the Portland Harbor Hotel on October 22-24, 2020. We encourage you to attend this fun and informative conference!

Your current Maine representatives on the NEBA Board are:

PRESIDENT
Virginia E. Davis (ggpitney@gmail.com)

DIRECTOR (term exp. 2020)
Derek A. Jones (derek@algmaine.com)

DIRECTOR (term exp. 2021)
Jonathan M. Dunitz (jdunitz@verrill-law.com)

DIRECTOR (term exp. 2022)
VACANT

We are looking for a member of the MSBA to serve in the vacant director position on the Board. Please reach out to me or one of the other directors if you have any interest or questions about serving on the NEBA Board. You can also contact us if you have an interest in presenting CLEs at the NEBA Annual Meeting, or have questions or concerns you'd like our representatives to bring to the group for discussion.

MSBA STAFF

The MSBA staff stands ready to serve you in 2020. We are dedicated to providing you with member services and benefits that support your successful law practice. Please be sure to visit www.mainebar.org to learn more about our services, to register for CLE and other programs, and to catch up on section, committee and other legal community events. Don't hesitate to contact a staff member if you have any questions about our services or if you have any ideas for new services or benefits. This is your membership organization, so let's work together to ensure that you have the services you want!

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And, of course, you can always contact me by phone at (207) 622-7523 or by email (aarmstrong@mainebar.org) with any ideas or concerns about the Maine State Bar Association. Thank you!

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Why Electronically Stored Information Does Not Comport with PDF Productions

As litigators know, even the smallest dispute can quickly become expensive, disruptive, and stressful for clients. Today's reliance on and use of technology in every facet of life has dramatically increased the volume of potentially relevant information for nearly every case. As a result, the important facts in civil cases today likely exist as electronically stored information (ESI). Accordingly, attorneys must consider a variety of electronic discovery issues that they may not have encountered in the past, such as how to identify, preserve, collect, review, and produce large quantities of ESI. Although ESI and electronic discovery present new opportunities, they also require attorneys to re-evaluate old litigation tactics to ensure compliance with the applicable procedural rules. Attorneys must, in turn, ensure that available technology is being used efficiently, effectively, and competently for clients. One area of electronic discovery that continues to be a concern is the practice of producing – and accepting – ESI in portable document format (PDF) during discovery.

By accepting ESI in PDF format, an attorney is allowing, to their and their client's detriment, the opposing party to treat ESI as the equivalent of hard copy documents. But ESI is much more. Producing ESI in PDF format may violate multiple discovery rules and risk manipulation of the data. It may also deprive the receiving party of critical information about the underlying material and render electronically searching and sorting impossible. Attorneys, however, can ensure that their clients are getting the most out of the electronic discovery process by recognizing the significance of electronic discovery and by making a few, easy-to-implement changes in their practice.

Producing ESI in PDF Format Removes Important Information

Electronic discovery, or "e-discovery," broadly refers to the process of collecting, processing, reviewing, and producing ESI. There are many types of ESI, and they often differ from one case to the next. Common examples of ESI are emails, Word files, Excel files, social media messaging (*e.g.*, Facebook, Twitter, and Instagram), text messages, and many other types of commonly used electronic data.[1] ESI may exist on computers, phones, tablets, servers, the "cloud," or in a myriad of other physical and digital locations.[2] In addition, ESI typically includes various categories of associated metadata. Commonly described as "data about data," metadata is created when electronic files are generated, used, and saved.[3] Although "[m]etadata is not addressed directly in the Federal Rules of Civil Procedure[,]" like other documents, "[it] is discoverable if it is relevant to the claim or defense of any party and is not privileged."[4] Because metadata often is relevant to a case, attorneys should become familiar with why metadata is important and, in many cases, request its production from the opposing side.[5]

Because ESI is "fundamentally different" than traditional hard-copy documents, parties must produce ESI in an appropriate format that allows the receiving party to access and use the ESI in a way that appreciates those differences.[6] Just as watching a 4K Ultra High Definition movie on a 10-inch black-and-white screen prevents a viewer from experiencing the movie as the director intended, so too does the production of ESI solely in PDF format limit what counsel can see and use with regard to that ESI.

Removing Relevant Content

To start, a document in PDF format provides only a static look at the face of the document but nothing more. As a result, converting ESI into a PDF removes potentially relevant information that otherwise would have been available.[7]

Microsoft Word and Excel documents are two common file types that provide useful starting examples of how a PDF production is inadequate. First, an Excel spreadsheet may contain embedded formulas that are as relevant to understanding the facts of the case as the numbers themselves. Second, in addition to revealing information such as the author and creation date, a Word document may contain relevant content hidden as comments or tracked changes that get omitted in the PDF conversion process. A Word or Excel document converted into PDF format simply may not "tell the whole story."

Similar concerns apply to other forms of ESI. For instance, social media or internet content can identify who wrote or reviewed (or "re-tweeted" or "liked") certain content. This type of information could be as important to the case as the content itself, but a PDF production may exclude it all.

Excluding Relevant Metadata

A "snap-shot" PDF production also removes discoverable metadata from ESI that may contain relevant information. For example, a Microsoft Word or Excel document contains metadata about the author, creation date, file type, file size, file location, and file name.[8] An e-mail's metadata contains the e-mail addresses of the sender and of recipients, the e-mail subject line, and the sent date and time. This information may be relevant and important in cases from multi-million-dollar construction disputes to divorces.[9] Removing metadata also eliminates the opportunity for the receiving party to efficiently organize potentially large volumes of ESI. This is especially true when the receiving party is using an e-discovery program that allows for the organization, de-duplication, review, coding, and production of vast volumes of data. These programs heavily rely on the metadata contained within the ESI production.[10]

Converting ESI To PDF Raises Additional Concerns Beyond Lost Information

Additional concerns abound. For instance, when e-mails or other electronic files are converted into PDFs, those documents are often combined into a single PDF file for production. As discussed in more detail below, such a production may violate the default requirements found in Maine and Federal Rule of Civil Procedure 34.[11] These single PDF productions also create unnecessary and potentially objectionable complications for the

receiving party. If a single PDF production combines multiple individual files, it is difficult (if not impossible) for the receiving party to determine where one document ends and another begins, or which documents are members of the same "family," *e.g.*, whether a document was sent as an attachment to an e-mail (and thus in the same family) or existed independently.

The conversion to PDF also creates potential modification issues, if the conversion is not handled with care. For example, when an e-mail is forwarded by a party to its attorney and then printed, the metadata of that e-mail is first altered (*e.g.*, by adding a new recipient to the e-mail) and then completely omitted by the PDF conversion process. The receiving party is entitled to rely on accurate and complete metadata, and any changes may create a misleading narrative of what actually happened.[12] Similarly, opening a "native" Word document to convert it into a new PDF document can change an automatic date field and alter the critical "sent date" in the header of a letter to a later date.[13] When that document is produced as a PDF, the falsely updated content remains, a newly created document is produced, and the original document – with its accurate contents – may be lost.[14]

Producing ESI in PDF Format Conflicts with Applicable Discovery Rules

Not only does producing ESI in PDF format remove potentially relevant information, but this approach likely violates the applicable rules of procedure as well. These violations, in turn, can expose attorneys and their clients to unnecessary – and avoidable – headaches, costs, and potential sanctions.

The Federal Rules of Civil Procedure and the Maine Rules of Civil Procedure provide similar standards for producing documents and ESI in discovery. Although litigants retain flexibility to negotiate their own preferred production format, the default rules will not be satisfied in most circumstances by a production of ESI in PDF format.

Specifically, Rule 34 requires the production of documents as maintained in the usual course of business or in another "reasonably usable" form.[15] In practice, however, parties sometimes respond to document requests by converting e-mails, Word documents, Excel spreadsheets, or other native ESI file-types into PDFs. This conversion directly conflicts with the default "ordinarily maintained" obligation: a document in PDF format is not, in fact, how that ESI was used or kept in the ordinary course. Nor is such a document likely to be considered a "reasonably useable" form for the production of documents. For example, if an e-mail is printed and then scanned as a PDF, it will lose useful metadata and the text may not be searchable. This process significantly limits the usefulness of the record.[16]

Given the plain language of Rule 34, it is not surprising that cases from around the country have held that removing metadata and converting native ESI files into PDFs is inconsistent with Rule 34's default requirements. For example, a North Carolina federal court held in 2018 that the plaintiffs failed to meet their discovery obligations under Rule 34(b) when their "productions . . . continued to contain e-mails in PDF format, which is not how e-mails are kept in the ordinary course of business."[17] The trial judge affirmed a recommendation for sanctions in the form of reasonable expenses, including attorneys' fees, incurred by the defendant in responding to the discovery issues. Similarly, in 2019 a federal court in California explained that when document requests did not specify a form of production for ESI, the producing party had the option of producing responsive ESI in the form in which it was ordinarily maintained or in a reasonably usable form. The producing party, however, did neither, and the court found that it was "inconceivable that experienced counsel would expect that combining multiple ESI documents into two massive PDFs without Bates labels would qualify as producing documents in 'reasonably usable form.'"[18] Numerous cases from around the country have reached similar conclusions.[19]

A Few Solutions for Correcting Improper Production Habits

Whether you are the producing party looking to take the right steps or the requesting party concerned about ensuring documents arrive in a usable form, below are a few suggestions to help avoid production headaches in the future.

