The Florida Law Practice
LINK
For Florida Lawyers – By Florida Lawyers
A JOURNAL OF THE GENERAL PRACTICE, SOLO AND SMALL FIRM SECTION
The Florida Bar
Volume XXXIII, No. 1 www.gpssf.org Fall 2013

Two Tips for Taking – or Re-taking – Control of Your Time

Excerpted from Nora Riva Bergman's E-Book "6 Keys to Your Success in 2013," with permission

It has always been a badge of honor for lawyers to work ridiculously long hours. The law firm culture says work late, every night, no matter what you are working on. This is a recipe for stress and burn-out. Moreover, recent research shows that those long hours may be jeopardizing your health.

A study from Health.com and reported by CNN found that "people who work more than 10 hours a day are about 60 percent more likely to develop heart disease or have a heart attack than people who clock just seven hours a day."

According to Marianna Virtanen, M.D., doctors "should include working long hours in their list of potential risk factors" for heart disease. And Peter Kaufmann, Ph.D., says that people who are driven and impatient at work "may be equally driven and impatient with . . . family and friends.

As Tony Schwartz, author and founder of The Energy Project notes in an article he wrote for the Harvard Business Review online: Just as you'll eventually go broke if you make constant withdrawals from your bank account without offsetting deposits, you will also ultimately burn yourself out if you spend too much energy too continuously at work without sufficient renewal. . . . When you're running as fast as you can, what you sacrifice is attention to detail, and time to step back, reflect on the big picture, and truly think strategically and long-term.

Chunk it Down

In order to gain the laser-like focus needed to be both effective and productive, start thinking of your time in chunks. Create a big chunk (60-90 minutes maximum) in the morning and, if you can, a big chunk in the afternoon. Use these big chunks – or Power Hours – to focus on your most important work for the day. Most of us are at our best at some point in the morning – even if it's not first thing in the morning. Take time to notice when you're at your best, and capitalize on your "best time of the day" to do your best work.

Put your Power Hours in your calendar, and make it a habit to stick to them. At the end of a Power Hour, take a break. In addition to scheduling Power Hours, use smaller chunks of time to process emails, return phone calls, and work on other tasks. You will be amazed by how much you can accomplish in only ten or 15 minutes of highly focused, uninterrupted chunks of time. Alternating between periods of highly-focused work and breaks will tremendously increase your productivity.

Limit Needless Interruptions

How often do you come to the office in the morning, work like crazy, and then as you're getting ready to leave for the day, think to yourself, "What did I do today?". If you have more days like this than you'd like to acknowledge, chances are you're dealing with too many needless interruptions. According to research in Winifred Gallagher's book, Rapt: Attention and the Focused Life, it can take the brain up to 20 minutes to recover from an interruption. So, if you're dealing with only six unnecessary interruptions during your day, you're losing up to two hours. Two hours – gone. Two hours you could be billing. Do that math over the course of a year! Two hours you could be spending with your loved ones or golfing or biking or on your boat. You get the idea. But there is something you can do about it. Learn to limit

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Message from the Chair

by Kevin Johnson

As Chair of the General Practice, Solo, and Small-Firm Section for the 2013-2014 year, I have one simple goal: to make this section work for you.

Almost two –thirds of Florida Bar members practice in firms of five lawyers or less. If you are part of that two-thirds, you may have more in common with other solo and small-firm practitioners than you realize.

Many of you feel that you have little time to pay attention to anything other than your clients and your practice. You wear many hats, and probably feel that many of them interfere with your ability to actually practice law. You may have a vague sense that there are better ways to do things, but not enough time to find them and sort through them. You probably wonder about the technology you use, and wish you had more guidance on what you should be using, what you should be paying for it, and how long it should last. You are confident in your abilities, but wonder how you can get the word out to potential clients.

If this description fits you, then GPSSF is your natural home within The Florida Bar. Rather than focusing on a single substantive area of practice, our mission is to serve solos and small firms in all areas of practice.

During the 2013-2014 year, we will be working on improving our ability to communicate with our members and to offer them information and resources to assist them in growing their practices. Expect to see more regular communication, more networking opportunities, and more information on practice management and technology.

Here are some of the events you can look forward to during the upcoming year:

Solo and Small Firm Conference 2014

This is our flagship event. It is designed to teach you how to select and use technology to help your practice, as well as providing old-fashioned nuts-and-bolts advice about the basics of practice management and the latest updates on the Affordable Care Act. SSFC 2014 is also intended to provide you with the opportunity to spend a day and a half networking with other solo and small-firm practitioners.

Out-Of-State Trip 2014: San Francisco and Napa

Rather than going out of the country this year, we are going to the West Coast to visit picturesque San Francisco. We will begin with a CLE session focused on representing small businesses. Once we take care of business, you will be free to let your hair down and explore the city. We are organizing a day trip to the wine country in Napa, and we will also plan on getting together with California practitioners for networking.

Other CLE Opportunities

Look for us to put on three other CLE seminars during this year: our annual **Ethics Seminar**, our **Agricultural Law Update**, and the **Florida Law Update** at the Annual Meeting.

Publications

We will continue to publish our quarterly newsletter, **The Link**, with useful information for small-firm practitioners.

LinkedIn

If you haven't joined our LinkedIn group, please be sure to do so. We have more members using it to post on topics of interest, and we will be using it to push out more information to our group. If you have articles, case analyses, or newsworthy information to share with our members, please feel free to post them.

I welcome your suggestions on how we can better serve your needs. Feel free to post suggestions on our LinkedIn page, or you can email me directly at kjohnson@tsghlaw.com.

We are looking forward to a great year – and we want you be a part of it!

Kevin Johnson
2013-2014 GPSSF Chair

The Florida Law Practice LINK is prepared and published by The Florida Bar General Practice, Solo & Small Firm Section.

