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Legal Technology

The newsletter of the Illinois State Bar Association's Standing Committee on Legal Technology

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E-mail service: Ready or not, it has arrived

BY MARK C. PALMER

Companies must continually adapt and evolve in order to survive. A stagnant organization is destine to fail. This is nothing new. Likewise, all change is not progress, as all movement is not forward. Customers demand better products, improved services, and organizations reassess and change. Why should lawyers be any different? You must adapt and evolve. In fact, not only do you have a duty to the representation of your clients, you have a duty to maintaining your own competency as a practitioner of the legal profession to progress.

Competency in the practice of law clearly means you must keep abreast of changes in substantive and procedural law in the representation of your clients. Supreme Court Rule 1.1 demands "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" of your clients. Just as rules change, statutes are amended, and

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Stop using free e-mail accounts for your business

BY BRYAN M. SIMS

In solo and small firm practices, watching the bottom line closely can have a great impact on your bottom line. In a solo practice, every dollar that we save can, quite literally, end up in our pocket. As a consequence, I am a big fan of spending responsibly. Significantly, spending responsibly does not mean spending the least amount of money possible. Instead, it means spending your money in a responsible manner.

The one thing that I see attorneys do most often that falls within the irresponsible category is to use a free email service for their business email. For those that treat this as a non-issue, I urge you to read the news stories about Artist Dennis Cooper. You can find information about Cooper's story at http://tinyurl.com/

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If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

E-mail service: Ready or not, it has arrived

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cases continue to interpret them, the role of technology brings various benefits and risks to the law and its practice, often at an exponential rate (e.g. see *Where Is Our Legal Profession Heading?* Part One & Part Two).

Technology Competency Is Required

In 2012, the American Bar Association modified Comment 8 to its Model "Competence" Rule 1.1 to require lawyers to "keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*." More than 20 states, including Illinois as of January 1, 2016, have since adopted this "technology competency" requirement. While such a requirement includes a working knowledge of the scope of eDiscovery or using electronic resources for legal research, it also means having and maintaining an understanding of technology in general.

At the same time Illinois was taking this significant step forward to expand on the demands of competency for its lawyers, it further and firmly planted its mandatory application of technology into its Rule for the manner of serving documents other than process and complaints on parties not in default in the trial and reviewing courts. Email service changed from an optional, opt-in method of service under Rule 11, to one of the stand-alone options for delivering documents.

You may recall that Illinois modified Rule 11 back in 2013 to permit service by email, but not require it unless a local circuit had adopted mandatory e-filing pursuant to Illinois Supreme Court Electronic Filing Standards. Nevertheless, just as soon as the optional email service took effect, advocates for progressing Illinois to a statewide e-filing court system were confident that a change from optional to mandatory acceptance by email in Rule 11 was a certainty sooner rather than later. As of January 1, 2016, that change arrived.

Mandatory Acceptance of Email Service to Attorneys

Now, in accordance with Supreme Court Rule 131(d)(1), attorneys filing or serving documents in any cause must include an email address on the document. This includes filings made in Illinois appellate courts (also see Rules 341(e) and 367(d)). This email address (and up to two optional secondary email addresses) qualifies as one of the acceptable forms of service under Rule 11(b)(6). As such, the relevant email addresses would be appropriately designated on the document's certificate of service to indicate that method of service used by the sender. The option to opt-in under Rule 131(d)(3) only remains for service by facsimile transmission, as email becomes one of the stand-alone methods of proper service.

Lawyers may alter how they use email communications in a manner to better control their case management and electronic file storage with this advent of mandatory acceptance of email service. For example, a law firm might consider designating a specific email address for all service to the firm, or to and for each attorney, or even a separate email address for every case file.

As these techniques and practices evolve, so may the potential for more mistakes, confusion, or miscommunications. We must be reminded that we all handle change in different ways and at different paces, calling upon a need for patience and civility to resolve the conflicts when they do occur.

Email Service to Pro Se Parties and "Good Faith Cooperation"

Unrepresented parties may designate an email address for service by including one on the unrepresented party's filing, but it is not required for non-attorneys. If the unrepresented party omits an email address, then service must be made by a method specified in Rule 11 other than email transmission. This opt-in allowance by unrepresented parties may see some changes as Illinois courts establish the

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procedures and requirements for electronic filing of all civil cases in Illinois by 2018.