Early Case Assessment and Planning

The key to discovery success is being proactive and developing a discovery strategy early in the case. By recognizing potential problems associated with ESI from the start, understanding the technical and legal issues at play, and appreciating the administrative burden and likely costs, attorneys often can negotiate a solution up front with opposing counsel.[20]

Accordingly, litigants should take advantage of the early case assessment obligations and not gloss over that stage of the case. For example, when practicing in federal court, Rule 26(f) requires parties to meet and confer near the start of the case to develop a discovery plan that includes the "parties' views and proposals" regarding "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced."[21]

Parties that fail to cooperate early in a case may also find a lack of sympathy when issues arise later. As one Court chastised: "many [ESI] disputes could be managed and avoided altogether by discussing the issue before requests for production are served."[22] Thus, meeting and discussing potential discovery issues with opposing counsel early on can help ensure compliance with the applicable rules and reduce unwanted surprises later in the discovery process.[23]

ESI Preservation

Preservation notices targeting potentially relevant information are a useful tool in any litigation.[24] Attorneys can send these to individuals or entities that might have relevant documents, including internal parties.[25] This can happen before the complaint is filed for a plaintiff or once a defendant receives notice of a complaint or dispute. Because much of the relevant information in litigation today is stored electronically, that information is at great risk of destruction – whether intentionally or unintentionally. Notice or even anticipation of potential litigation triggers an obligation to preserve potentially relevant ESI, and the consequences for failing to preserve this information can be severe.[26] A document preservation notice targeting relevant types of ESI and relevant topics will increase the likelihood that the necessary information remains available for discovery in the case.[27]

Specific Document Requests With Production Formats

Even if early case planning is not successful,[28] Rule 34 provides guidelines for addressing production formats during discovery. For instance, Rule 34 permits the requesting party to specify the form or forms in which it wants ESI produced.[29] Counsel should be familiar with the applicable framework to ensure rights are not waived and violations are not overlooked.

First, the requesting party has the opportunity select a production format of its choice. Once the format is specified, the burden shifts to the producing party to either comply or object and state the different form it intends to produce.[30] If the parties do not agree on an ESI production format, they must meet and confer regarding the issue, and raise the issue with the court if it is not resolved.[31] Throughout that process, the producing party may not chart its own path and unilaterally decide to ignore a requested ESI format. Further, an insufficient response may waive any objection to production formatting and may result in a court order requiring the reproduction of the ESI or, in certain circumstances, sanctions for non-compliance with the applicable rules.[32] On the other hand, failure to include a specific production format in the document requests will significantly limit – if not waive – the requesting parties ability to later object to the production format selected by the producing party.[33]

In order to successfully operate within the discovery rules, the requesting party has several options to ensure the production is in the appropriate format and contains the appropriate metadata. The requesting party should press production-formatting issues early in the case, including through the initial discovery plan or by negotiating a consensual ESI protocol addressing such issues. The requesting party also should draft document requests to clearly state the production format that is preferred and to specifically request metadata. The burden then shifts to the producing party to object and propose an adequate alternative.[34]

As to what format to select, there is no one-size-fits-all solution. Parties often request the production of ESI in "native" format and request all available metadata associated with that ESI.[35] Although native format has its own flaws – such as the inability to Bates label the face of the documents or to redact privileged information (though each of those limitations has its own simple workaround) – native format provides a low-cost, easy-to-use option.

Depending on the complexity and needs of a case, a party may request ESI as "TIFF" images with extracted text files and accompanying metadata. Requesting TIFF format especially makes sense when using e-discovery software, and it eliminates many of the shortcomings from a native production – albeit often at an increased cost to the producing party.

In sum, there are resources available and a framework of rules that, if used correctly and diligently, can ensure that proper formatting is used and all rights are preserved when a dispute arises.

Conclusion

Attorneys today should recognize and appreciate the technological landscape in which their clients exist, be familiar with the applicable discovery rules, and hold their adversary accountable to discovery obligations. With a working knowledge of ESI and production options, parties can ensure compliance and protect their rights and interests in discovery. This knowledge can ensure that the most compelling facts are not lost – even inadvertently – in the production process and that all available discovery tools are used to their full potential.

Endnotes

1 *The Sedona Conference Guidance for the Selection of Electronic Discovery Providers,* 18 Sedona Conf. J. 55, 62–63 (2017) (listing various formats of commonly encountered ESI).

2 *Id.* at 121-122.

3 *See United States v. Heiser*, 473 F. App'x 161, 164 n.5 (3d Cir. 2012) ("Metadata is 'data about data' that 'helps to describe the contents of the file and the characteristics of the file.'") (citation omitted).

4 *Aguilar v. Immigration & Customs Enf't Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 355 (S.D.N.Y. 2008).

5 *See Younes v. 7-Eleven, Inc.*, No. CIV.A. 13-3500 RMB/J, 2015 WL 1268313, at *4 (D.N.J. Mar. 18, 2015) (stating that "metadata regarding source, date, and other key background information" related to documents "is plainly relevant and discoverable," and that "the requested metadata is relevant to authenticating . . . documents, especially since the authors or creators of some important documents are unknown"); *S2 Automation LLC v. Micron Tech., Inc.*, No. CIV 11-0884 JB/WDS, 2012 WL 3656454, at *28 (D.N.M. Aug. 9, 2012) ("[M]etadata could be important information for some of that electronic discovery to establish various matters, including to determine custody or to determine what modifications to the document have occurred over time."); *see also Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 560 (N.D. Ill. 2008) ("[I]n order to obtain metadata you may need, you should specifically ask for it to begin with." (internal quotation marks omitted)).

6 *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, Cmt. 12.a, 169 (2018) ("ESI is fundamentally different from paper information in that it is dynamic, created and stored in different forms, and has a substantial amount of metadata and other non-apparent or undisplayed data associated with it.").

7 Amii N. Castle, *Requesting and Producing ESI Under the Amended Federal Rules: Which Form Is Right for You?*, 39 Am. J. Trial Advoc. 51, 56 (2015) ("Image files [such as PDFs] themselves contain no metadata about the underlying document or data."); Steven W. Teppler, *Testable Reliability: A Modernized Approach to ESI Admissibility*, 12 Ave Maria L. Rev. 213, 255 (2014) ("If a producing party converted the hybrid Word document to PDF format, the format conversion process would strip all the Excel information.").

8 *Irwin v. Onondaga Cty. Res. Recovery Agency*, 895 N.Y.S.2d 262, 267 (N.Y. App. Div. 2010) ("Some examples of metadata for electronic documents include: file name, file location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it.")(quotation marks omitted)).

9 *See* Gaetano Ferro et. al., *Electronically Stored Information: What Matrimonial Lawyers and Computer Forensics Need to Know,* 23 J. Am. Acad. Matrim. Law. 1, 33 (2010) (discussing, in the context of a divorce proceeding, how "[a] review of that metadata may be useful in creating a time line of critical computer events which, in turn, may assist in determining who was responsible for those events.").

10 There are numerous e-discovery software companies providing litigation support applications designed to help organize, review, and sort large volumes of ESI. A few examples of these companies and applications include Ipro Tech (www.iprotech.com) and Relativity (www.relativity.com). E-discovery and litigation-support service companies host these software applications and provide a variety of other litigation and e-discovery related services such as proposed e-discovery protocols, ESI harvesting, database storage, database management, and software training. *See* Julia M. Ong, *Another Step in the Evolution of E-Discovery: Amendments of the Federal Rules of Civil Procedure Yet Again?* 18 B.U. J. Sci. & Tech. L. 404, 429 (2012) (discussing a "Proposed Joint Ediscovery Protocol . . . put forth by Evidox [a company that] provides ediscovery services, to 'govern the collection, processing, and production of [ESI]' in the relevant litigation") (citation omitted)). *See also Portland Pipeline Corp. v. City of South Portland*, No. 2:15-cv-54-JAW, 2016 WL 4703620, at *4 (D. Me. Sept. 8, 2016) (discussing, in the context of a discovery dispute, how plaintiffs relied "on a technologically-assisted privilege review by a hired ESI discovery vendor" that led to "the production of more than 100,000 pages of ESI to the defendants").

11 M. R. Civ. P. 34(b); Fed. R. Civ. P. 34(b)(2)(E); *see Venture Corp. Ltd. v. Barrett,* No. 5:13-CV-03384-PSG, 2014 WL 5305575, at *3 (N.D. Cal. Oct. 16, 2014) (concluding that a production violated Rule 34 and noting that "there is no serious question that a grab-bag of PDF and native files is neither how the Ventures ordinarily maintained the documents and ESI nor is 'in a reasonably useable form'").

12 *See* Mike Breen, *Nothing to Hide: Why Metadata Should Be Presumed Relevant,* 56 U. Kan. L. Rev. 439, 453-56 (2008) (arguing that metadata provides litigants and courts with a more complete and accurate record on which to resolve a dispute).

13 *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 161 (3d Cir. 2012) ("The native file format is the 'file structure defined by the original creating application,' such as a document created and opened in a word processing application.") (quoting The Sedona Conference, *The Sedona Conference Glossary: E–Discovery & Digital Information Management* 35 (Sherry B. Harris et al. eds., 3rd ed. 2010)).

14 This actually happened in a recent case involving one of the authors, where the date of an important letter was modified to a later date, creating confusion and a potentially false record of events had the error not been recognized quickly.

15 *See* Fed. R. Civ. P. 34(b)(2)(E)(ii) ("If a request does not specify a form for producing electronically stored information, a party must produce it in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms"); M.R. Civ. P. 34(b) ("If a request does not specify the form for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form that is reasonably usable.").