Ask the Risk Manager

by Nancy Stuparich, FLMIC's Risk Manager

"My client just sent me a letter saying I was a bad attorney. What should I do?" It is important to remember and know that professional liability insurance is written on a "claims made and reported" basis and in order to trigger coverage, a "claim" or "incident" must be reported to your professional liability insurance company, in writing, as soon as the insured becomes aware of either during the policy period. "Claims" and "incidents" are specifically defined in the terms and conditions of a policy and the failure to timely follow a policy's notification procedures can be the basis for an insurance company to deny coverage.

Failure to preserve electronic information in anticipation of litigation in both state and federal courts can result in sanctions for spoliation including adverse inferences, fines, precluded use of a witness, payment of an opposing party's costs resulting from the e-discovery misconduct and an adverse jury instruction. It may be difficult for an insured attorney to explain to a judge why a "litigation hold" to preserve relevant electronic information was not implemented although the professional liability insurance company was notified of a possible claim. Many professional liability insurance policies contain an exclusion of coverage with respect to any claim seeking indemnification for fines, sanctions or penalties imposed by a court of law. Therefore, now more than ever it is important for attorneys to follow their own advice as it relates to the preservation of electronic information and the importance of implementation of effective litigation holds in anticipation of future legal malpractice litigation.

Effective preservation requires knowing when the duty to preserve arises and how to document effective management of electronic information to prove that electronic information was not negligently or intentionally lost. A federal district court in New York recently held that an attorney's receipt of a termination letter from a client was sufficient notice to the attorney to implement preservation efforts since litigation was "reasonably foreseeable." In Michael Distefano and Nicole Distefano, v. Law Offices of Barbara H. Katsos, PC and Barbara H. Katsos CV 11-2893 U.S. Dist. NY March 29, 2013, the Distefanos sued their attorney for malpractice. Before the legal malpractice suit was filed, the attorney upgraded and replaced the computers in her office. Consequently, the attorney was unable to respond to a request to recover emails from the discarded computers. The district court found the Distefanos' use of specific words in a termination letter and the fact that they wanted to terminate representation on a number of matters "immediately" was indicative that litigation was forthcoming and preservation of electronic information was needed. Other facts influencing the court's decision was the attorney's document preservation practices and the attorney's knowledge of the duty to preserve electronic information in view of foreseeable litigation, which imputed to the attorney by virtue of the work as an attorney. The case is another example of the importance of attorneys following the advice they give to clients in their own practices.

Thus, it is a good risk management practice to develop and implement a user friendly document preservation, retention, deletion and destruction system. The system should include at a minimum 1) inventory and maintenance records for computers and other electronic equipment storing electronic data; 2) copies of service agreements with vendors and computer technicians; 3) policies specific to email management and billing records; 4) staff training and supervision regarding electronic data management; and 5) storage of a list of all email addresses used by the entity; effective dates of the various policies and scheduled updates. More information on electronic document management can be obtained from The Florida Bar Law Office Management Assistance Service.

Florida Lawyers Mutual Insurance Company ("FLMIC") was created by The Florida Bar in the late 1980s as a benefit to its members to provide a perpetual source of professional liability insurance for Florida attorneys. FLMIC is now a mutual company owned by its policyholders, who are all Florida attorneys. This article is intended to provide general information to assist lawyers and their staff to develop and enhance risk management procedures. For advice on specific legal questions, consult experienced legal counsel. For advice on ethical conduct consult The Florida Bar. Implementation of the suggestions in this article are not warranted, expressed or implied to prevent claims nor to establish a standard of care as the conduct recommended may be above the legal standard of due care. While all materials presented are carefully researched, no warranty, express or implied is offered to the accuracy of this information. Reproduction in any manner of the material herein requires written permission.

While We Know Florida's Offer of Judgment Statute May Apply in Federal Court, Does Florida's Offer of Judgment Procedural Rule Apply?

by Camille J. Iurillo and Gina M. Pellegrino

The question that this article generally addresses is whether Florida's offer of judgment rule, Fla. R. Civ. P. 1.442, may apply in federal court, and therefore, must a federal court consider any arguments based on Rule 1.442?

Fla. Stat. § 768.79 provides, in pertinent part, that "[i]n any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff…the defendant shall be entitled to recover reasonable costs and attorney's fees…if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer." Fla. Stat. § 768.79(1). Florida has also adopted a rule of civil procedure, Rule 1.442, which establishes additional requirements as to the form and content of an offer of judgment that are not set forth in section 768.79 of the Florida Statutes.

Federal courts in diversity cases must apply the law of the forum state to any substantive issues and must apply federal law to any procedural issues. *See*, Tiara Condominium Ass'n, Inc. v. Marsh USA, Inc., 697 F.Supp.2d 1349, 1357 (S.D. Fla. 2010). Section 768.79 of the Florida Statutes is substantive in nature and therefore applicable in federal court. *See*, McMahan v. Toto, 311 F.3d 1077, 1081 (11th Cir. 2002).

Several cases have discussed whether Rule 1.442 is procedural or substantive in nature because if Rule 1.442 is deemed procedural then it likely does not apply in federal court and if it is deemed substantive then it arguably applies in federal court. The Fourth District Court of Appeal has stated that section 768.79 of the Florida Statutes provides "the substantive law concerning proposals for settlement while Rule 1.442…provides its procedural mechanism." Saenz v. Campos, 967 So.2d 1114, 1116 (Fla. 4th DCA 2007).

However, other courts have held that Rule 1.442 is not purely procedural and does have at least some substantive aspects which are applicable in federal court. The Supreme Court of Florida has noted that both section 768.79 and Rule 1.442 contain substantive and procedural portions. *See*, Campbell v. Goldman, 959 So.2d 223, 227 (Fla. 2007).

In addition, in McMahan, the Eleventh Circuit construed Rule 1.442 as substantive in nature by applying it to a claim in federal court where Florida law was applicable. In McMahan, the Court applied Rule 1.442 in determining whether an offer of judgment that included a claim for punitive damages was stated with sufficient particularity to comply with Rule 1.442, and in doing so, the Court acknowledged the substantive nature of the Rule. *See*, McMahan, 311 F.3d at 1081-3.

