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THE POWER AND PITFALLS OF THE ELECTRONIC OFFICE -Why use technology at all? WHAT CAN BE ACCOMPLISHED?

Paper Usage … You Can Save Trees … Dump File Cabinets

- The good news is that you may be able to cut up to 90% of Paper Usage…
- The bad news is …. it's a bumpy road to get there, full of pitfalls and learning curves…

Need for Staff … You Can Eliminate Up To All Employees, Without Shooting Them

- The good news is, there is some technological tool for almost every job in a law office (except you of course).
- The bad news is, you may lose friends, and … the learning curves continue…

Personal Presence … You Can Be On the Beach in Hawaii, Making Good Money

- The good news is, you can eliminate being tied down to an office, courtroom etc.
- The bad news is – you have to give up doing litigation to get there 100% (is that bad news?) And … more learning curves of course, and perhaps sand in your keyboard or cell phone.

Scheduling … You Can Minimize the Necessity of Scheduling Around Others

- The good news is – you can become "the master of your domain" …
- The bad news is – you can become spoiled very fast, and make others frustrated (by having to work around YOUR schedule)

Monetary Savings … You Can Cut Expenses Drastically As You Move Forward

- The good news is that you can cut down overhead, the need for space, and half or more of your clothing "closet" size and costs, and save on transportation.
- The bad news is you might be lonely and turn into a slouch, and miss the stimulation of a bustling office.

Efficiency … You Can Cut the Amount of "Wasted Time" Drastically

- The good news is that technology, going "paper-less", and possibly even turning to a satellite office and/or working at home can eliminate so many time-consuming parts of the working day.
- The bad news is that you may end up with too much time on your hands and get into mischief, or become bored … or drive your significant other crazy by being underfoot.

Notoriety…You Can Use Technology To Gain Notoriety – To Enhance Your Reputation

- The good news is you can gain a reputation and notoriety faster and wider than ever before, depending on what you put out to the world on the internet.
- The bad news is – that reputation may be sallied by others that are jealous or angry with you, or by your own demise (not knowing what you are talking about)

WHAT ARE THE PITFALLS?

Learning New and Keeping Up With New Technology … The Learning Curve Is an Endless Task!

Finding The Time To Learn New Things

This is probably the biggest hurdle for attorneys (or anyone else for that matter). Do you remember trying to learn how to use your first cell phone? Unless you are a whiz-kid, it took time, energy, hair pulling, probably some swearing, and eventually though, it became an extension of your arm, to be useful at the flip of a thumb. Attorneys are busy people, often stressed to the max, often over programmed and over scheduled. So taking a half a day to learn something new (and electronic to boot) seems just another stressor. In utilizing technology, there is a new learning curve around every corner. Think cordless-speaker-multi-line-conferencing telephones to cell phone, to computer and how to deal with the glitches, to each new software program, such as word processing, billing, accounting, calendar, conflicts checking, faxing out messages, and just being able to receive client input and output the sage advice you have to offer, let alone the email etiquette, risk and practical application. **The best piece of advice here is: JUST DO IT! The more you resist learning anything new, the more time and energy you expend in the end and the more frustrating the whole process becomes! Then the more fearful it becomes! It's a vicious circle. It is *all* attitude! If you treat learning new things as an exciting thing to look forward to, then you've got the key to success.**

Moving Information Around

As you master the very things you need simply to run an office, to communicate and accomplish what needs to be accomplished in your law office to serve your clients, then you can move on to more sophisticated technology and electronic ways of moving information, like email (no, it is not a dirty word if you set boundaries for yourself and others), synchronizing info from computer to laptop for more portability… later, sending to phone, learning how to use the zune, palm, treo, blackberry (where do they come up with the names

for these things anyway?) and other seemingly foreign objects, learning how to work with email, to read, save, and send messages and attachments, working from a distance, accessing office and client databases, lists, forms, useful tools, how to do internet searches for information, how to avoid spam, how to protect work and confidentiality when using these means, and how to prevent information from falling into the wrong hands by accident.