16 For example, the Maine Public Utilities Commission has cited to the "reasonably usable" language in Fed. R. Civ. P. 34 and M.R. Civ. P. 34 when ordering that all documents filed in a proceeding be "searchable" and "readable," explaining that "[u]nsearchable and unreadable pdf documents are inconvenient to use and often require time-consuming 'work-arounds.'" *N. New England Tel. Operations, Inc., Request for Approval of Reorganizations,* No. 2010-76, *Request to Modify AFOR SQI Provisions*, No. 2010-77, and *Request to Modify Merger Order Broadband Provisions*, No. 2010-78, Order, 2010 WL 1294530 at *1 (Me. P.U.C.

April 1, 2010).

17 *Johnson v. Italian Shoemakers, Inc.*, No. 3:17-CV-00740-FDW-DSC, 2018 WL 5266853, at *2-3 (W.D.N.C. Oct. 23, 2018).

18 *Song v. Drenberg*, No. 18-CV-06283-LHK-VKD, 2019 WL 5095744, at *6 (N.D. Cal. Oct. 11, 2019).

19 There are numerous other examples from around the country. For instance, a court in Florida concluded the producing party breached Rule 34 when it produced documents "printed off the server and then scanned back into a digital format as PDF files" because such "documents were not produced as ordinarily kept." *Indep. Mktg. Grp., Inc. v. Keen*, No. 3:11-CV-447-J-25MCR, 2012 WL 207032, at *1 (M.D. Fla. Jan. 24, 2012). A court in Louisiana ordered the plaintiff to re-produce construction schedules in native format, stating: "the need for production in the requested, unobjected-to native format, with its associated metadata, is self-evident" because that metadata "in the construction schedule context, with its frequent alterations, change orders, and time sensitive but often disturbed deadlines, is relevant." *McDonnel Grp., LLC v. Starr Surplus Lines Ins. Co.*, No. CV 18-1380, 2018 WL 4775063, at *1-2 (E.D. La. Oct. 3, 2018); *see also, e.g.*, *MC Asset Recovery, LLC v. Castex Energy, Inc.*, No. 4:07-CV-076-Y, 2012 WL 12919263, at *7 (N.D. Tex. Apr. 26, 2012) (concluding that the defendants' decision to produce all documents in text-searchable PDF format did not satisfy Rule 34 where the plaintiff had requested that ESI be produced in native format and the PDF production failed to include metadata); *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, 586 F. Supp. 2d 1250, 1263–65 (D. Kan. 2008) (ordering the defendants to re-produce e-mails and attachments that had been converted to PDFs and printed out in the form in which those documents were ordinarily maintained, or in a reasonably usable form).

20 *See* Fed. R. Civ. P. 37(a) (requiring cooperation and good faith conferring in discovery and identifying grounds for motion to compel and sanctions for non-compliance with discovery obligations); *William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 135 (S.D.N.Y. 2009) ("[T]he best solution in the entire area of electronic discovery is cooperation among counsel.").

21 Fed. R. Civ. P 26(f).

22 *White*, 586 F. Supp. 2d at 1263–65 ("[T]his discovery dispute is an example of one which the re-production of discovery could have been altogether avoided had the parties adequately conferred at their Fed. R. Civ. P. 26(f) conference regarding production of electronically stored information ("ESI"). While not all disputes regarding discovery of ESI can be prevented by early efforts by counsel to investigate and consider the possible forms discovery may be produced, many disputes could be managed and avoided altogether by discussing the issue before requests for production are served.").

23 *See MedIdea, L.L.C. v. DePuy Orthopaedics, Inc.,* No. 1:17-CV-11172-GAO, 2017 WL 9289450 (D. Mass. Oct. 20, 2017) (entering a stipulated order regarding production during discovery that contained detailed definitions and requirements regarding the production of ESI and associated metadata).

24 *See Simoes v. Target Corp.*, No. 11 CV 2032 DRH WDW, 2013 WL 2948083, at *4 (E.D.N.Y. June 14, 2013) (concluding that "Target breached its duty to preserve" relevant information because the opposing party "served a preservation notice upon Target prior to commencement of suit and made numerous demands for the [information] during the discovery period").

25 Rachael M. Wertheimer, *A Practical Guide to Discovery and Depositions in Maine*, Massachusetts Continuing Legal Education, Inc., § 3.5.3 Document Preservation and Preservation Notice, 2014 WL 8244606 (explaining that "[t]he first step in document preservation is to send a preservation notice to any individuals who might have relevant documents, including document custodians").

26 *See United States v. Philip Morris USA, Inc.,* 327 F. Supp. 2d 21, 25-26 (D.D.C. 2004) (ordering Philip Morris to pay nearly $3 million dollars in sanctions and preventing the company from calling certain fact and expert witnesses at trial after it failed to comply with a preservation obligation by continuing to automatically delete e-mails).

27 Ike Vanden Eykel & Lindsey V. Underwood, *Spoliation of Electronic Evidence A Primer with Sample Spoliation Letter to Opposing Counsel*, 41 Fam. Advoc. 26, 26-27 (Winter 2019) (providing a sample preservation of electronic evidence letter that can be sent to opposing counsel at the start of a divorce proceeding).

28 *See generally* Jack Woodcock, *All According to Plan: Fed. R. Civ. P. 26(f)*, Maine Bar J. (Fall 2018) (discussing Fed. R. Civ. P. 26(f) and encouraging parties to prepare for and take advantage of early case planning).

29 Fed. R. Civ. P. 34(b)(2); M.R. Civ. P. 34(b).

30 Fed. R. Civ. P. 34(b)(2); M.R. Civ. P. 34(b).

31 Fed. R. Civ. P. 37(a)(1); M.R. Civ. P. 26(g).

32 *See, e.g.*, *Puerto Rico Med. Emergency Grp., Inc. v. Iglesia Episcopal Puertorriquena, Inc.*, 318 F.R.D. 224, 229 (D.P.R. 2016) (where plaintiff requested billing records in Excel format and the producing party failed to object, that failure was "enough to waive all future objection" to requests); *McDonnel Grp. LLC*, 2018 WL 4775063, at *1 ("By failing to object to production in native format, defendants waived that objection.").

33 *Smith v. TFI Family Servs., Inc.*, No. 17-02235-JWB-GEB, 2019 WL 4194046, at *10 (D. Kan. Sept. 4, 2019) (finding that plaintiff has "not made a particularized showing of why re-production of the 5,767 pages of PDF documents in native format with associated metadata is relevant to the case at hand where plaintiff failed to specify production format in subpoena").

34 Fed. R. Civ. P. 34(b)(2); M.R. Civ. P. 34(b).

35 *See Mr. Mudbug, Inc. v. Bloomin' Brands, Inc.*, No. CV 15-5265, 2017 WL 111268, at *3 (E.D. La. Jan. 11, 2017) (refusing to order production of metadata when not requested in document requests); *Autotech Techs.*, 248 F.R.D. at 559 (same); *cf. Aguilar*, 255 F.R.D. at 358 (denying motion because plaintiff failed to show a "particularized need" for metadata but permitting plaintiff to request metadata for any specific document for which the "date and authorship information is unknown but relevant"). At least one court has suggested that native format is the "default," but that is contrary to the plain language of Rule 34. *See Urban 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, No. 18 C 6109, 2019 WL 5963644, at *4 (N.D. Ill. Nov. 13, 2019) ("But again, the default setting is native format and what the defendants think might end up being relevant isn't part of the calculus in that determination.").

Maine-based psychologist AMY WOOD, Psy.D., created Law and the Good Life, a researched-based attorney wellness coaching and training system designed to address the challenges of lawyering. She'll be presenting three CLE seminars in March and April in Portland, Bangor, and Ellsworth: Law and the Good Life: How to be a Productive and Happy Attorney and Lawyer Like an Athlete: A Unique CLE Opportunity to Up Your Game. For details and to register, visit www.mainebar.org. For more information about Dr. Wood, visit www.amywoodpsyd.com.

What Life Balance Really Means and How to Create It

Life balance is a goal many attorneys strive toward without a solid grasp of its meaning. Popular misconceptions are that it's about juggling multiple responsibilities with exacting finesse or having personal and professional lives equally weighted like a yin-yang symbol.

This black and white understanding of life balance used to be largely attainable when work and home lives really were distinct and clear. But that once-indelible line between home and the office is blurry in a world where technology allows us to be accessible around the clock from anywhere.

The truth is that life balance is an ancient definition of success that is reached when a resonant outer life nurtures a vital inner life. Way, way back in simpler times, the idea was to invest money in personal surroundings expressly designed to rouse pleasing thoughts and feelings integral to overall fulfillment and productivity.

The original American ideal was to put earnings towards beautifying the home and garden, creating a sanctuary in which passions, relationships, and inspirations could flourish. Balance was possible when you enveloped yourself with a customized balm of intellectual, emotional, and social stimulation necessary to rejuvenate from daily pressures and keep evolving at a satisfying – not exhausting – clip.

Most Americans – it's not just attorneys – don't experience true life balance anymore because our outer environments are distracting and noisy and pull us away from – rather than enrich – ourselves. We are so swept away by external directives – *Respond to this signal! Read that text message! Keep up with it all or you will be left behind!* – that we are downright depleted internally.

To bring life balance back in the way it was initially intended, we must give up the crazy notion that every outside call demanding our attention is worthy of a response. We need to see that trying to be in command by flexing to an ever-multiplying flow of information is a sure way to feel off-kilter. Regaining our equilibrium requires taking from "out there" only what we know deep down will serve and sustain us.

The more you cultivate your inner world in ways that feel fortifying and right, the more likely you are to feel balanced. And when you have real life balance, you feel grounded, curious, connected, confident in your inner wisdom, and fully alive – and much more able to thrive in an external world that will never be balanced no matter what you do.