Rule 1.442 has also been applied by the Bankruptcy Court in the Middle District of Florida. In determining whether attorneys' fees would be awarded on a judgment for non-dischargeability against a debtor, the Bankruptcy Court looked to the offer of judgment proposed by the creditor in state court under Rule 1.442. *See,* In re Auffant, 274 B.R. 554 (Bankr. M.D. Fla. 2002). The debtor argued that the offer of judgment was not stated with particularity and therefore was not enforceable. *See*, Fla. R. Civ. P. 1.442(c)(2)(C) and (D). The Bankruptcy Court applied Rule 1.442 and determined that the offer of judgment complied with the Rule. This is another example of where a federal court applied the terms of Rule 1.442, thereby acknowledging the substantive nature of the Rule. *See*, In re Auffant, 274 B.R. at 559-60.

This article is intended only as a starting point with respect to discussing the applicability of Florida's offer of judgment civil procedure rule in federal court and an exhaustive discussion of all case law is beyond the scope of this article.

Iurillo & Associates, P.A., *located in St. Petersburg, is comprised of* **Camille J. Iurillo**, *Shareholder,* **Gina M. Pellegrino**, *Associate, and* **Sabrina C. Beavens**, *Associate. The primary areas of practice of* **Iurillo & Associates, P.A.** *are Commercial and Bankruptcy Litigation, Debtors' and Creditors' Rights, and Foreclosures/Workouts.*

The Florida Bar's General Practice, Solo & Small Firm Section Is Reaching Out to Florida's Law Schools

by Jennifer Dietz, Esq.

The Florida Bar's General Practice, Solo & Small Firm Section's Sub-Committee on Law Students/New Lawyers' mission is to educate law students and new lawyers about the many benefits of the General Practice, Solo & Small Firm Section of The Florida Bar. The GPSSF Section welcomes new lawyers and law students from the 12 law schools in the state of Florida to join the Section. Student membership in the GPSSF Section is **free** for law students.

Currently, solo and small firms represent the largest entry-level law-firm market in Florida. Firms of 10 or less attorneys comprise 73% of The Florida Bar's membership. Therefore, the GPSSF Section undertakes to educate law students about solo and small firm practices through lunch-time educational presentations stressing the following ideas:

- What are some of the advantages of going solo or joining a small practice?
  - More immediate client contact and case management
  - Hands-on experience in the courtroom
  - More autonomy and responsibility
  - Greater variability in the types of legal work
  - Work environment differences
  - Ability to see how your work helps others
- When do solo and small firms recruit?
  - Whenever need arises - there is no set hiring cycle
  - Small firms typically do not have a formal summer-associate program.
- How do solo and small firms advertise their openings?
  - 80% of the openings ae advertised by word-of-mouth
  - Cannot rely solely upon career services postings as most small firms do not participate in on-campus interviews or list openings with career offices at law schools.
- How do you find a job in small firm practice?
  - Networking - Attend GPSSF Section's seminars such as the Solo and Small Firm Conference 2014 in Orlando and receptions promoted by the Executive Council of the GPSSF Section around the state
  - Volunteer to participate in service projects in local bar organizations or law offices
  - Do a targeted mailing -The National Association of Legal Professionals survey indicates that over 22% of law students gained their post-graduation position by conducting a targeted mailing.

Thinking About Going Solo? Some law students begin their careers by opening a solo practice. This can be both challenging and rewarding. If you are considering this option, the GPSSF Section can help provide you with the resources and networking opportunities you will need to establish a successful solo practice.

How can the Florida Bar GPSSF Section help you if you are interested in solo or small firm practice? Student membership in the GPSSF Section includes:

- A host of resources for those interested in learning about solo and small firm law practice.
- Access to the section's on-line membership directory, which allows you to search the list of Section Members by location, area of practice, or law school.
- Access to all GPSSF publications.
- Live or recorded Continuing Legal Education programs that address many useful topics ranging from substantive legal knowledge to practice management help.
- Access to seasoned lawyers who can serve as mentors.
- And a reduced cost to attend the ever-popular Solo and Small Firm Conference in January 2014 in Orlando.

During the fall, members of the GPSSF Section will present at all 12 Florida law schools. The focus of the GPSSF Section's presentation involves the advantages of working as a solo or small firm practitioner in Florida. The presentation describes how to start a solo firm and how to fit into the small firm atmosphere. In addition to the presentation, the GPSSF Section serves lunch to those students in attendance at the GPSSF Section's presentation. These presentations are geared to those law students who are interested in small or solo practice. Each presenter is in a solo or small firm practice and has a great deal of knowledge regarding solo and small firms.

We encourage all law students to attend the presentations at their respective law schools. The presentations run just under 40 minutes and there is plenty of time to answers students' questions and to eat lunch.

The Law Student/Newer Lawyers Sub-Committee also encourages both law students and new lawyers to attend the Solo and Small Firm Conference 2014 which will be held in Orlando on January 24 and 25, 2014. This conference will be held at the beautiful Hilton Walt Disney World, Lake Buena Vista, Florida. The cost for law students is only $60 which pays for the 1 ½ days of fantastic programming, two breakfasts, lunch, and a reception with entertainment and prizes. Each law student will be assigned a conference mentor attorney. The law students will interact with solo and small firm attorneys regarding different practice areas and geographic opportunities. An Exhibit Hall will have vendors offering products and services to law students and new attorneys. For additional information please visit www.flabar.org and click on CLE.