The statewide standardized forms developed by the Illinois Supreme Court Access to Justice Commission, which are required to be accepted by all Illinois Circuit Courts, make it easy for pro se litigants to opt-in to email service by including the Rule 131(d) consent language with a check box and space for an email address on Entry of Appearances, Answers, and other relevant forms. These forms should be easily accessible at your local courthouse as well as online.

Service to attorneys via email requires ensuring the proper email is used for delivery in the similar manner that one must ensure the proper mailing address of the recipient. However, the new Rule 11 is purposefully vague as to what format the document must or should be in when transmitted electronically via email. The Committee Comment from December 9, 2015 related to the amending of Rule 11 emphasizes the flexibility of acceptable format types:

> [T]he Committee considered whether special additional rules should apply to documents served by email, e.g., specified file formats, scan resolutions, electronic file size limitations, etc. The Committee rejected such requirements in favor of an approach which provides flexibility to adapt to evolving technology and developing practice. The Committee further anticipates **good faith cooperation by practitioners**. For example, if an attorney serves a motion in a format which cannot be read by the recipient, the Committee expects the recipient to contact the sender to request an alternative electronic format or a paper copy. (Emphasis added).

The most commonly used format for service by email is likely the "Portable Document Format" or PDF, a cross-platform file type developed by Adobe. This may be preferred to directly emailing an opposing party the final Word format version of the filing due to the metadata provided along with the Word format file.

Metadata – the internal information about the file in addition to the actual content of the file – can identify a lot about a document, picture, or other file type that may be confidential or otherwise reveal private information. While a PDF still may have metadata, such as the author's name, keywords, and copyright information, it should protect against other document information such as who worked on the document and what revisions were made.

It is expected that the transmitted file is easily readable by the recipient regardless of the file type used in emailing service of documents to another attorney or a consenting unrepresented party. This may seem obvious or simple regarding most filed documents that can easily and inexpensively be emailed. Nevertheless, complications may occur when certain unique files, such as picture and video exhibits, included in email service are unreadable due to the system or software limitations of the recipient's computer.

Proof of Service and Effective Date

Under Supreme Court Rule 12(b)(6), the attorney serving by email must file a certificate stating "the time and place of transmission to a designated e-mail address of record." Non-attorney filers must include the same information in affidavit form pursuant to a verification under 735 ILCS 5/1-109. Email service is deemed complete on the first court day following transmission, pursuant to Rule 12(f).

It has been presumed that email service may be transmitted at any time of day as the Rule provides no express limitations as to the time the email is sent (read: transmitted), so long as the proof of service accurately states such time and place of transmission. Theoretically, a paradox might exist when, for example, an email could be transmitted from the sender's computer at 11:59 p.m. and service could be considered completed as of a minute later, even if the email with attached service document has not made the complete electronic journey to the recipient's inbox.

Technology Won't Wait up for You

As the legal profession has historically been known for being slow to adapt to change, it is no particular surprise that lawyers might be slow to adopt and accept this change in service. The fax machines will continue to beep and chirp. The copy machines will continue to churn out copy after copy of pleadings for mailing. The mail carrier's bin will remain full of outgoing and incoming parcels, all of which might have been avoided with a click to attach a PDF and a click to send it.

Changing technologies and the need to maintain an understanding of them has led to some frustrations from attorneys lacking tech savvy. Rule of Professional Conduct 1.1 makes it clear that competent representation of clients now demands it. And just as these recent Rule changes were specifically drafted to be elastic to conform to the changes in technology, so must the legal profession and the competency of its attorneys. We owe it to ourselves and our clients. ■

It's Campaign Season for the 2017 Election

Run for ISBA Office—

Positions Available:

- **3rd VP**
- **BOG:**
  - **Cook (2)**
  - Under Age 37 Cook County (2)
  - Under Age 37 Outside Cook County (1)
- **Assembly:**
  - **Cook (21)**

The 2017 ISBA Notice of Election (http://tinyurl.com/jabs3xk) is now available. Find out more at www.isba.org/elections.

Candidate filing begins January 3, 2017 and ends January 31, 2017.

Stop using free e-mail accounts for your business

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hyrlbfn and http://tinyurl.com/h3flwqy. For our purposes, the important part of his story is that Google deactivated his blog (which was hosted for free on Blogger) and his free Gmail Account.