You can experience the exquisite centeredness of genuine life balance by practicing the spirit of these stabilizing suggestions:

• *Take an honest look at the settings you spend most of your time in* – bedroom, office, yard, living room, car – and get rid of everything in those contexts that does not in some way serve a real purpose or bring value to your life. If it's not totally essential or absolutely meaningful, it is distracting clutter that must go.

• *Wake up your senses* with fresh flowers on your desk, exotic foods cooking in your kitchen, compelling art on your walls, or stirring music in the background.

• *Provoke refreshing thoughts* by reading imaginative books, listening to irreverent podcasts, or enjoying movies that you wouldn't ordinarily choose.

• *Get better acquainted with your inner callings* by walking alone in nature, or tossing your calendar for a day and letting your intuition navigate.

• *Make face-to-face dates* – coffee, dinner, at your home or theirs – with people whose company brings you the most joy and comfort.

• *Enliven your perspective by immersing yourself in contrasting backdrops* – city grit if you're usually in the country, the steamy tropics if you're tired of snow.

• *Replenish your brain by* routinely shutting down all your gadgets and bathing your mind in restorative silence.

As you pursue true life balance, the most important question to consider is what kind of atmosphere will keep you working and living at your best. Navigating the constant cacophony of modern life and lawyering takes a clear, calm head – and if you put your focus on fostering that kind of equilibrium with well-suited circumstances, you will always be up for the challenge.

ALPS Risk Manager MARK BASSINGTHWAIGHTE, ESQ., has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at mbass@alpsnet.com.

What's Wrong with Assuming Everything Will Turn Out Just Fine?

Everyone makes assumptions. As I see it, doing so allows each day to progress with some level of predictability and efficiency. Most days I assume my wife will return home for dinner at her usual time, all of my tech will function problem-free, and that if I need anything from anyone at the office they'll be available. There's nothing wrong with making such assumptions unless, of course, it turns out one of them is wrong **and** I am not prepared to deal with the consequences.

My guess is many attorneys would be surprised at the number of claims that are the result of a mistake that can be best described as the attorney was working under a false assumption. Think about a situation as simple as an attorney allowing her workload to grow beyond a reasonable level. Some won't worry because they assume they will somehow find the time to get it all done while others may assume that someone else will be available to pitch in. But what if there really isn't enough time to get it all done? What if no one else is available? What if the person who was asked to help out isn't properly trained and doesn't do the work correctly? Let me share two short stories based upon actual claims to further underscore the concern.

Attorney Jones had a high-volume real estate practice. He made a decision to assign all title search responsibilities, settlement package preparation responsibilities, and additional related administrative tasks to one staff person. Attorney Jones assumed everything would be fine because there was no pushback on the amount of work assigned and this person was a trusted, devoted, and competent employee. This staff person, however, was one who also happened to feel unable to speak up for a number of reasons. It wasn't long before she began to feel overwhelmed. She ended up in the weeds due to what had quickly become an excessive workload. The fallout was mistakes were made because the attorney's assumptions proved to be incorrect and there was no safety net in place.

What could this attorney have done to avoid having a claim arise if and when an assumption proved incorrect? I would have advised him to develop a quality control process to ensure that all completed settlement documents were reviewed for accuracy. After all, having all important legal documents of any type reviewed by a second set of eyes is always a good idea regardless of practice area. He might have also monitored the reasonableness of every employee's workload or conducted periodic reviews of work in progress in order to stay abreast of how the staff was doing day-to-day (remember, some people are just unable to say "stop, this is enough."). Finally, he could have instituted a file review process. Obtaining a periodic status update on all active files is a great risk management tool in any practice. One caution with these ideas, however. Understand that the intent here is to have you approach the problem as looking for ways to maintain a quality work product. These processes should never be used as an excuse to start micromanaging the staff.

The second story is one that focuses on assumptions about attorney competency. It started with Attorney Smith, who was in the process of retiring. He was fortunate in that another attorney, Attorney Wilson, had an interest in purchasing his practice. As a result of the eventual transfer of files, Wilson's workload jumped literally overnight. Wilson made a decision to assume that all of Smith's prior work was accurate and correct. Wilson also assumed that she would only be liable

for the work she did on these new files and not for anything Smith might have done prior to her involvement. Both of her assumptions proved to be incorrect.

The problem here was that Wilson failed to consider the reasons that might be behind Smith's decision to retire. What if Smith's decision was due to his being burned out? What if in the final year or so leading up to his retirement Smith's mental acuity had started to deteriorate? Wilson took no steps to be prepared to deal with any files that might have been neglected or mishandled. When Wilson decided to accept responsibility for Smith's files, she also accepted accountability. From a liability perspective, accountability for past work done by Smith may not be immediate, but it will come. These new clients will expect to be told of any problems in their file. As they see it, Wilson's acceptance of responsibility for their files brought with it a responsibility to review those files. Wilson really should have conducted a thorough file review of all incoming files from Smith, even recently closed files.

These two stories demonstrate the kinds of consequences that can arise due to working under assumptions – and doing so without a plan – should one of those assumptions turn out to be wrong. In any busy practice, the temptation to assume all is well can be strong. *The new associate is settling in just fine. The network will never go down. Everyone is excited about and using the new case management system.* Again, none of this is a problem as long as every assumption made turns out to be correct. But what if the new associate is actually struggling? What if a truck hits a pole and knocks out power so your network isn't available for a last-minute filing? What if a few attorneys and staff are using the new case management system incorrectly or not at all due to poor training? You see, life isn't always neat and tidy. Some assumptions will turn out to be incorrect. It's important to keep this in mind and periodically ask if any assumptions are in play. If there are, then the next step is to create contingency plans. If you don't, it's only a matter of time before something goes wrong.

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BEYOND THE LAW: SARAH RUEF-LINDQUIST

It was once famously said that skiing is a dance where the mountain always leads. For those skiers who get too far over their skis, it inevitably falls to a member of ski patrol to help make things right. On a crisp winter morning at the Camden Snow Bowl, **SARAH RUEF-LINDQUIST** hits the slopes with her fellow ski patrollers and puts these words into practice. Although the Camden Snow Bowl provides a unique delight in offering a rare ocean view from its peak, the crucial work of the ski patrol does not leave much time for contemplation. Before long, the steady drip of ski patrol calls turns into a manageable torrent, leaving Ruef-Lindquist occupied through the end of her shift. Through her ski patrol activities, she has been able to meld her love of skiing with the satisfaction of giving back to her community, and not necessarily in that order. Ruef-Lindquist, a financial advisor focusing on wealth management, estate planning, and endowment building at Allen Insurance and Financial in Camden, recently sat down with the *Maine Bar Journal* to discuss her interests.

MBJ: Please tell our readers about your ski patrol activities.
SRL: About seven or eight years ago, I realized I wasn't spending enough time on my skis. I have this incredible facility right in my town, the Camden Snow Bowl. It's only about five minutes from home and work. I thought ski patrol would be a great way to see how things work on a ski hill. The Snow Bowl's ski patrol – it's called Ragged Mountain Ski Patrol – is mostly a volunteer-driven organization, with a paid director and a few paid patrollers. So, I signed up for the course, received pretty extensive training, and have been enjoying it since. I just had my seventh anniversary of getting certified.

MBJ: What is it that you enjoy about ski patrolling?
SRL: I enjoy getting out on the mountain when nobody is there. On Sunday mornings, I head over to help open the mountain. We have to make sure that everything is safe, so we go out before the mountain actually opens to the public. Seeing kids grow up skiing as opposed to sitting at home watching T.V. or playing on their computers is gratifying. Knowing that our region is producing some fantastic athletes through the high school and our racing program is great. And, it's also just a beautiful place to be outside. The Snow Bowl is a real gem for our town and I love being a part of that.

MBJ: Tell us about the view from the mountain.
SRL: We now have a triple lift that brings you all the way to the top of the mountain, which gives you an even better view than when you are just standing on the snow. Being up another 20 feet in the air, you can see all the way out to Monhegan Island, and all the way down to Cadillac Mountain and Isle au Haut. You can basically see all of east and west Penobscot Bay. And at night, because we have night skiing, you can see lights across the region. There are lights out on Owls Head and lights out on the islands in the distance. The wind turbines out on Vinalhaven have flashing red lights that are also visible. It's really quite spectacular. I've seen a lot of places in the world, including the Alps and out west, and they are all beautiful, but there's nothing like seeing that bay in the wintertime from the mountaintop.

MBJ: I imagine that there are some years where the weather is great and other years where you wonder if winter will arrive.
SRL: It can be insane. The last couple seasons we have had so much snowpack between the natural and the man-made, that some of us were skiing right up through April. Ski up and ski down! But we find that we're covered in ice in December and that we really don't start to get decent snowpack until January, when we are already also making a significant amount of snow. The groomers won't go out on natural snow alone. They are thoughtful about making sure that there's a good base, which ensures that their equipment won't get damaged when they go to turn it up and pack it down. They insist on a certain amount of man-made snow – which has more water-density – before they will go out and groom it. If the snow's not deep enough, it's pretty easy for stuff to stick up through rocky, jagged areas on the hill and damage equipment. Natural snow compacts more easily than manmade snow, with lower moisture content, so you really can't rely on its depth.

MBJ: How many people are involved in the ski patrol at the Camden Snow Bowl?
SRL:We have about 40 at our mountain, mostly volunteers. We are part of the National Ski Patrol, so we have to do everything any patrol would do at bigger mountains, except that we don't do avalanche training.