2013 Annual Convention

First Place Winner, Dade Legal Aide-Put Something Back. Linda Calvert Hanson, GPSSF Section Chair, Jerry Curington, Pro Bono Committee Chair and Karen Josefsberg Ladis, Dade Legal Aid

Jerry Curington, Maria Green, Three Rivers Legal Services and Linda Calvert Hanson

Maria Green and Karen Josefsberg Ladis

GPSSF Section Executive Council, 2013 Annual Convention

Best Practices to Protect Client Confidentiality with Professionalism When Working with Electronic Documents

by Amber M. Scott*

Maintaining client confidentiality with professionalism while working with electronic documents is a topic of concern in today's legal environment. Many lawyers and legal professionals may be unaware that their daily actions of transmitting and storing client information might be in jeopardy if the proper steps are not taken. This paper will discuss the sources of the attorney's duty of confidentiality in Part I; the emerging trends with electronic communication and how it affects client confidentiality in Part II; a general overview on metadata in Part III, and how to prevent or remove metadata in Part IV.

A Lawyer's Responsibility of Professionalism in Client Confidentiality

Client confidentiality is more complex than just keeping secrets. It is made up of three individual doctrines. Attorney-client privilege, lawyer work-product immunity, and a lawyer's ethical duty to maintain client confidences[1] are the three elements that make up the law of confidentiality.

The attorney-client privilege is typically implemented during court proceedings when an attorney may be called to produce evidence regarding a client. Dating back to sixteenth century England, it is the oldest of privileges for confidential communications[2]. The attorney-client privilege is the only communications privilege recognized in every state.[3]

Each state has its own set of privilege rules but they tend to follow the common law doctrine. Federal courts are governed by Rule 501 of the Federal Rules of Evidence, which reads:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The purpose of the attorney-client privilege is to protect against the disclosure of confidential communications between a client and his counsel.

The second element of the law of confidentiality is lawyer work-product immunity. Work-product immunity is meant to include everything that an attorney gathers when preparing a case for a client, not just the aforementioned communications between client and counsel. This includes discovery, any theories concluded by the attorney, opinions, conclusions and any additional material an attorney might prepare for litigation.

The third element of the law of confidentiality is a lawyer's ethical duty to maintain client confidentiality. With the exception of California, the states in the United States base their legal ethics rules on The Model Rules of Professional Conduct (herein after referred to as the "Model Rules"). The Model Rules help underline how to ethically handle information obtained in confidence by a client, within certain exceptions. Under the Model Rule 1.6(b), lawyers are permitted to:

> reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services'
>
> (4) to secure legal advice about the lawyer's compliance with these Rules'
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (6) to comply with other law or a court order.

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Given all of the exceptions above, it is important for a practicing attorney to be mindful of what is protected under the law of confidentiality, and to know when it is appropriate to divulge information that is no longer protected under confidentiality.

Client Confidentiality and the Emergence of Electronic Communication

In modern society, electronic communication has become commonplace and thus creating the concern regarding the protection of client information, correspondences, and discovery. It is up to lawyers to educate themselves on the threats regarding electronic data and to learn the best practices for how to protect and share client information.

Concerns over keeping client information confidential and protected is nothing new. Prior to having access to email and the internet, lawyers often spoke with their clients on the telephone. Tapping into a telephone line was not a difficult concept to anyone who was determined to do it and there were originally no laws to prevent it from happening. In 1968, The Federal Wiretap Act was enacted and, under 18 U.S.C § 2517(4), stated that "[n]o otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." This statute gave rise to the expectation of privacy from unauthorized interceptions made to telephone lines and wiretapping.

With the rapid emergence of the internet, communication between the public in general changed forever. The Electronic Communications Privacy Act was added as an amendment to the Federal Wiretap Act to provide definitions of various electronic communications and to include the protection of email from unauthorized interception. But despite the statutory legislation regarding the legality of intentional interception, many attorneys have chosen to take the extra step of using email with encryption, which is the conversion of data into a form, called ciphertext, that cannot be easily understood by unauthorized interceptors.

There is much debate surrounding the requirement (or lack thereof) for attorneys to use email with encryption, or whether it is even appropriate for lawyers to discuss sensitive information via email. In an ethics opinion of the Committee on Professional Ethics of the Delaware State Bar Association, it was determined that a lawyer is permitted to utilize email with the intention of communicating in confidence. However, the attorney shall be mindful of whether or not the possibility of intentional interception is greater than usual. The committee suggests that the lawyer must determine if there is a significant risk of inadvertent disclosure and if it does not seem likely, then client communication can generally be made without violation.

Metadata

Metadata is an area of concern in which most lawyers and their staff should be aware. Metadata is the stored information regarding the transmission of data or any other information that may be directly linked with or embedded into a document. When a law student prints an article from Westlaw and the printer includes the time and date printed at the bottom of the document, that information qualifies as metadata and falls under the category of "software generated" metadata. Software generated metadata is data that is generated and stored in a document by the software used to create it.

A major purpose for metadata is primarily to help the author of the file access the data readily and to help keep track of where a file originated, when it was created, and when it was modified. The creator of the file can see when changes are made, therefore making metadata a useful option for organizingiv. Metadata can also keep track of how many minutes of editing have taken place within a document, making it a handy tool for client billing purposes.

However, there are often times when metadata cannot be readily seen but can still be retrieved quite easily by an unprivileged party who knows how to do it. In 2008, *The Florida Bar Journal*,[5] reported the story of an attorney who experienced firsthand how easy it can be to expose confidential information through files embedded with metadata while he was negotiating a contract with opposing counsel. This attorney was using Microsoft Word and utilized the "track changes" features in order to allow other members of the legal team to see the specific changes as they were made. Then he would email the revised contract back and forth with the opposing counsel unaware that the document contained hidden metadata with each passing transaction. After receiving one version of the draft, the opposing counsel was able to click around within the document and access hidden internal comments regarding terms of the contract, negotiating positions, and bottom-lines. This clearly gave the opposing party the upper hand and cost the client his bargaining power.