After the deactivation, Cooper could not access either. After significant negotiations, Cooper was eventually able to obtain access to his data. However, this cost him significant time and, in likelihood, significant funds. See <http://tinyurl.com/zl454vo>.

When Cooper's blog was deactivated, it had 14 years' worth of information that he had nowhere else. Similarly, he lost access to his email that had sent and received via Gmail.

Google's actions here may sound arbitrary. However, they are squarely within the agreement that Cooper, and everyone else who has a free Gmail address, has agreed to. The terms of service, which can be found at <https://www.google.com/intl/en/policies/terms/>, specifically provide: "You can stop using our Services at any time, although we'll be sorry to see you go. **Google may also stop providing Services to you, or add or create new limits to our Services at any time**." Emphasis added.

Thus, at any time, Google can choose to stop providing services to you. This is obviously not what you want to have happen if the email that Google is controlling access to is email communications with your clients, opposing counsel, and the court.

Before we look at the alternatives, let's first address the reasonableness of Google's position. Google is providing you a free service. Further, given that you are not paying Google any money,[1] they are giving you essentially no rights to the service. By using the service, you are agreeing to those terms. Are they good terms of you? Absolutely not. However, if you want something different, you shouldn't expect to get that for free.

If you look at the terms of services for Google's paid email, however, you will find that they are quite different from the terms found in the free service. See <https://gsuite.google.com/intl/en_in/terms/2013/1/premier_terms.html>.

For example, the following terms are found in the paid version. These terms are not available to you in the free version.

> 1.1 **Facilities and Data Transfer.** All facilities used to store and process Customer Data will adhere to reasonable security standards no less protective than the security standards at facilities where Google stores and processes its own information of a similar type. Google has implemented at least industry standard systems and procedures to ensure the security and confidentiality of Customer Data, protect against anticipated threats or hazards to the security or integrity of Customer Data and protect against unauthorized access to or use of Customer Data. As part of providing the Services Google may transfer store and process Customer Data in the United States or any other country in which Google or its agents maintain facilities. By using the Services Customer consents to this transfer, processing and storage of Customer Data.

Thus, Google agrees to use reasonable security standards that are based upon "industry standard systems and procedures to ensure the security and confidentiality of Customer Data." This certainly sounds like something that most attorneys would want a cloud provider to agree to.

> 3.4 **Suspension for Non-Payment.**
>
> a. Automatic Suspension. Customer will have thirty days to pay Google delinquent Fees. If Customer does not pay Google delinquent Fees within thirty days, Google will automatically suspend Customer's use of the Services. The duration of this suspension will be until Customer pays Google all outstanding Fees.

We should all pay our bills on time. However, Google at least gives you 30 days to pay up before it discontinues your service.

> 5. **Suspension**
>
> 5.1 **Of End User Accounts by Google**. If Google becomes aware of an End User's violation of the Agreement, then Google may specifically request that Customer Suspend the applicable End User Account. If Customer fails to comply with Google's request to Suspend an End User Account, then Google may do so. The duration of any Suspension by Google will be until the applicable End User has cured the breach which caused the Suspension.

If you violate their terms of service, you get the opportunity to handle the problem yourself and the opportunity to cure the breach. With the free service, if Google determines that you have violated the terms of service, Google can disable your account and preclude you from ever accessing it again.

> 6. **Confidential Information.**
>
> 6.1 **Obligations**. Each party will: (a) protect the other party's Confidential Information with the same standard of care it uses to protect its own Confidential Information; and (b) not disclose the Confidential Information, except to Affiliates, employees and agents who need to know it and who have agreed in writing to keep it

confidential. Each party (and any Affiliates' employees and agents to whom it has disclosed Confidential Information) may use Confidential Information only to exercise rights and fulfill its obligations under this Agreement, while using reasonable care to protect it. Each party is responsible for any actions of its Affiliates' employees and agents in violation of this Section.

…

6.3 **Required Disclosure**. Each party may disclose the other party's Confidential Information when required by law but only after it, if legally permissible: (a) uses commercially reasonable efforts to notify the other party; and (b) gives the other party the chance to challenge the disclosure.