Moving Toward Paper-Less

Now you are cooking; its time to think about how to pare down the mountain of paper a law office generates and the library of books that take up space, by moving toward paper-less … you probably will have to settle for that because "paperless" is a myth. And I think it appropriate to ask the question … isn't there a better way than being reminded every day of the forest that you are consuming, tree by beautiful tree? I began to feel that the amount of paper going through my home and office and piling up around me everyday was obscene!

Thus, to move forward on the continuum, there is a whole new set of learning curves … you will have to study and locate means of scanning, cataloging documents, backup and information storage systems, moving information around, creating systems for multiple users with multiple functions that encompass otherwise separate tasks such as calendaring, contacts, conflicts checks, scheduling, billing, accounting for such things as mileage and expenses, costs of travel and doing business, income and expenses, etc. without having to print it all out. And as for the library aspects, you will need to learn the electronic research programs like Westlaw or Lexis or Lois Law, where to get the electronic access to the books (the group that does continuing education in your state is a good place to start), and what to do when, for your own computer backfires, you need the information … and NOW! (By the way, have you forgotten that there are law libraries everywhere? Let someone else store the stuff you need.)

Moving Away From Having Employees And Staff

Now let's say that you are ready to consider paring down the number of employees (there go a few headaches, right???) You will need to learn new programs like:

- Dragon Naturally Speaking or the like to eliminate the dictation clerk or secretary
- Outlook, or electronic calendaring to eliminate the assistant
- Timeslips or the like to eliminate the billing clerk
- Travel Pal or Tripticks to eliminate the staff that plans travel
- Hot Docs to get the court docs you need
- Westlaw or Lexis or the like to eliminate the need for legal research assistants
- Abacus or another form of law office database that ties it altogether
- PC Away so you can work from a distance, and don't need someone in the office to do "it"
- An automatic coffee pot that grinds and starts on a timer to eliminate the coffee help
- A robot vacuum to eliminate the janitor … (no, I am getting carried away now)

You probably have the option within your geographic area of "satellite office services", sometimes called "business suites", where amenities, reception, telephone systems, business equipment, and space are shared among various business people, meaning you can eliminate the secretarial, receptionist and assistant workers you have needed in the past, their computers, desks, chairs, cubicles, and the office issues that come with staff.

Giving Up "Your" Space, Working With Satellite Offices – Business Suites – Working At Home

Here comes the ultimate: so, if you are really ready for this brave new world, you may want to look at minimizing or eliminating costly overhead that is space related. Obviously, the more employee positions that you are able to eliminate, the less money you have to make to come out ahead, and the more you have to spend on other things than ordering and storing paper, pencils, envelopes, hiring, firing, attending secretary day luncheons, etc. The same goes for working spaces. There is less of a learning curve here, but there may be some hesitancy to let go of the familiar. These satellite offices of which I speak allow you to pay a monthly fee for things like a business telephone number and receptionist to take calls and messages, or forward calls (through something like Centrex) to your number wherever you are) as seamlessly as if you were sitting in an adjacent office. Your clients never need to know that you are in an RV or a tent, at a resort, or at the local Starbucks enjoying a cup-a-joe. You can have an office suite address for receiving and sending your mail, and a menu of available services from ***their*** staff so you can pick and choose what you want someone else to do. And as a bonus- you have a one-step-removed presence so neither clients nor salespeople nor crazies can "drop by" hoping to confront you personally or give you a piece of their mind.