"Track changes" can be one of the most troublesome features regarding metadata and client confidentiality. Problems often arise when the creator of the document is unaware that the "track changes" feature is on. Word does not always display the changes made to the document directly on the screen, which can make it easy for an attorney to overlook. If Word does not display the changes directly on the pages of the document, then one would simply have to follow a specific set of instructions to view the information regarding the changes. If an attorney who is not aware that the "track changes" function sends a document to an opposing party who is electronically savvy, as mentioned in the example above, then the opposing party can check to see if any changes have been recorded. If changes are present, then information is compromised.

The "track changes" feature falls under the category of "embedded metadata." It accompanies every Word document unless it is "scrubbed." Mircosoft Office products do not make it easy to remove metadata and may require a "document inspector" to assist in finding and removing different kinds of hidden data from its files. Users need to be aware, however, that because there are so many different types of metadata, a document inspector may not be successful in removing all of the metadata.

There is strong controversy surrounding whether lawyers can use technology to scan and review any metadata that is embedded in electronic documents. There are several

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rules regarding the handling of metadata in The Model Rules, including Rule 1.1, 1.6, 4.4, and 8.4[6]. Generally, The Model Rules do not prohibit lawyers from reviewing metadata, with the exception of Rule 4.4(b), which states "[a] lawyer who received a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." It is the ethical obligation of the attorney who received the document in error to speak honestly about the information that he or she has received. This rule was put into place in order to provide the inadvertent sender the option to take protective measures. Since no other rules prohibited lawyers to look for hidden embedded data, the American Bar Association determined that the majority of metadata was essentially harmless to a case and that attorney's were free to search for it in documents. The lawyer who is sending the document also has the duty to take certain steps to make sure that any information that could be considered privileged or confidential should be omitted from the metadata before the document is passed around to additional parties.

Certain state bar associations have not completely followed the position of the American Bar Association but, instead, have concocted their own viewpoints regarding metadata. The New York State Bar Association and the Florida Bar Association have both concluded that it is unethical for lawyers to obtain information from metadata. The New York State Bar Association has a Committee on Professional Ethics and, upon consulting the New York's Disciplinary Rules, determined that "in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work-product doctrine of that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of [the] Disciplinary Rules.[7]" The Florida Bar Association agreed with New York and expanded what responsibilities lawyers have when transmitting electronic documents.[8]

The first obligation is for the sending attorney to take the necessary steps to reasonably protect the confidentiality of all communications sent through electronic means to other attorneys and to prevent any third party from obtaining privileged information through metadata. This contradicts the viewpoint of the ABA by concluding that metadata, whether it is often harmful or not, still has the potential to reveal information that a client otherwise expects to be kept confidential.

The second obligation put forth by the Florida Bar involved the responsibility of the attorney who receives the communication. Florida Bar says that it is "the recipient lawyer's obligation not to try to obtain from metadata any information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information in which the sending lawyer did not intend to transmit.[9]"

The third obligation for lawyers who send or receive metadata unintentionally, as established by the Florida Bar, is the same criteria of that in Model Rule 4.4(b), which states that if an attorney receives a information via metadata that he or she knows was not sent intentionally, it is the responsibility of the receiving attorney to notify the sender. This is the only element in which The Florida Bar Association and The New York State Bar Association can agree on with the ABA.

Many other jurisdictions have opted to side with either the ABA or with the methods established by Florida and New York. Some states have compromised both theories and asked that attorneys who receive documents with questionable metadata to use their best judgment on how to handle the information that was likely sent unintentionally.

Metadata: How to Avoid Creating It and Common Practices for Removing It

It is certainly in everyone's best interest if the metadata is not created in the first place. While some metadata is easier to prevent than others, many popular office software companies have recognized the importance of removing any basic metadata and have a set of simple instructions that allow for "scrubbing" a document. Microsoft Word, which is likely the most widely used word processing software in the legal industry, has an option for its users to remove metadata under the "Tools" menu. Under "Tools," the user can select "Options" and click on the "Security" tab. A dialog box will appear and this allows the user to encrypt a file for higher level of privacy during transmission. There is an option box to "remove personal information from the file properties on save" and this prevents any information that may reveal the user's location or network from embedding into a document[10].

Word allows users to save multiple versions of the same document and many users are often unaware that the old version can attach itself to a new version automatically. Previous versions of a document may contain information that has later been decided to be privileged and was purposely omitted from a document so that the receiving attorney does not see it. To inquire about whether an older version of a file has attached itself to the new version, the user can go to the "File" menu and click on the "Versions" option. Word will list any attached version by date, time, and the creator of the saved version. To delete the old versions, the user can highlight the document(s) he or she wishes to remove and hit the delete button.

An easy, and often practiced, method of reducing the amount of metadata generated is for attorneys to create documents in a .pdf format, rather than as a straight Word document. Because .pdf files cannot easily be changed, this reduces the amount of metadata that builds up. It should be noted, however, that this is not a fail-safe option and that .pdf files are still subjected some metadata.

As an extra precaution, many large software makers have worked to provide additional security to prevent the unintentional transmission of metadata. Microsoft has created an option, which is downloadable from their website, that can help remove information that is generally regarded as sensitive. This feature is user-friendly and is accessible in the "File" menu once it has been downloaded.

There are several commercial products on the market that were created

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to help "scrub" metadata by scanning files before they are transmitted and removing the offending information. These products offer a wide range of options and lawyers can research and select the program that best suits his or her needs.

Conclusion

Technology is always changing. A diligent attorney must be aware of the emerging trends with software and take reasonable care to stay currently informed on all of the risks and dangers that may accompany the transmission of documents to other attorneys or to third party individuals. Confidentiality is not only recognized by law, but is also expected by the client. The utilization and exchange of information through electronic means is ubiquitous in today's legal profession. Lawyers have a duty to protect against the disclosure of any electronically communicated information that may be deemed confidential.

Endnotes:

[1] *See* Louise L. Hill. *Emerging Technology and Client Confidentiality: How Changing Technology Brings Ethical Dilemmas*, 16 B.U. J. Sci. & Tech. L. 1, 3 (2010) (discussing the three doctrines of client confidentiality).