MBJ: What's the history of the Camden Snow Bowl?
SRL: It has a very interesting history. There was a little skating shack that was built down on the edge of Hosmer Pond. This was the basis for a lot of the recreational use in the area 100 years ago. There used to be an annual carnival on the ice, with horseracing and skating and all kinds of outdoor activities. It did not necessarily revolve around skiing then. A toboggan chute was built in the early 20th century, and the Snow Bowl hosts the toboggan nationals every year. The chute is a 420-foot wooden chute that ends up out on Hosmer Pond, which is hopefully frozen. Early in the last century, they also put in a towrope on the mountain. The Watson family of IBM fame installed a chair lift in the 1970s, and they brought in the towers with helicopters to install it. This provided the first, non-surface transportation on the mountain. That was great until about five years ago when the redevelopment plan was to put in a triple, all the way to the top, which used to only be accessed by a T-bar. There was some fundraising and bonds were issued to redevelop the mountain. We then moved the double and replaced the T-bar with a triple chairlift that was purchased from Shawnee Peak. With this increased uphill capacity and additional work that was done to open up the trails by about 30 percent, we also increased the snowmaking capacity very significantly. So, if you haven't been to the Snow Bowl in the last five years, you really haven't been to the Snow Bowl. It is quite a different mountain now.

MBJ: And the Town of Camden owns the Camden Snow Bowl, which is unique.
SRL:Yes, it's always interesting to have a Select Board running a resort! It can be challenging sometimes because Select Boards are not always nimble decision-making structures, but the town works hard at it.

MBJ: What is the turnout on a busy weekend?
SRL:On a busy weekend, I'm not sure exactly what the numbers are, but I know it's not unusual for us to see a line form out the door of our lodge for people waiting for food. Our triple chair, our double chair, and our magic carpet provide really ample movement, so don't have long lines for lifts. The lines are really for the food, and plans are in the works for a new lodge, which means more fundraising. On toboggan weekend, there are thousands of people there, but on a normal weekend it's probably 750 – 1000. That's a good day.

MBJ: As a ski patroller, have you had any close calls, or tough situations?
SRL:We have tough situations all the time for such a small mountain. My first call was in the first few days of being certified – I had a broken femur for an 8-year old girl. She ended up at Maine Med with two rods and seven pins. We've had serious head injuries, we've had broken backs, typical tib-fib fractures above the boot, broken wrists; with snowboarders we tend to see more arm injuries than leg injuries. We see just about everything. For a mountain that's small, it can generate some crashes.

MBJ: I understand that this special certification for ski patrollers the Snow Patrol at Camden Snow Bowl is a national certification?
SRL: Yes. We are part of the National Ski Patrol. The course itself involves what's called outdoor emergency care, which is the course that we start in August or September for one night per week, before we are tested around December. Then we have called ski and toboggan training, on the snow, which will go right through the winter, with certification in March. We are also trained in CPR and the use of an AED, as well as lift evacuation. Every year we have to be recertified in each of those areas – we don't have to retake the courses, but we have to be recertified. So it tends to involve a half to a full day of recertification on the medical side and then once we are actually on our skis, running an empty and loaded sled for an instructor to view and make sure we still know how to do it.
MBJ: So it's very thorough.
SRL: It's very through, but it's what it should be, I think, in terms of making sure we have the ability to get someone from an accident to a higher level of care as quickly and safely as possible.

MBJ: Any memorable experiences while on patrol?
SRL: On Sunday mornings, one of the things I have enjoyed seeing is the older skiers coming out. John Christie was always one of those Sunday skiers in his later years. John was one of the original people involved in Sugarloaf's management and is viewed by many as the father of skiing in Maine. It was a treat to get to ride the chairlift with him. I would try to catch up with him on the lift so I could listen to him talk. Each year, he aimed to ski as many days as he was old.

MBJ: Did he shift from Sugarloaf to the Snow Bowl?
SRL: Well, he lived in Union, so this was close to him. He was just an absolutely elegant skier, as many older skiers are. It's something that older people continue to do, and I hope I can continue to do it, too.

MBJ: Has there been any interaction or interplay between your legal world and the world on the slopes?
SRL:There are a couple of us lawyers here. I think I'm the longest serving lawyer on the patrol. Darby Urey joined the patrol a couple years ago – he's in Rockport. You know, whenever there's a question about liability, the heads always swivel around to Darby or me. I don't always opine, because resort liability is outside of any field I've ever worked in. But I have my antennae up for any issues and I try to make sure that if I have concerns, I pass them along to management. I also am naturally attuned to safety issues. I am among the members of the patrol who are constantly asking people, especially children, to put the bar down on the chair lift. When I see adults with the bar up, I think they're putting themselves in jeopardy if there's a sudden jolt to the lift. But the adults are also a role model for children. We want people to be as safe as possible. I don't know if that comes from being a lawyer, but I'm definitely the "put the bar down" patroller of the Camden Snow Bowl.

MBJ: What's the best advice you have ever received?
SRL: That would be to love what matters. That comes from really poignant remarks at funerals. I seem to be going to them more and more these days. However, that advice is probably why I got involved in doing something that supports the skiing industry. It really mattered to me and I really love doing it. So, I'm trying to spend the second 50 years of my life doing more of that. The advice has allowed me to let go of the things that didn't matter so much and to focus more on what really is important in life.

BEYOND THE LAW features conversations with Maine lawyers who pursue unique interests or pastimes. Readers are invited to suggest candidates for Beyond The Law by contacting Dan Murphy at dmurphy@bernsteinshur.com.

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Now more than 2,750 members strong, the Maine State Bar Association is the largest and most active alliance of lawyers in Maine. Our members include active and inactive attorneys, judges, law professors, corporate counsel and government lawyers. The goal of the MSBA is to provide its members with membership services and benefits to enhance their practice and enrich their experience in the legal profession. Our MSBA leadership and professional staff are dedicated to meeting your high expectations of quality, commitment and service. There's never been a better time to join the Maine State Bar Association!

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Bar Fellows Endowment Reaches $1 Million with Support of New Fellows and Honorary Life Fellows

The Bar Fellows of the Maine Justice Foundation constitute an honorary society of professional recognition for Maine attorneys. To earn election, the Fellows have distinguished themselves in their legal practice and have supported the mission of the Foundation: to ensure that all Mainers, regardless of means, have access to our system of civil justice.

The Foundation instituted the Bar Fellows in 1991 to provide a base of financial support for the Foundation's operations, should income from IOLTA (Interest on Lawyers' Trust Accounts, the only source of revenue to the Foundation at the time) prove insufficient. The Fellows' financial support over that time has allowed us to succeed admirably in that aim. The Foundation places the Fellows' donations of $1,500 in an endowment, which now stands at $1 million. Each year we use income from the endowment to underwrite our annual operations. The fund allows the Foundation to work on access to justice projects for which we have no other source of income.

We are proud to acknowledge those attorneys who became Bar Fellows in 2018 and 2019.

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We also thank Berman & Simmons, PA for the firm's generous support of the Bar Fellows endowment in 2018. A complete list of Bar Fellows can be found at www.justicemaine.org.

In 2017 the Foundation created the designation of Honorary Life Fellow to recognize those Fellows who wished to make an additional pledge of $1,500 or more. We are proud to thank them here, starting with the following five Patrons, who pledged support of $5,000 or more:

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The Power of Gratitude

Sometimes the simplest things can yield significant benefits. Such appears to be the case with the practice of gratitude. By the practice of gratitude we mean a deliberate, periodic reflection upon those things in one's life for which one is thankful.

Most religions encourage their followers to give thanks to their supreme being(s) for the blessings they receive. Many nations have set aside specific days for their citizens to express gratitude for the good fortune they have enjoyed. While the observance of a day of thanksgiving may have originated as a religious practice, in the United States and other countries it long ago evolved into a secular holiday. This raises an interesting question. While thanking someone for an act of kindness is common courtesy, what about the gratitude we feel for a spectacular sunset or breathtaking view? If you don't believe in a supreme being, to whom do you give thanks? Well, from a psychological standpoint, it doesn't seem to matter. Simply feeling grateful is enough.

The positive effects of gratitude have been the subject of considerable study in the field of positive psychology. The practice of gratitude appears to be associated with a variety of health benefits. Psychologists Robert Emmons of the University of California at Davis and Michael McCullough of the University of Miami conducted a number of studies that explored this relationship. In their most well-known study, three groups of participants were asked to keep weekly journals over a period of 10 weeks. One group was assigned to write down things for which they were grateful. The second group was to list things that had angered or upset them. The third group was assigned to simply describe their daily activities from a neutral perspective. After 10 weeks the participants underwent a series of psychological tests. The gratitude group proved to be more optimistic, felt better about themselves, had fewer medical visits and even averaged 90 minutes more exercise per week than the other two groups.[1] Another study by researchers in China found that greater levels of gratitude correlated to better sleep and lower levels of anxiety and depression.[2]

A recent study involving several thousand lawyers and judges, cosponsored by the American Bar Association, found that 28 percent of participants exhibited signs of clinical depression and 25 percent had elevated levels of anxiety. In contrast, the rates among the general population of the United States are approximately 8 percent for depression and 19 percent for anxiety.[3] Why are lawyers more anxious and depressed than others? We do not know the answer to that question. But common sense would suggest that the nature of law practice might well be fertile ground for the development of these disorders. The practice is frequently adversarial. Conflict is inherent in much of our work. Discovery deadlines, trial lists, appeal deadlines are a constant source of stress. Many attorneys serve clients who are facing crises. Criminal, family and personal injury practitioners and many judges are especially at risk for secondary trauma. Moreover, helping clients make informed decision about significant matters requires lawyers to advise them of the possible consequences of their choices. The nature of such advice involves explaining all reasonably foreseeable downside risks. I recall a first-year law professor emphasizing that a lawyer must "parade out the horribles" before allowing a client to make a significant decision in a case. When it comes to envisioning worst-case scenarios, lawyers have few peers. While unquestionably valuable in counseling clients, this talent can become problematic when it creeps into one's personal life. Over time it's not difficult for us to develop a "glass-half-empty" perspective. Gratitude can help counteract that tendency.