Here both parties agree to keep Confidential Information confidential. That is a good thing. Further, Google agrees that, if it must disclose your information to a third party (such as pursuant to a subpoena or a warrant), that as long as it is permitted, Google will provide you with notice of the attempt and give you the opportunity to challenge the disclosure. I think we can agree that this sounds like a nice right to have.

10.2 **Services Term and Purchases During Services Term**. Google will provide the Services to Customer during the Services Term. Unless the parties agree otherwise in writing, End User Accounts purchased during any Services Term will have a prorated term ending on the last day of that Services Term.

An actual term of service. Again, this is great. If you pay Google, they will provide you services until the end of the term. This means that Google can't just stop providing services to you simply because it wants to.

11. **Termination**.

11.1 **Termination for Breach**. Either party may suspend performance or terminate this Agreement if: (i) the other party is in material breach of the Agreement and fails to cure that breach within thirty days after receipt of written notice; (ii) the other party ceases its business operations or becomes subject to insolvency proceedings and the proceedings are not dismissed within ninety days; or (iii) the other party is in material breach of this Agreement more than two times notwithstanding any cure of such breaches.

11.2 **Effects of Termination**. If this Agreement terminates, then: (i) the rights granted by one party to the other will cease immediately (except as set forth in this Section); (ii) Google will provide Customer access to, and the ability to export, the Customer Data for a commercially reasonable period of time at Google's then-current rates for the applicable Services; (iii) after a commercially reasonable period of time, Google will delete Customer Data by removing pointers to it on Google's active servers and overwriting it over time; and (iv) upon request each party will promptly use commercially reasonable efforts to return or destroy all other Confidential Information of the other party. If a Customer on an annual plan terminates the Agreement prior to the conclusion of its annual plan, Google will bill Customer, and Customer is responsible for paying Google, for the remaining unpaid amount of Customer's annual commitment.

If Google believes that you have breached the agreement, you have a 30-day cure period. Further, event if your services are terminated, Google agrees to provide you "access to, and the ability to export, the Customer Data for a commercially reasonable period of time at Google's then-current rates for the applicable Services." Thus, even after your service is terminated, you still have the ability to access and retrieve your data.

Google, of course, is not the only free email provider out that there. However, if you are using a different provider, you will likely find terms of service quite similar to those governing the free Gmail service. On the other hand, if you select a paid service, you will find that you actually have enforceable rights that can protect you and your client.

Best of all, paid email is not expensive. Paid Gmail starts at $5 per user, per month. Similarly, email through Office 365 starts at $5 per user, per month. You can have both email and the office applications for $12.50 per user, per month.

When choosing a service to use for your business, be responsible and choose one, that for just a few dollars per month, provides you with enforceable rights to protect both your and your client's data. ■

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1. This, of course, does not mean that Google is not making money off of you, but that is a different discussion.

Legal issues with technology

BY EDWARD WASILEWSKI, COOK COUNTY ASSISTANT STATE'S ATTORNEY

There are a plethora of issues in the legal community as the development of technology in society evolves. These issues will continue to persist as the court system adapts to how technology develops. There are a few areas in which I will explain how the courts and legal community attempt to adapt to technological developments.

Cell Phones in Criminal Cases

One continuous legal issue with technology is in criminal law, more specifically, Fourth Amendment issues pertaining to cell phones. While many believe that this issue is clear, it is still developing. The courts have adapted to the use of cell phones by individuals.

For example, one important decision which has been handed down by the United States Supreme Court has shown how the legal system has developed to the use of cell phones and protections the Fourth Amendment provides to criminal defendants. More specifically, this is shown in *Riley v. California*, 134 S.Ct. 2473 (2014).

In *Riley*, the U.S. Supreme Court held the police must generally obtain a search warrant before they search a criminal defendant's cell phone. Chief Justice Robert's opinion, declared, "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." *Riley*, 134 S. Ct. 2495.[1] However, there are a few exceptions to this general rule. One exception that remains is exigent circumstances. If exigent circumstances exist, the police do not need a warrant to search a criminal defendant's cell phone. Another exception to the general rule is the good faith exception. For example, if the police relied on case law or statutory language prior to the holding in *Riley*, the search may considered reasonable and the evidence resulting from such search would not be suppressed. Because a criminal case can take years before it is resolved, cases which existed before *Riley* are still undetermined.

