

Zero Tolerance for e-Filing Error: Avoid Committing Malpractice, with a Few Clicks of Your Mouse

By Beverly Michaelis

Online case management and electronic case filing systems (CM/ECF) offer great convenience for lawyers and legal staff — extended hours, online document filing, easy access to court calendars and more. But with technological advancement comes peril.

In recent years, courts have punished lawyers mercilessly for CM/ECF-related mistakes.

What Can Go Wrong

In 2007, an attorney who failed to appear in Colorado was required to pay the opposing party's attorney fees when his firm's spam filter inadvertently blocked the court's e-notice of a settlement conference. *Pace v. United Serv. Auto. Ass'n*, 2007 U.S. Dist. Lexis 49425 (D. Colo. July 9, 2007). When the firm's I.T. administrator adjusted the spam filter to block messages with offensive content, he failed to white-list the court's e-mail domain. He never checked the spam filter to see whether e-mail messages from the court were being blocked.

Two years later, the U.S. Court of Appeals for the 8th Circuit was equally unsympathetic when the losing party failed to timely file a notice of appeal because an employee at the law firm accidentally deleted an e-notice informing the parties that a final order had been issued. *American Boat Co. v. Unknown Sunken Barge*, 567 F.3d 348 (8th Cir. 2009).

In *Kinsley v. Lakeview Reg'l Med.Ctr. LLC*, 570 F.3d 586 (5th Cir. 2009) the plaintiff uploaded the wrong document to the CM/ECF system but argued that a deficiency notice directing him to refile within five working days extended the time for electronically filing a notice of appeal. The 5th Circuit disagreed. See Also *In re Sulzer*, No. 1:01-CV-9000, MDL Docket No. 1401, 2006 U.S. Dist. Lexis 10712, 2006 WL 4910299 (N.D. Ohio March 14, 2006). (Counsel failed to enter his e-mail address into ECF system and did not receive notice of entry of an order. The court denied his motion for extension of time to appeal.)

In 2010, the U.S. Court of Appeals for the 4th Circuit upheld the dismissal of a wrongful termination case when the plaintiff's lawyer failed to respond to a motion for summary judgment served by e-mail. The lawyer told the court he never received electronic notice of the motion because of his various computer problems, including a malware virus. *Robinson v. Wix Filtration Corp* 599 F.3d 403 (4th Cir. 2010). The *Robinson* case was particularly egregious, as the lawyer knew the deadline for dispositive motions in the case was pending during the time his firm was experiencing a computer meltdown. He never checked the ECF system for docket activity and failed to inform the court of his inability to receive e-notices. To make matters worse, when Robinson became aware that the deadline had passed, he made a strategic decision not to contact opposing counsel or the court.

In 2011, a lawyer in Philadelphia lost the right to pursue a \$35,000 fee claim because he did not receive electronic notice of the scheduled arbitration. The lawyer relied on his wife, who was also his secretary, to retrieve and read e-mail. When she broke her arm and was out of the office for an extended period, the lawyer simply allowed e-mail to accumulate. He made no alternative arrangements to retrieve e-mail, failed to hire a temporary secretary during his wife's absence, and did not know how to use Philadelphia's ECF system to view upcoming docket activity. As with Robinson, the lawyer did not inform the court of his inability to access e-mail. *Knox v. Patterson*, PICS Case No. 11-0256 (C.P. Philadelphia, Jan. 11, 2011).

How Can Oregon Lawyers and Staff Avoid These Traps?

Understand CM/ECF Systems

Attend training, watch tutorials, download manuals, read answers to frequently-asked questions, learn tips and tricks, and bookmark help desk pages by following these links:

U.S. District Court of Oregon (www.uscourts.gov/en/e-filing/cm-ecf-and-pacer);
U.S. Bankruptcy Court, District of Oregon (www.uscourts.gov/Ecf/helpdesk.cfm);
Oregon eCourt FAQs (<http://courts.oregon.gov/OJD/OnlineServices/eFile/electronicFilingFAQs.page>); and
Oregon eCourt Web Training and Online Study: <https://oregon.tylerhost.net/>.