Undertaking a gratitude practice is not complicated. Simply commit to keeping a gratitude "journal" for two weeks. A formal journal is not necessary. Just making a list of things for which you are grateful that day will suffice. It may be something as minor as a good workout at the gym. There is no right or wrong way to complete the list. This is about establishing a practice, not achieving a goal. It is important to retain each list for later review. Therefore, it is essential to write each item down. Some people find it helpful to make a list before retiring each night, others upon awaking at the start of the day. Whenever you make your entries is not important. However, it is essential to make a list every day during the two- week period.

At the end of two weeks reread each of your lists and consider whether your general outlook has changed for the better. If it has, you may want to continue the daily journal for a while longer. If daily entries are too burdensome, then commit to making at least one gratitude list every week. The point is to maintain focus on the positive things in life rather than the negative, i.e. to see the glass as half full.

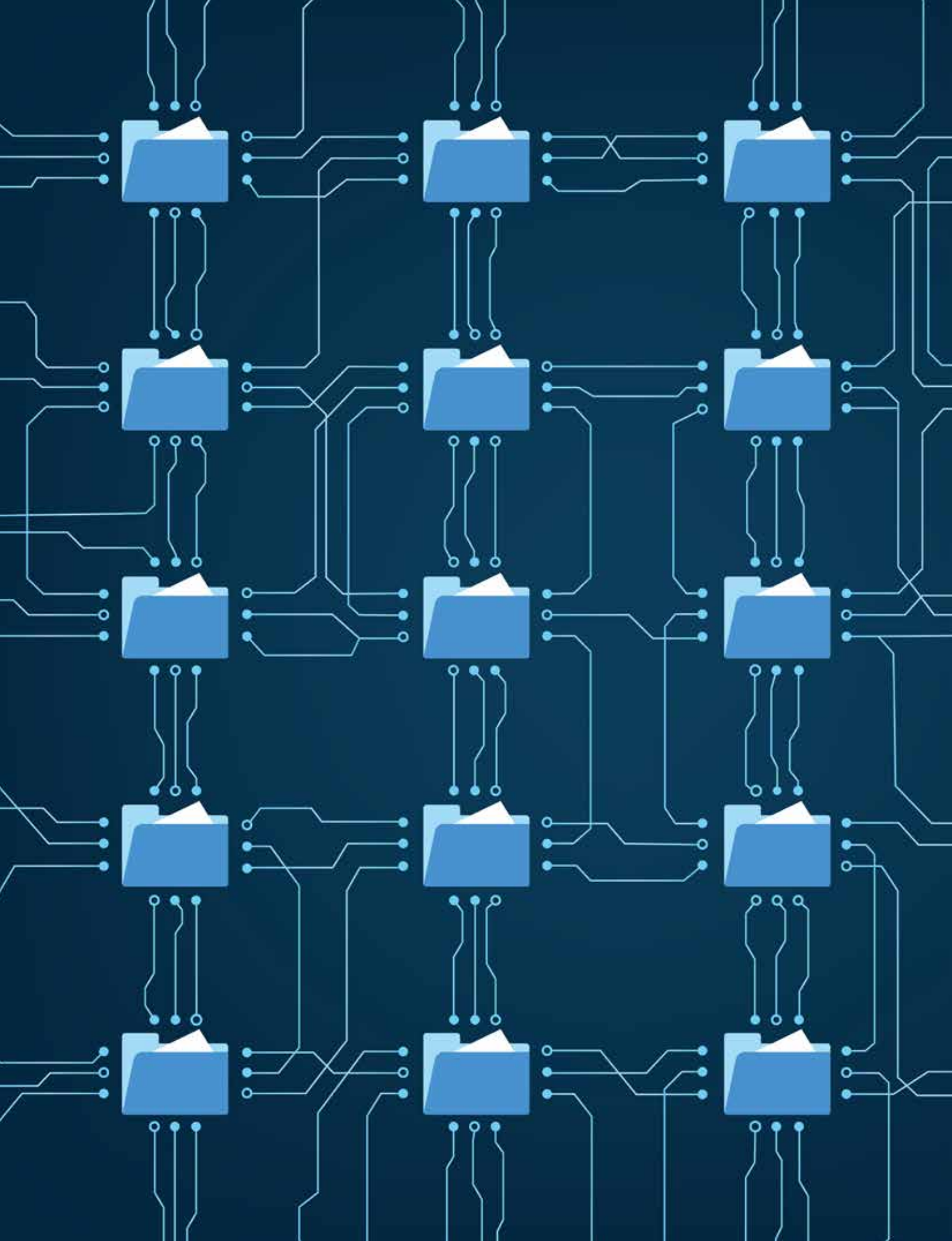
In the course of their work most lawyers and judges encounter a lot of negativity. Over time that can erode one's optimism. A gratitude practice helps reminds us that there are a multitude of good things, large and small, in our lives. As author Melody Beattie wrote in *The Language of Letting Go: Hazelden Meditation Series*:

> Gratitude unlocks the fullness of life. It turns what we have into enough, and more. It turns denial into acceptance, chaos to order, confusion to clarity. It can turn a meal into a feast, a house into a home, a stranger into a friend. It turns problems into gifts, failures into successes, the unexpected into perfect timing, and mistakes into important events.

1. Emmons, R.A. & McCullough, M.E. (2003) Counting blessings verses burdens: Experimental studies of gratitude and subjective well-being in daily life. *Journal of Personality and Social Psychology,* 84, 377-389

2. Morin, A., 7 Scientifically Proven Benefits Of Gratitude That Will Motivate You To Give Thanks Year Round. *Forbes Online* 11/23/14

3. P.R. Krill, R. Johnson & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,* 10 J. ADDICTION MED. 46 (2016)



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E-Filing: Ready, Set, Send

Several months ago, Laura O'Hanlon, like Paul Revere, galloped through Maine's legal community, announcing that a revolution had begun.[1] Unlike her predecessor, who warned that "the British are coming," Laura alerted Maine lawyers that "e-filing is coming." She was providing fair warning of an impending digital revolution soon to arrive in Maine courts.

As Laura reported, Chief Justice Saufley described the e-filing/digital case management initiative as "one of the most complex projects" she had "ever been involved with in Government."[2] Although I can appreciate the difficulty of setting up and communicating how the new system works, my mind naturally turns to how lawyers can best use this new system to persuade courts to rule in their clients' favor.

I understand the anxiety Maine lawyers may be experiencing as they contemplate the change to e-filing. I also appreciate their tendency to push aside any concerns they may be feeling, when they shrug and say "they don't expect much change for lawyers" who have been using PACER in the federal courts for years.[3] Laura's *Maine Bar Journal* article, called "E-Filing: It's a Big Deal," was her clarion call, warning Maine lawyers that they need to be ready for this change and participate in decisions about how that change will be implemented.[4]

I am sympathetic to the tendency to downplay the need for change in the way lawyers communicate with courts through motions and briefs once e-filing becomes a reality. For both my partner Susan and me, the digital revolution was a major reason we decided to retire from our respective jobs. Susan, the Director of Guidance at Wiscasset High School, had enjoyed putting together students' college applications by hand and did not welcome the change to e-filing being adopted by virtually every college. She took pleasure in making each student's application packet as professional and well organized as possible. As the push to file everything online took hold, she knew she didn't want to go there and retired.

Similarly, as a legal writing professor, who loved hand-writing personalized comments on her students' papers, I was not pleased when the legal-writing community began to advocate for electronic filing and grading of student assignments, which inevitably led to professors inserting canned comments into electronic documents. Although it was theoretically possible to insert personalized comments electronically, many professors were developing lists of canned comments to be quickly inserted into the text of students' assignments. Sometimes, students were even provided a numbered list of those canned comments, and the professors simply inserted a number, directing a student to a key to find the relevant comment. Gone would be the days of student assignments, filled with personalized comments I had made with my signature purple pen. For some students, the move to electronic comments might have been a welcome change. I am sure my handwriting was not always legible, and it might have disturbed some students to see so much purple on the page. For me, though, I knew the end had come. E-filing and e-commenting were not for me. Recognizing the impending revolution in legal-writing instruction, I decided to retire and leave the e-filing and e-grading to the next generation.

Retirement, however, is not a solution for most lawyers who may not welcome the change to e-filing in Maine courts. For that reason, I am dedicating this column to all the Maine lawyers who will be making that transition, offering some practical advice about how to turn this potentially unwelcome change into an opportunity to be even more effective advocates.

The Three Ps of Writing for the Digital Age: Persuasion, Professionalism, and Pity (for the reader)[5]

Persuasion

Although e-filing will require lawyers to change many of their ways, little needs to change in the area of persuasion. First and foremost, when e-filing, lawyers will need to use all the tools of persuasion they employed when submitting motions and briefs on paper. They must conduct thorough research, base their arguments on relevant law and precedent, apply the law to the facts, and lead with their strongest arguments. They need to identify the proper standard of review and show the court why ruling for their client leads to justice.

In short, these principles that applied in the era of paper-filing are still valid in the rapidly advancing e-filing age. It is reassuring to know that some things never change, especially when it comes to persuasive writing.

Professionalism

Professionalism is as important as ever in the digital age, and perhaps even more important, given the speed with which e-filing occurs. Also, privacy concerns arise when court filings are published online, providing public access that never existed when they were kept in folders, securely locked in file cabinets in the clerks' offices and judges' chambers.