Here, you may have to learn and tap into various kinds of telephone/computer systems to communicate with via "office". You may need to calendar your own use of the conference room, set up work orders for the menu services, etc., but being able to tell clients that you meet "by appointment only, " you can easily eliminate the "drop bys". As for me, I charge more for an office consultation than a phone consultation, and a lot more to travel to a meeting than take a telephone conference meeting, and I won't come out to a local meeting that takes less than an hour, or a further distance meeting if the time to get there exceeds the meeting time, and this works well for me. I find that boards like the convenience and savings of the "call" alternative and I like not having to get dressed up and drive in traffic. Anytime you can find a "win-win" in your plans for transitioning, it is a good thing.

I am sure you are asking by now "How am I ever going to be able to do all this learning, and continue practicing law." Well, you can take a month or two off and dive in head first if you want a quicker transition, or stretch it out over time to minimize the "learning curve" burnout. That's what I did. It took 13 years to move from a bustling office that had its staff issues and partner issues and into the perfect practice (almost perfect I should say, there is one more step to perfect and that is cross country travel and working out of the RV). In the bustling office, I was the office mediator as well as the partner mediator as well as the only one (as I see it at least) that thought "out of the usual attorney firm box". Leaving the partnership was like leaving a bad marriage though, painful in some ways, but well worth it. (By the way, you do

not have to break up a partnership to go "electronic".) Now, I can work from anywhere, on my own scheduling time, and make pretty much the same money I have earned annually **in any of the past 13 years** since I began my own practice, which is well more, I might say, than when I was with a firm where everyone was getting paid but the partners and the focus was on building staff and "underlings" and not so much just practicing law. And I work about an average of 3-4 hours a day on billable stuff. The rest is cream (I do about the equivalent of an hour a day of service type of work and spend the rest writing, playing with my grandkids, working with and shooting photographs, traveling, etc.).

I planned my changes and movement toward the accessing the available technologies according to what I wanted my life to be like, and my future to unfold as I moved toward retirement. I was not in a hurry. You might be. ***And today, there are many more options to accomplish these things available, many more people that are familiar with the law office needs, and many more resources including programs, books, and teachers available to help you learn all these things in a much shorter time.***

And remember, patience is a virtue … and being in a hurry does not always work the best especially with technology (because it seems to know when you are stressed or rushed … and react badly). Example of why longer term plans might be better: If you strive to work at home and your home is full of active kids, pets, commotion, chatty (or catty) spouses or siblings, moody teenagers, disorganization or clutter, you may be sorry you got what you wished for.

The Expense Can Seem Daunting!

Know What You Want, And Tell Your Service Provider, Not The Other Way Around.

Websites: You can get burned quite easily in purchasing services or equipment that you know nothing about. I know of countless attorney offices that paid thousands of dollars for websites that were useless in terms of marketing or interest. Many sit parked today because the firm came to the point of saying **ENOUGH**! One way to make sure you do not get burned is to take some classes and read up on websites and marketing, surf the web and look at examples, and ***then*** talk to a web designer and ***tell them*** what you want your website to do. If you know nothing of the possibilities, or let them tell you what they think it should be, you will get what they think it should be. And write up a good contract specifying some terms of satisfaction, productivity or validation. If they are "puffing up" their skills and making representations you wonder if are true, then tie the compensation into a format that requires results before dollars are paid. The more you know, the more you will have a sense of whether they are being realistic and what their level of knowledge is (kind of like going to the car mechanic – if you know nothing, you will never even know if they are honest and good at what they do.) **You are an attorney. If anyone knows how to research what is needed for a good contract, you do!**

Marketing Options: Don't pay for marketing from someone who markets for other types of businesses and works inside a "box", unless you need their expertise! You can spend a lot of bucks on marketing. If you hire a firm and they approach your marketing needs from the

standpoint of marketing for CPAs or managers or realtors or bankers or consumers, you will probably be sorry. Take a marketing class! You will be amazed at how much you can learn about what is important about marketing from one basic class on starting or boosting a business. If you want to do it "on the ground", there are all sorts of learning centers that offer classes all over the US. Skillpath is just one example of a well known group that offers classes, books, tapes, and instruction on ***EVERYTHING BUSINESS RELATED. Knowledge is Power!***