[2] *See* id. at 4.

[3] *See* Daiske Yoshida, *The Applicability of the Attorney Privilege to Communications with Foreign Legal Professionals*, 66 Fordham L. Rev. 209, 212 (1997).

[4] *See* David Hricik and Chase Edward Scott. *The Ghosts Haunting e-Documents*, 82 Fla. B.J. 33 (2008) (discussing the purpose of metadata).

[5] *Id* at 33-34. (discussing how metadata is traceable in a Word document).

[6] *See* Bradley H. Leiber, *Current Development 2007-2008: Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar's Approach to Metadata*, 21 Geo. J. Legal Ethics 893, 897 (2008) (discussing the Model Rules pertaining to metadata).

[7] N.Y. Code of Professional Responsibility DR 1-102(A)(4) (2007).

[8] *See* Leiber, supra, at 901.

[9] Florida Bar of Professional Ethics Committee., Op. 06-02 (2006), http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument.

[10] *See* Hricik, *supra*, at 36.

**Amber Scott* *is currently a 2L student at the University of Dayton School of Law. She began studying law in 2012 at Barry University School of Law, Orlando, before transferring to Ohio to be closer to her family. Currently focusing her studies on intellectual property law and contracts drafting, Amber intends to get an L.L.M in Entertainment and Media law after she completes the Juris Doctor requirements. Her objective is to practice entertainment law in Southern California.*

E-Filing: Electronic Transmission of Documents to the Court*

by Kevin D. Johnson

Excerpt from "Let Your Fingers Do the Walking to the Courthouse – An Introduction to E-Filing and E-Discovery" presented at the 2012 Solo and Small Firm Conference. An article on e-service appeared in the Winter 2013 issue of the Link.

While e-service and e-filing are related, they are slightly different concepts. E-service refers to the service of court documents on other parties by e-mail transmission. E-filing refers to the filing of pleadings and other documents with the court by e-mail transmission. Each is the subject of a separate amendment to the Rules of Judicial Administration. Below are 14 fundamental questions associated with e-filing.

1. Why did the Florida Supreme Court decide e-filing was necessary?

The Florida Supreme Court has stated that e-filing will improve the effectiveness, efficiency, and accessibility of the courts. The Court believes that investing in electronic filing and case-management systems will allow courts to have better access to records contained in their dockets, will reduce the cost of storing and managing large archives of paper records, and will enable the court system to provide the public with low-cost electronic access to court records.

2. When will e-filing go into effect?

E-filing became mandatory in the Florida Supreme Court and the District Courts of Appeal on October 1, 2012. However, clerks were not required to transmit the record on appeal electronically until January 1, 2013.

In the civil, probate, small claims, and family law divisions of the court, e-filing became mandatory as of April 1, 2013, except as otherwise provided by administrative order. This deadline also covers appeals to the circuit court in these types of cases.

For cases in the criminal, traffic, and juvenile divisions of the trial courts, e-filing will become mandatory on October 1, 2013, except as otherwise provided by administrative order. Again, this deadline also covers appeals to the circuit court in these types of cases.

3. What rules govern e-filing?

E-filing is governed by Rules of Judicial Administration 2.520 and 2.525. Rule 2.520 provides that all documents filed in any court shall be filed by electronic transmission in accordance with Rule 2.525. In turn, Rule 2.525 sets the specific procedures for e-filing.

4. To whom do the e-filing rules apply?

Rules 2.520 and 2.525 are intended to

continued, next page

govern all aspects of electronic filing of documents. In that regard, they apply not only to attorneys; they also govern the administration of e-filing systems by clerks of court.

5. What is meant by "electronic transmission of documents"?

The phrase "electronic transmission of documents" is defined broadly to allow for filing of documents using any one of a broad range of electronic formats. This phrasing appears to be intended to "future-proof" the rule to the extent possible by giving clerks flexibility the flexibility to accept different types of electronic filings, including types that may not yet be in existence. Specifically, Rule 2.525 defines "electronic transmission of documents as follows:

> " 'Electronic transmission of documents' means the sending of information by electronic signals, to, by or from a court or clerk, which when received can be transformed and stored or transmitted on paper, microfilm, magnetic storage device, optical imaging system, CD-ROM, flash drive, other electronic data storage system, server, case maintenance system ("CM"), electronic court filing ("ECF") system, statewide or local electronic portal ("e-portal"), or other electronic record keeping system authorized by the Supreme Court in a format sufficient to communicate the information on the original document in a readable format. Electronic transmission of documents includes electronic mail ("e-mail") and any internet-based transmission procedure, and may include procedures allowing for documents to be signed or verified by electronic means."

6. Are all courts required to use the same e-filing system?

No. The filing and retention of court records are under the control of the clerk of court in each of Florida's 67 counties. The rules assume that each court clerk will be responsible for selecting and instituting an e-filing system that is appropriate for the resources and geography of that county.

7. What requirements must a clerk meet before "going live" with an e-filing system?

Before "going live" with an e-filing system, the clerk must obtain approval from the Supreme Court of Florida, and the system adopted by the clerk must comply with the then-current e-filing standards, as promulgated by the Florida Supreme Court in In re Standards for Electronic Access to the Court, Administrative Order No. AOSC09-30, or any subsequent administrative orders adopted by the Court that address e-filing.

8. How does this tie in with the statewide "e-portal"?

The statewide "e-portal" is a website that is intended to be used as a single access point to file, review, and transmit court records to and from Florida courts. Here is how the Supreme Court describes the e-portal in its e-filing opinion:

> "As conceived, all filers of court records, lawyers and nonlawyers, would use the e-portal for secure electronic access to the court, including electronic filing. The e-portal will be capable of accepting electronic filings from multiple sources, using common data elements passing to and from each local case system."