By now, everyone should be aware of the dangers of sending electronic communications. Without careful attention, electronic documents can be sent prematurely, before they are properly edited and proofread. If the writer relies on spellcheck and grammar check, they can be riddled with mistakes. If the address is incorrect, they can be sent to the wrong recipient or even disappear into cyberspace.

Another danger is that the wrong draft will be submitted electronically. Unlike paper drafts, which probably have corrections written all over them in someone's handwriting, electronic drafts all look about the same. Great care must be taken to discard earlier drafts or mark them as Draft #1, Draft #4, or Final Draft. Once someone hits "send," that draft is on its way. I can only imagine the dismay a lawyer would feel upon realizing that a preliminary draft, containing many errors and possibly even some unconvincing legal arguments, has been sent to the court.

One of the advantages of preparing paper documents was the time it took to process them and get them ready for mailing. Although that lack of speed may, at times, have seemed like a disadvantage, it provided an opportunity to spot problems and generally prevented the wrong document from being sent. The advantage of e-filing is the speed with which it is accomplished. That is also its greatest disadvantage.

In the past, lawyers have often left the actual filing of documents to their assistants. Because they would have created and signed the motion or brief themselves, it seemed acceptable to have an assistant photocopy the original, send it to the court, with copies to opposing parties. Everything changes when e-filing is involved.

Although lawyers do not necessarily need to be the ones loading documents onto the computer, they do need to have a "basic understanding of how the system works and establish the necessary business processes" to meet their professional obligations.[6]

For example, lawyers need to decide carefully who will be filing their documents because those people will not only do the filing, but will also be receiving notice from the system about whether the filing was accepted or rejected.[7] Decisions need to be made about which email will be designated in the system for service from other parties and the court, who in the office will receive those emails, and what will be done with them. Will they be printed and put into binders or stored electronically?[8]

Also, law firms need to determine their policies regarding signatures. Will they use "/s/ " with an attorney's first and last name? Should the attorney filing the document be the only one who can convert the document from a word-processing document to a PDF file for filing and affix that signature? Allowing staff to sign such important documents is a bad practice.[9] Federal courts, which have had mandatory e-filing for some time, have not been forgiving when lawyers make e-filing errors.[10]

Additional professionalism concerns arise as the public gains access to many, although not all, e-filings. In proposed legislation, the Maine Supreme Judicial Court is providing for approximately 85 percent of case records to be made publicly available on the internet.[11] Digital case records in traffic infractions, criminal matters, and most civil matters will be publicly available, but not records involving adoption, child protection, juveniles, and mental-health civil commitment.[12] The nature of the proceedings and summaries of judicial actions in other family matters, including divorces, will be made public, but filings between and among the parties will not be.[13] Sensitive information like social security numbers, bank account numbers, and medical records will not be

available to the public.[14]

In the past, paper records that were technically public continued to retain a high degree of "practical obscurity."[15] Although personal information could be available to the public, the difficulty and costs of retrieval limited access as a practical matter. Also, over time, paper records grow old and must be cleared away to make room for the new.[16] Once judicial records go online, however, people can search information with relative ease, and such records will be available, potentially forever. For these reasons, lawyers will need to be sensitive and vigilant about the personal information they include in e-filings to the court.

Pity (For the Reader)

Screen-Readers: A Distinct Breed

Research suggests that sustained attention declines and retention suffers when people read electronic documents.[17] Screen-readers tend to skim more frequently than paper-readers, navigating text rapidly. They seek out headers and summaries, tending to read the first paragraph of a text, then skim the remainder."[18] Also, screen-readers tend to pay more attention to the top left of the screen and less attention to the bottom right, "as their eyes move in a pattern that resembles an 'F.'"[19]

Apparently, screen-reading takes more mental effort, which means the reader has less mental energy left for comprehension of e-documents.[20] The implications of this reality are significant. Recognizing that judges may be more likely to skim and absorb less of the content of their e-filings, lawyers will need to work even harder than before on writing and formatting effective briefs and motions to advocate effectively for their clients.

Although the Maine Supreme Judicial Court has yet to promulgate rules regarding the format of documents filed electronically, the current rules provide guidance regarding form and formatting: "All printed matter must appear in at least 14-point font . . . except that footnotes and quotations may appear in 11-point font . . . with double spacing between each line of text except for block quotations." [21] Presumably, those requirements would continue to apply to e-filed briefs and motions.

Begin with a Summary

Beyond these basic requirements, attorneys need to organize their documents with care, recognizing that screen-readers may need extra guidance in navigating and comprehending their arguments. As soon as possible, they should provide a summary, containing the substance of their arguments and reasoning. Because screen-readers tend to be impatient to get to the heart of things, they need more than a simple road map, pointing out what topics will be covered.[22]

Such summaries should introduce the client's case and lay out the arguments as well as the legal and factual basis on which the court should rule in the client's favor. This short introduction engages the screen-reader and provides an overview of all that is to come.[23] Even if screen-readers skim the rest of the document, they will have already been introduced to the main points, which may be enough to persuade them to rule for the client.

Use Effective Topic Sentences

Following the summary, it is important to draw screen-readers' attention to the full argument. This can be accomplished by the use of effective topic sentences beginning each succeeding paragraph. Such topic sentences need to summarize the content of the paragraph. Then, even if screen-readers skim the rest of the paragraph, they will at least have been exposed to the main idea. Although topic sentences can also come at the end of a paragraph, that is not an effective way to use them in electronic documents. By the end of the paragraph, the screen-reader may have already moved on. For this reason, topic sentences in e-documents should always come at the beginning of the paragraph.

Provide Headings

Headings help to keep screen-readers focused as they skim and jump around in the text. Such headings should be aligned on the left, "given screen-readers' tendency to pay closer attention to information on the left-hand side of the screen."[24] In addition to the usual main headings expected in a brief or memo—Facts, Argument, Conclusion—sub-headings that are specific to the case can be very helpful. Such short, case-specific headings can make a brief more readable and understandable.[25]

Keep it Brief

Although all legal writing should be concise, attorneys need to be even more vigilant in this regard when writing for screen-readers. Ways to make briefs and memos as concise as possible include eliminating legalese, verbosity, and unnecessary passive voice. Using concrete subjects and active verbs is a good practice in all writing, but especially in e-writing.

Font Choice and Legibility

Screen-readers can become annoyed by fonts that make reading more diffcult. Although the Maine Supreme Judicial Court has not specified the font to use, it is generally agreed that a serif font that is simple and proportional, like Times New Roman, is the easiest to read.[26] The Court has specified that text should be double-spaced and feature a font that is at least 14-point, which is probably larger than attorneys generally use in practice. That is the font I required my students to use, too, and I can attest to how much easier it is to read than anything smaller.

Avoid using ALL CAPS and underlining in e-documents. Because they are difficult to read, screen-readers will probably skip over them. If you want something to stand out, it is better to use bold, italics, or even a larger font size for headings.

Include Ample White Space

The effective use of white space helps screen-readers to stay focused when reading an e-document. Such white space should appear above and below headings, and between paragraphs and sections. Bullet-pointed lists are also easy for screen-readers to absorb.

Add Visuals

Visuals like maps, photographs, and charts can be useful to illuminate facts and persuade judges. Such visuals can be inserted fairly easily into electronic documents. Because they are digital images, they may be even crisper than photocopied pictures inserted into a paper filing.[27]

CONCLUSION

Although I have suggested some techniques to make e-filings as effective as possible, everything I have described above applies to traditional paper-filing as well. Although screen-readers may face bigger challenges when it comes to concentration, they are really no different from traditional paper-readers with regard to their appreciation of sound research; well-documented legal analysis; clear organization; complete and correct legal citation; and excellent grammar, punctuation, usage, and spelling.

Electronic communication is here to stay. Soon, all Maine courtrooms will be digital. Mastering the online environment, coupled with strong legal-writing skills, is the key to persuading courts to rule in your clients' favor. Good writing is still good writing, and always will be. That is one truth that will never change, no matter where technology takes us in the years ahead.

Endnotes

1 Laura O'Hanlon, *E-Filing: It's a Big Deal,* 34 Me. Bar J. 127, 127 (2019).
2 *Id.*
3 *Id.*
4 *Id.*
5 Credit goes to Laura O'Hanlon for identifying these three essential aspects of e-filing. Heartfelt thanks go to Laura and Maureen P. Quinlan, Reference Law & Government Documents Librarian at Garbrecht Law Library, University of Maine School of Law, for their invaluable assistance in researching the topic of e-filing for this column.
6 Michael Mehall, *Fix the Top 10 Mistakes for E-Filed Court Documents*, The Advocate 24, 24 (October 2017).
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* (citing several cases, including *Knox v. Patterson*, 21 Pa. D. & C.5th 149 (Pa. Com. Pl. 2011), in which "an attorney left all e-filing (and all email for that matter) to an assistant. When [the] assistant was out with an injury, the attorney missed electronic notice from he court and lost the right to pursue a $35,000 fee claim.")
11 O'Hanlon, *supra* n. 1 at 127 (citing *A Report to the Joint Convention of the First Regular Session of the 129th Maine Legislature*, presented by Chief Justice Leigh I. Saufley, Feb. 26, 2019 (SOJ 2019), https://www.courts.maine.gov/maine_courts/supreme/speeches/SoJ-2019.pdf.)
12 *Id.*
13 *Id.*
14 *Id.*
15 Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash. L. Rev. 307, 316 (2004).
16 Id.
17 Tenielle Fordyce-Ruff, *Writing for E-readers: Tips and Tricks to Craft Effective Briefs*, The Advocate 51, 51 (March/April 2017) (citing Laura Levey, *101 E-filing: How to Craft Effective Motions and Briefs in the Digital Era*, available at www.wisbar.org/NewsPublications/WisconsinLawyer/Pages?Article.aspx?Volume=89&Issue=10&ArtileID=25200.)
18 *Id.*
19 *Id.*
20 *Id.*
21 Me. R. App. Pro. 7A(g)(2).
22 Tenielle Fordyce-Ruff, *supra* n. 17, at 51.
23 *Id.*
24 *Id.* at 52.
25 *Id.*
26 *Id.*
27 *Id.*

EVAN J. ROTH After nearly 20 years in Portland as an assistant U.S. attorney, Evan is now an administrative judge for the Merit Systems Protection Board in Denver. He can be reached at evan.j.roth@icloud.com.