To schedule a presentation on Oregon eCourt for your organization or agency, call or e-mail:

Oregon Judicial Department
Office of Education, Training and Outreach
503-986-5911
oeto@ojd.state.or.us

Use Technical Support if Necessary

The following technical support resources are available in Oregon:

Oregon Judicial Department Help Desk – Monday through Friday 7:00 am to 6:00 pm
503-986-5582 or 1-800-922-7391
ETSDHelp@ojd.state.or.us

OJIN Online Subscriber/Business Support – Monday through Friday 8:00 am to 5:00 pm
1-800-858-9658
OJIN.Online@ojd.state.or.us

File & Service/eFiling User Support – Monday through Friday 7:00 am to 7:00 pm
Tyler Technologies
1-800-297-5377
Efiling.support@tylertech.com

Learn How to Retrieve Docket Activity

Learn how to retrieve docket activity and search court calendars online for matters involving a specific attorney. In the U.S. Bankruptcy Court or U.S. District Court of Oregon, access the CM/ECF system, click on “Reports” in the blue navigation tab at the top of the page, click on the link “Docket Activity,” check the box “Only Cases to Which I Am Linked,” enter the desired date range, and choose “Run Report.”

For instructions on searching Oregon court calendars refer to the PLF Practice aid, “Searching Oregon eCourt Calendars,” available on the PLF Web site, www.osbplf.org.

Manage Your E-mail Carefully

Keep your e-mail address current with the Oregon State Bar (OSB). The Oregon eCourt system generates notices to the filing attorney at the e-mail address on file with the OSB. If you are using eService through Oregon eCourt, you must manually update your contact information through the eService system.

In the federal CM/ECF system, you must log in to your account and update your information.

If you download e-mail into Outlook or a similar program, consider changing the default settings to prevent your trash from being automatically emptied each time you exit the program. Keeping your inbox lean and mean is

usually a good idea, but what happens if you accidentally delete a court notice? If the trash is emptied automatically when you exit, it may be difficult, if not impossible, to recover the message. (Desktop search engines can find e-mail that is deleted and sitting in trash, but once the trash is emptied, the messages are no longer visible to the system.) Instead, consider taking manual control of emptying your deleted items so you can review them one last time.

If you accidentally delete a court notice and empty your e-mail program's trash, you can attempt to undelete the file and restore its path using Recuva, a free file recovery program from Piriform www.piriform.com/recuva). Otherwise, log in to the court's eFiling system and run a docket activity report or check the court calendar online.

Know the capacity of your mailbox on the mail server and the consequences if your mailbox becomes full. In some cases, your Internet Service Provider (ISP) will block receipt of incoming messages and send a "bounce back" message if your mailbox is full. In other cases, the ISP may delete or archive older messages to make room for new messages. In either instance, you could miss an important court date.

Approach e-Filing Thoughtfully

Give documents meaningful file names so they are easily identified and distinguished. Carefully review all information entered into the ECF system, as well as the document selected for uploading. When filing is complete, check the confirmation.

Besides selecting the wrong document for uploading, other common e-filing mistakes include the following: entering incorrect party or event codes; failure to include a certificate of service; failure to associate the attorney with the filing party; failure to identify exhibits; inclusion of sensitive or confidential information; failure to segregate documents; and improper signatures. (Thankfully, at least one court has accepted a late notice of appeal in which the initial e-filing had an incorrect event code: *Vince v. Rock County*, 604 F.3d 391 (7th Cir. 2010).

Be aware of applicable ECF file size limitations. Jurisdictions vary, sometimes significantly. If you attempt to upload a document that is too large, your filing will be rejected and you may miss a deadline. See *Satterlee v. Allen Press Inc.*, 455 F. Supp. 2d 1236, 1244 (D. Kan. 2006) ("While plaintiff's counsel now contends that the documents were not filed because their large size exceeded the maximum amount allowed by the electronic filing system and that this was the fault of his legal assistant, plaintiff's counsel bears responsibility for this oversight...") Adobe Acrobat can help you properly split and label large files for uploading to ECF systems. The Oregon system can accommodate files sizes up to 25MB.