In essence, the e-portal should function like a post office for electronic filings, accepting filings by lawyers from all over the state and routing them to the correct county e-filing system. Thus, rather than having to locate the designated ECF site for each county, lawyers would have a single statewide site that they could use for all state-court filings.

The statewide e-portal is located at https://www.myflcourtaccess.com/.

9. Will the official court file be kept in paper form or in electronic form?

As set out in Rule 2.525(c), the official court record will now be kept in electronic form.

10. Are there any types of documents that do not have to be "e-filed"?

Rule 2.525(d) provides several exceptions to the e-filing requirement:

- When the clerk does not have the ability to accept and retain documents by electronic filing;
- When the filer of the document is a self-represented party or self-represented nonparty;
- When the filer is an attorney excused from e-mail service under Rule of Judicial Administration 2.516;
- When submitting evidentiary exhibits or filing nondocumentary materials;
- When the filing involves documents in excess of 25 megabytes in size;
- When the document is filed in open court;
- When paper filing is approved by any approved state or local electronic filing procedure; or
- When a court determines that justice so requires.

11. Can a court serve orders on the parties electronically?

Yes. Rule 2.525(e) authorizes a court or clerk to use electronic transmission to serve all orders.

12. When is a document deemed "filed" with a court?

According to Rule 2.525(f)(3), a document will be deemed "filed" on a date established by using one of two possible methods:

- On the date and time that such filing is acknowledged by an electronic stamp or otherwise, pursuant to any procedure set forth in any ECF Procedures approved by the supreme court, or
- On the date the last page thereof of such filing is received by the court or clerk of the court.

13. How will the courts handle filing fees and other required payments?

Rule 2.525(f)(2) specifies that "all attorneys, parties, or other persons using this rule to file documents are required to make arrangements with the court or clerk of the court for the payment of any charges authorized by general law or the Supreme Court before filing any document by electronic transmission."

14. Where can I go to learn more about e-filing?

More information on e-filing can be found on these web pages:

- http://www.flcourts.org/gen_public/technology/e-filinginfostatus.shtml and

continued, next page

- http://www.flcourts.org/gen_public/technology/statutesRules.shtml.

**The information contained in this article is intended as an informational overview on legal developments of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Moreover, this area of the law is still under substantial development. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.*

***Kevin D. Johnson** is a shareholder in the firm of Thompson, Sizemore, Gonzalez & Hearing, P.A., in Tampa, Florida. He has represented management exclusively in the area of labor & employment law for 18 years. Kevin is Board Certified in Labor & Employment Law by The Florida Bar and has been recognized in that field by the publication Best Lawyers in America. He currently serves on The Florida Bar's Civil Procedure Rules Committee, for which he is the immediate past chair. During his time on that committee, Kevin chaired the E-Discovery Subcommittee during the year that it completed the development of the e-discovery amendments to the Rules of Civil Procedure that were recently adopted by the Florida Supreme Court. Kevin also serves as the Chair of the Executive Council of The Florida Bar's General Practice, Solo, and Small Firm Section, and is the President-Elect of the Tampa Bay Chapter of the Federal Bar Association. Kevin was born in Gainesville, Florida, and is a graduate of the University of Florida's College of Law.*

Editor's Note: The audio of Mr. Johnson's entire presentation is available for purchase on The Florida Bar website http://www.floridabar.org.

Affiliate's Corner

News for Paralegals to Use...

by Priscilla Horn Warren, CP, (FRP)

As some of you know, the GPSSF Section elected to move the date of its Annual Conference this year to coordinate it with the January mid-year meeting of The Florida Bar in Orlando. The Annual Conference is now being held at the Hilton Walt Disney World Village on January 24-25, 2014. This conference-workshop-seminar is undoubtedly the most comprehensive, hands-on technology information workshop you will ever attend in Florida. The topics have been significantly improved each year, and the exceptional information and networking provided by your attending this GPSSF Annual Conference is strongly emphasized. Please see the registration information and speakers/topics offered by going to our website: www.gpssf.com. While you are exploring our website, please consider joining the GPSSF Section as an affiliate member; applications are also available on the website.

On another note, changes have been made to the NALA examination for the CLA/CP designation. Effective September 2013, the Substantive Law section of the test has been modified to reflect questions on the following subjects: American Legal System; Civil Litigation; Business Organizations; and Contracts. For more detailed information, please go to their website: www.nala.org, for updated information.

The Paralegal Association of Florida, Inc., will be coordinating new goals with its many chapters in Florida, including proposed modifications to its State and Chapter By-Laws to keep them uniform and consistent. Your input is important, as each chapter is dedicated to providing skills and quality services to its paralegals. Their website information is: www.pafinc.org.

There are several new online paralegal companies offering seminars and services, and I'm sure you have been inundated with many offers. However, please keep the GPSSF Section in mind as your go-to source for current information on technology in the law office. *So, one more reminder: please calendar the GPSSF Annual Conference on January 24-25, 2014, at the Hilton Walt Disney World Village in Orlando!*

If you have questions or if I can be of any assistance, please do not hesitate to contact me by email: pris2323@yahoo.com.