Privacy Issues with Cell Phones and Cell Phone Companies

Another important issue with technology and the legal community is privacy issues between customers and their cell phone companies. In the article, "How the Law Deals With Emerging Technology: Not Well," Eric Crusius declares, "Remember when it was revealed that Apple was keeping location data of iPhone customers? Since that time, *The Washington Post* revealed that Verizon and AT&T have been tracking their customers' web browsing history with "super cookies.""[2] Clearly, this is an infringement on privacy of many individuals. If people had a clear understanding that their cell phone companies were doing this before signing a contract, many people may decide to get a cell phone with a different cell phone provider.

While there may be benefits for the cell phone company in retaining access to where the a person may have searched on their web browser on their cell, there should be some limitation. This clearly builds distrust between the customer and the cell phone company. This is just another example on the developing legal issues as technology advances.

These are just two examples on developing problems with technology and the legal community. However, these are not the only two. Technology will continue to develop. There is no doubt that will occur. It will be very interesting to see how the courts, public sector, and private sector react to the ongoing growth and expansion of technology. ■

This article was originally published in the October 2016 issue of the ISBA's Young Lawyers Division newsletter.

1. <http://lawfamilyweekend.syr.edu/wp-content/uploads/2011/10/Excerpt-of-Riley-v-California.pdf>

2. Crusius, Eric S. "How The Law Deals With Emerging Technology: Not Well." Above The Law, 4 Feb. 2015. Web. 12 Sept. 2016. <http://abovethelaw.com/2015/02/how-the-law-deals-with-emerging-technology-not-well/?rf=1>.

Crash plan

BY DON MATEER

I recently experienced two PC computer crashes. A laptop became infected due to a lapse of protective software (this is a long story) and a desk top became corrupted to the point of no return. I told Frank Ariano that I am seriously considering his Mac alternatives to a PC given my present luck with PCs. The reason for this article is to explain how neither of the crashes caused any heart ache. Everything from all my computers was in the cloud waiting for me to download it to a new computer.

Several years ago, I researched back up plans. I came to the conclusion that an automatic back up to the cloud was best for me. I did not want to rely on my having to originate the back up and I did not want to rely on an external piece of equipment that could also fail. Next, I had to decide on what software to use. There are many good programs available, but I chose CrashPlan. First of all, I was impressed with many of the companies using CrashPlan; for example, Intuit, Adobe, Mayo Clinic, Stanford University, Los Alamos National Laboratory, SanDisk, Yelp and the list goes on. Secondly, I called a friend whose business is computers and everything related to them and he recommended CrashPlan. So off I went to purchase the product (CrashPlan.com).

I purchased the Family Plan which covers 10 computers and has **UNLIMITED** storage. I do not know if this will be the case forever, but I have owned it for several years and it still is unlimited storage. Why the need for 10 computers? I have one lap top and two desk top computers presently. But I have three other dead computers that still have all their data, pictures etc. in the cloud for me to access at any time.

Now the best part. If you purchase a new computer, you can move everything from an old computer to the new computer by "adopting" the new computer with the push of a button. Your new computer now has everything in it that was in the old computer. If you only want some files, or some pictures, all you do is go into CrashPlan and find the computer that has what you want, then mark those individual files or pictures and move them into your new computer. This is really helpful for me even when I do not experience a crash. I work on a desk top in Rockford and a desk top in Florida. I could transfer files with a thumb drive between the computers, but that takes planning and hoping that you get all the files you want. With CrashPlan while in Florida, I open my desk top in Rockford on CrashPlan and mark the documents, files or pictures I want and copy them into my desk top or lap top in Florida. Nothing could be easier or more convenient.

If you are not presently backing up your computers to an external hard drive or to the cloud, I guarantee you will be after you experience a crash and lose all your data. Once on CrashPlan, they run certain promotions. I took advantage of the last promotion and got two years for the price of one.

CrashPlan works for Macs as well as PCs. My desk top in Rockford runs on Windows 7 and my desk top in Florida, as well as my lap top, run on Windows 10. There is no problem taking the files from my Windows 7 and copying them into my computers with Windows 10. I have no idea if I could copy files from a Mac into a PC. Perhaps I will be learning this in the near future and will let you know.

If you are not backing up your computers, do so now. There are business plans for CrashPlan as well as the personal plans. You will never have to worry about losing data again. It's a small price to pay for a good night's sleep. ■

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