Keep your credit card information current with the court. Required fees must be paid when documents are electronically filed. If your card has expired and the fees are not paid, your filing will be rejected even if the document was uploaded prior to the deadline. See *Kellum v. Comm'r of Social Security*, 2008 FED App. 0591N, 2008 U.S. App. Lexis 21138 (6th Cir. 2008).

It is never a good idea to file at the last minute. E-filing is a somewhat tedious process: you must log in, enter the appropriate field codes, pay applicable fees, select and possibly split your documents for filing, and so on. If you lose your Internet connection, your computer crashes or you encounter other technical difficulties, there is no time for recovery. Upload documents during regular business hours when help desk staff are available and you have sufficient time to remedy any technical glitches.

Remember the adage "two heads are better than one?" Add staff e-mail addresses to court filings whenever possible. This will ensure delivery of court notices to the attorney-of-record and designated staff members who can enter deadlines into the calendaring system. If the ECF system will not permit multiple e-mail addresses, establish a generic e-mail address for court notices, such as *docketing@abclawfirm.com*. Set mailbox permissions to give everyone access to the generic mailbox. You may also create rules in your e-mail program

to forward copies of court notices to staff. This is the best approach in Oregon since notices are only sent to the filing attorney. Refer to the PLF Practice Aid, “eCourt Notices – Forwarding is Up to You,” available on the PLF Web site, www.osbplf.org.

All three approaches are designed to keep important notices from slipping through the cracks. If you are ill, on vacation or simply get buried by work and don’t have time to go through your inbox, staff can monitor incoming e-mail and docket court dates.

Know the Applicable Court Rules

Learn the rules and standing orders for each court you practice in.

Do “business hour” deadlines apply? In some jurisdictions, if your pleading is e-filed after the courthouse is closed, your document is deemed filed on the next business day.

Does the filing deadline vary based on the type of document being filed? In Minnesota, “new cases” must be filed by 5 p.m. Other documents may be e-filed up to midnight on the day of the deadline.

Are you required to serve paper copies on non-e-filing parties or the judge?

Is the court in a different time zone? (One Oregon firm believed it had “beaten the clock” by uploading a document a few minutes before the Pacific Standard Time deadline, only to discover later that Mountain Time controlled.)

Keep Your Own File

Don’t rely on third parties to keep records for you. Be the keeper of your own file. Mistakes by court personnel are rare, but they do happen.

In 2003, nearly 50,000 court files were erased in Idaho’s 3rd District Court during an overhaul of the court’s computer system. The entire case log was affected, including all civil, criminal, traffic and family court matters.

In late 2012 or early 2013 the Washington State Administrative Office of Courts was hacked, exposing 160,000 social security numbers. See <http://oregonlawpracticemanagement.com/2013/05/09/washington-state-administrative-office-of-courts-hacked/>.

When three servers crashed in the New Orleans Civil District Court in 2010, more than 150,000 digital mortgage and conveyance records were lost. Soon after the crash, it was learned that the remote backups had also been wiped out because of a software problem.

While Oregon hasn’t experienced a technological catastrophe, our system isn’t problem-free. In 2010, the Professional Liability Fund (PLF) requested a court file only to find that a key document was missing. It was logged in to OJIN and appeared on the OJIN Case Register but was missing from the scanned file. The court’s original paper file had been shredded. The lawyer who submitted the document did not retain a copy.

More recently, the PLF has discovered instances where the Oregon eCourt REGISTER OF ACTIONS was incomplete or entry of documents into the system was significantly delayed.