SAVE THE DATE

January 24-25, 2014
Hilton Walt Disney World Resort

- 2014 Solo Small Firm Conference -

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Day 1: Technology 2014: Conquering the Cloud
Day 2: Florida Practice Management 2014: Conquering the Practice

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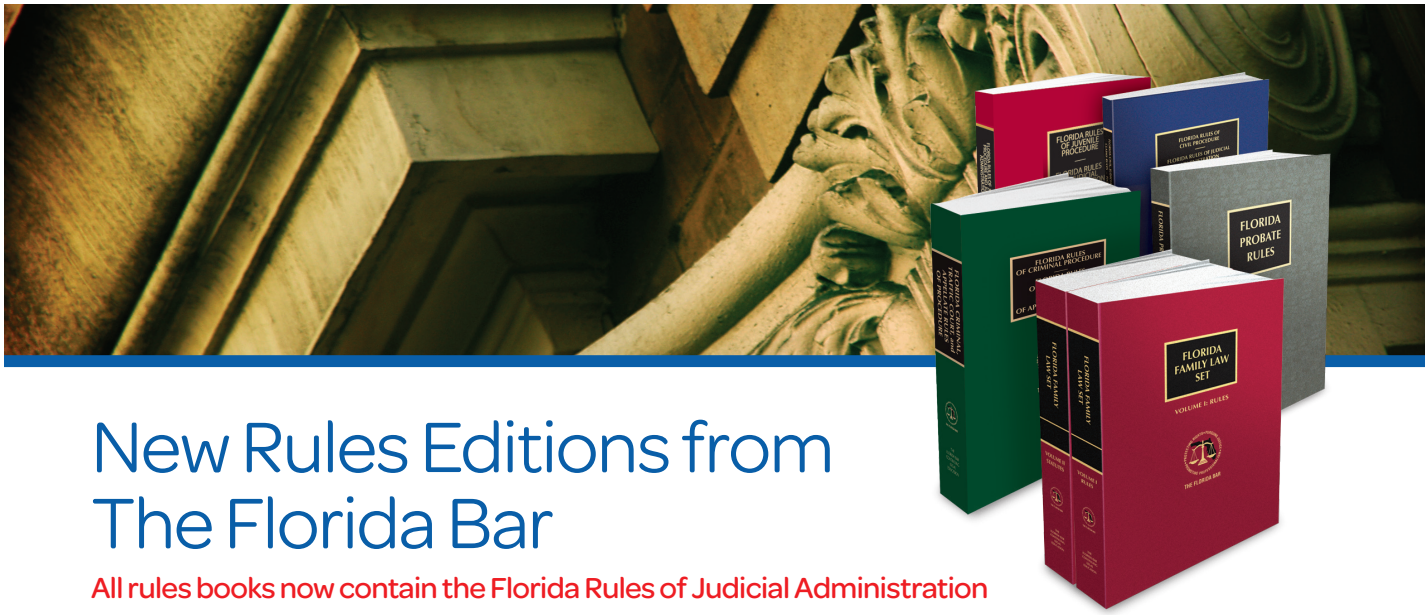

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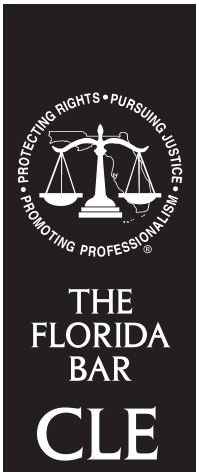

The Florida Bar Continuing Legal Education Committee and the General Practice, Solo & Small Firm present

Annual Ethics Update 2013

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Course No. 1623R

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Opening Remarks

8:40 a.m. – 9:30 a.m.
Ethical Practice in the Real World
Eugene Shuey, Esq., Gainesville

9:30 a.m. – 9:40 a.m.
Break

9:40 a.m. – 11:20 a.m.
Panel Discussion: Ethical and Malpractice Risks Created by Impaired Lawyers
Moderator: Nancy Stuparich, Oviedo
Panelists:
Twyla Sketchley, Esq., Tallahassee
Michael J. Cohen, Esq., Pompano Beach
Deborah Brown, Esq., Tampa

11:20 a.m. – 11:30 a.m.
Break

11:30 a.m. – 12:20 p.m.
The Florida Bar Disciplinary and Professionalism Rules
Sheila Tuma, Esq., Orlando

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TWO TIPS
from page 1

needless interruptions and limit the amount of multitasking you do. Research conducted by the University of London, found that workers who are distracted by email and phone calls (READ: multitaskers) can suffer a 10-point drop in IQ. That is more than twice the impact of smoking marijuana, according to researchers. Multitasking, or as Dave Crenshaw, author of The Myth of Multitasking, refers to it – "switchtasking" – only serves to shorten our attention spans and make us more susceptible to interruptions – both internal and external.

Interruptions and multitasking create a sort of self-induced ADD. Our brains cannot multi-task. They can only focus on one thing at a time. And as we age, our ability to switch quickly from one task to another diminishes. Maybe you've experienced this first-hand by hitting accidentally hitting "Reply to all" in an email while talking on the phone processing emails at the same time.

- Turn off email alarms and notices.
- Shut your door.
- Create Power Hours for yourself.
- Use earplugs or listen to music with headphones to drown out distractions.

You can do this. It's not easy to replace bad habits with good ones. There will be times when your day will blow up and you'll feel discouraged. But know that if you stick with it, you'll create new habits that will propel you toward your goals. These keys work together and build upon each other to help you take control of your practice and your life. Begin now to turn these keys into habits that will work for you. And don't get discouraged! Know that if you stay focused, you can change your old way of work, increase your productivity, decrease your stress, and reclaim your life.

A licensed attorney since 1992, Nora Riva Bergman is a law firm business coach and the founder of Real Life Practice. She's also a Certified Practice Advisor with Atticus. For more information, go to http://reallifepractice.com/

Small Firms Can Reap Volunteer Awards Too!

Jack W. Merritt received the first award for volunteerism from the Suncoast Center for Independent Living (SCIL) (www.scil4u.org). As explained on its website, it is a "non profit organization providing services to people with disabilities within Sarasota and Manatee Counties." Mr. Merritt provided pro bono legal services to this organization in 2012 and 2013. It is the first time the SCIL has made the award in its 23 year history. Future awards will be named the "Jack W. Merritt, Esq. Award for Volunteerism." This shows that even small firms can make a difference to local non-profit organizations that need help, but cannot afford to pay any firm, large or small, fees for legal services. The GPSSF congratulates Mr. Merritt for his continued efforts.

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The trip will also include an excursion to the Napa wine country, networking opportunities with Florida and California bar association members, and free time to explore the city.
(Be sure to wear some flowers in your hair.)

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