Plenty of Nothing

Bank Markazi v. Peterson, 136 S.Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting) (quoting D. Heyward & I. Gershwin, Porgy and Bess: Libretto 28 (1958)).

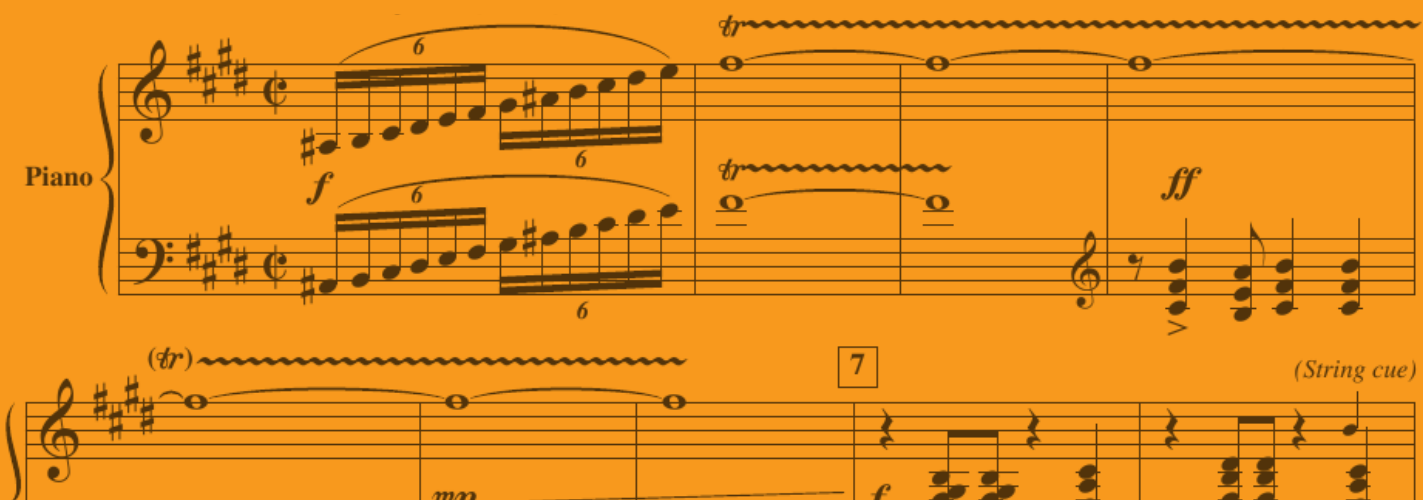
A group of American victims of Iranian state-sponsored terrorism obtained United States judgments against Iran worth billions of dollars. The plaintiffs, however, were unable to collect. To remedy that situation, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012.

The Act was unusual because it only applied to the financial assets identified in the plaintiffs' collection action pending in the United States District Court for the Southern District of New York. The Act's sole purpose was to authorize the plaintiffs to collect against the specified assets as long as the District Court made very limited findings of fact, including that Iran had an equitable interest in the assets, and that the assets were held by a financial firm doing business in the United States.

Bank Markazi, the holder of the financial assets, argued the Act violated separation of powers because Congress was, essentially, dictating the result of a pending collection action. The District Court rejected the Bank's argument. The United States Court of Appeals for the Second Circuit affirmed. The Supreme Court also affirmed.

Writing for the majority, Justice Ginsburg insisted Congress did not dictate the result of the collection action because, as the District Court explained, there was "plenty" to litigate regarding the Act's required factual findings. In dissent, Chief Justice Roberts scoffed at that description, particularly since all of the important factual findings were well-established *before* the Act was passed. Channeling Ira Gershwin's famous opera, Porgy and Bess, the Chief Justice insisted the majority's "plenty" was actually "plenty of nothing," and that, apparently, "nothing is plenty for the Court."

Disclaimer: The views expressed are those of the author and do not necessarily represent the position of the Merit Systems Protection Board or the United States government.



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Eight Columns I Decided Not to Write

1. Attorneys, Firearms and Funds: Why It's a Good Thing Warren Zevon Wasn't a Lawyer. A linguistic appreciation of Zevon's classic "Lawyers, Guns and Money."

2. We Need a Better Action Word. Other professions have impressive-sounding words for the important work they do. Doctors *operate*, *diagnose*, and *prescribe*; dentists *drill* and *extract*; architects and engineers *design* and *build*. What do lawyers do? We "file" things.

According to dictionary.com, "to file" means "to place in a file," or "to arrange (papers, records, etc.) in convenient order for storage or reference." The zealous litigator doesn't let her adversaries take the initiative: she acts, by placing things in files, or arranging them in convenient order for storage or reference.

There are better ways to say this! If it's a motion you are filing, you have available the fine action word "move." Why *file a motion* for something when you could *move* for it? If it's a complaint, a word that nicely captures what you are up to is "sue." We do, to be sure, file these things—or at least, we give them to courts that presumably file them somewhere. But why make *filing* our signature action?

3. Enough with All These Useless Legal Doctrines. Examines the elaborate yet indeterminate legal standards and multi-part tests courts have created and argues that judges should stop fetishizing their byzantine doctrinal creations and trust instead in their common-sense intuition about what seems just and fair.

4. Enough with All These Outcome-Oriented Rulings. Argues that judges should stop letting their common-sense intuition about what seems just and fair color their legal analysis and simply apply the law.

5. Why Both Sides in Washington Are Equally at Fault for the Breakdown of a Fact-Based Public Sphere.
Evidence: On the one hand, media reports indicate that the president's public statements feature an unending torrent of falsehoods, a phenomenon that threatens the existence of the shared external reality that a functioning democracy requires.[1]
On the other hand, the previous president said that if you liked your health insurance plan you could keep it, and it turned out that not everyone could.[2]
Analysis: Both sides do it.
Conclusion: Nothing matters.

6. The Surprising Trick that Could Change the Way You Look at Hyphens. People need to know whether or not to hyphenate the phrase "follow up." The answer is, it depends. If it's being used as an adjective, hyphenate: "we held a follow-up conversation." But if it's being used as a verb, don't: "I am writing to follow up on our conversation."

1 "President Trump has made 15,413 false or misleading claims over 1,055 days," by Glenn Kessler, Salvador Rizzo, and Meg Kelly, *Washington Post*, December 16, 2019.
2 "Lie of the Year: 'If you like your health care plan, you can keep it,'" by Angie Drobnic Holan, PolitiFact, December 12, 2013.

7. Why There's No Point in Making Any Arguments on Appeal. A three-part proof, based on the two most common responses to appellate arguments, that no arguments on appeal are appropriate:

A. There are two kinds of arguments you can make on appeal: new ones, and the same ones you made to the trial court.

B. It isn't appropriate to make new arguments on appeal because you waived them by not making them in the trial court.

C. It isn't appropriate to make the same arguments you made in the trial court on appeal because that's just recycling the same nonsense you tried below.

Conclusion: no arguments are appropriate on appeal.

8. Preparing for Battle in the War Room: Why Military Metaphors Are a Constructive Way to Talk About the Process of Civil Dispute Resolution. Argues that while a skeptic might think that military metaphors would not be the most constructive way to talk about the process of civil dispute resolution, it turns out that some clients really do just want to fight.

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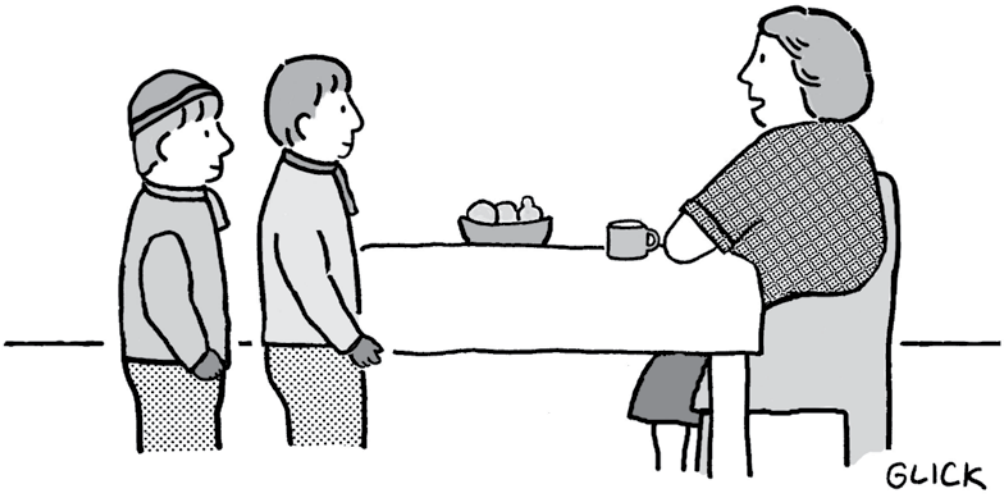

"Have fun playing outside, kids, but stay away from any unnatural accumulation of snow and ice."

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