Some Documents Must be Retained in Original Paper Form

In U.S. Bankruptcy Court “An electronically filed document described in FRBP 1008 [petitions, lists, schedules, statements, or amendments] or a properly completed, signed, and filed LBF #5005 [electronic filing declaration] ... must be maintained by the filing ECF Participant or the firm representing the party ... until the later of the closing of the case or the fifth anniversary of the filing of the document, except as otherwise provided for trustees by the U.S. Department of Justice. The filing ECF Participant or firm retaining the original document or

LBF #5005 and scanned electronic replica of the document must produce it for review upon receipt of a written request.” Oregon LBR 5005-4(e).

In Oregon eCourt “... an image of a document that contains the original signature of a person other than the filer ... (must be retained) in its original paper form for 10 years (unless the court orders otherwise) On reasonable notice, the filer must provide a paper copy of the original for inspection by another party, the clerk, or the court.” Oregon UTCR 21.120 effective May 1, 2014. (Chief Justice Order 14-012 March 31, 2014.) “Filer means a person registered with the electronic filing system who submits a document for filing with the court.” UTCR 21.010(6).

These examples are not exhaustive. Conduct your own appropriate legal research to identify other instances where original paper documents must (or should) be retained. See the PLF Practice Aid, “File Retention and Destruction,” available on the PLF Web site, www.osbplf.org.

Secure Your Computer System

It is absolutely essential that you back up your computer system. This is even more critical as we become increasingly “paperless.” For more information, see the PLF practice aid, How to Backup Your Computer, available on the PLF Web site (www.osbplf.org). Select Practice Aids and Forms, then Technology.

The American Bar Association Legal Technology Resource Center offers free resources to inform and update lawyers about security issues, including links to security sites, analysis tools, security accessories and security software. These resources can be found at:

www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/securityresearchfyi.html.

Practice Smart Spam and Junk Mail Filtering

While some courts have excused lawyers for missing a deadline due to an errant spam filter,¹ most are not given a second chance. Follow these steps to prevent court notices and other important e-mails from getting blocked:

Practice white-listing. Set your spam or junk e-mail filters to allow receipt of e-mails from approved senders or domains. Include courts, administrative agencies, key clients, opposing counsel and any other senders whose e-mail you don’t want to miss. You may need to make this change at the ISP level and in the settings of your specific e-mail program. If you aren’t sure how to white-list a sender or domain, search the Help or Support pages for your e-mail program or provider.

Review quarantine summaries daily. Aggressive spam filters like Google’s Postini will occasionally block senders and domains you have added to your white-list if the filter finds content in the e-mail to be possible spam. Court e-mail addresses and domains can also change, causing new notices to be marked as spam.

Check junk mail folders daily. Approved senders and domains can make it past your ISP or server-level spam filter, then land in your e-mail program’s junk mail folder. Outlook permits users to disable automatic filtering of junk mail to avoid this problem, but understand that if Outlook believes a message originated from a blocked sender, it will still land in your junk mail folder. The best practice is to check your junk mail folder regardless.

Is There a Safety Net?

Once you’ve learned how to retrieve docket activity online, consider making it a weekly routine. Every Friday, run a docket activity report for a specified date range or search circuit court calendars online. Compare the court’s calendar with yours and update your calendar if necessary.

Thoroughly train support staff on CM/ECF systems, proper handling of court notices, and technology in general.

If you have no staff, consider creating a secondary e-mail account for yourself to which you can forward eCourt notices. If your primary e-mail account goes down, you can check the second account.

If you're experiencing problems, tell the court. The attorney who lost the right to arbitrate in Philadelphia would probably still have a viable \$35,000 fee claim if he had just picked up the phone. According to the judge, "A telephone call to (my) chambers might have avoided the whole predicament."

Endnote

See *Pace v. American Int'l Group*, 08 C 945 (N.D. Ill; Nov. 1, 2010) and *Shuey v. Schwab*, Case No. 08-4727 (3rd Cir. 2009). For a discussion of these cases, see Eric Goldman's Technology and Marketing Law Blog at <http://blog.ericgoldman.org/>. See posts dated Nov. 4, 2010 and Dec. 1, 2009.

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