Another example of a good type of class to consider is how to market on the internet. In a good class you will learn how to think about who you want to reach, how you want to reach them, and what message you want to get across. You can learn about email blasts, how to grab attention, how to reach the market, etc. You can learn what YOU should be doing and thus you will know what YOU should hire a vendor to do. A more perfect and specific example: did you know that when you send an email blast out it is likely that less than 80% of the recipients are likely to receive it. There are companies that you can hire that send your email blasts out one at a time (by computer programs working 24-7) so that all get through. Did you know that if you accidentally copy all recipients into the send, and the cc sections, that you can hit send and be shut down by your internet provider within 1 minute! I mean shut out of the entire system altogether in a manner that you have to "beg" to get your server to start you up again. (Yes, I have done this … twice … accidentally … and now I use Constant Contact.) **My point: the more you learn about what you want to accomplish, the more you are likely to get good results when you pay to do it! And the more you are likely to be saying "Whew! That was a lot of work, but worth it!"** Rather than **"Jeez, another $10,000 down the drain."**

Software and Training: Don't cry or resist when it comes time to buy a new program or you have to hire a programmer to get you a special program or you realize you need a class or a lesson in some new thing. There is a cost to purchasing programs and services, and staying competitive, and just keeping your head above water once you step onto the technology-electronic bus, but it's better than being left in the snail-mail dust. You have to have clients, yes. You can get them by wining and dining them, playing golf with and socializing with people, joining Rotary, attending luncheons, seminars, and the like, or, if you are like me, you will find that getting the ***best bang for your buck*** is the goal, and time is a commodity that becomes ever more precious as each passing year flies by. And, if you approach learning how to use a computer calendar to schedule your life, or use a computer dictating program, or what scanner will suit you best in the same way (with excited anticipation) as you would approach learning how to use your new Tivo or Wii system, you will not waste precious energy or time grumbling, procrastinating, or resisting.

And, in the most simple terms, imagine by moving toward electronic communications and a paper-less office system the amount of money you can save on stamps, pens, paper, printing, stationary, envelopes, envelope wetting sticks, stamps, envelope stuffers, mailing houses, trips to the office supply store, supply storage, file cabinets, closets, inventory and ordering services, staplers, staples, stickies, labels, white out, tape, mailing lists, staff, insurance, taxes, and stress involved in arranging for all these things. It's ***incredible.***

And I would not want to minimize the ***incredible joy*** that comes with receiving a client call, and while on the phone, pulling up their file on the screen in front of you, looking something up, making a note (on the computer) of what is needed or what information is being passed to you, thanking the client, hanging up and closing the file would feel like. You have eliminated the time lag in getting the file pulled, clearing the stack of papers on your desk, calling the client back, flipping through pages and pages, making the note in your tickler or to do file (wherever it is), and putting the folder back in the stack of things to do or files to be filed. You have eliminated probably at least 1 hour of effort and cost. Yes, you may have to learn how to type. I think this is one of the biggest hang-ups for lawyers in thinking about eliminating staff. If you started as I did like a bookkeeper, then a legal secretary, progressing to assistant, moving on to paralegal, and then becoming an attorney, typing notes or cleaning up your own (Dragon Naturally Speaking) dictation is no big deal. But, if you never learned any of the "lower" skills, that might be hard to take, and, I will admit, another learning curve.

The Competition is Tough! There are Thousands and Thousands of Lawyers on the Internet.

Yes, the competition is tough. It's not any easier to be the ***one*** internet surfers pick on the internet than it is to be the ***one*** exhibitor seminar attendees pick from the hundreds present, or the **one** someone using the fingers to do the walking in the yellow pages. Waa, waa, waa…….I don't even want to hear it. The more one does to make themselves visible, in a good way, in the community or on the internet, the more one will attract business. I could show you 100 websites and you could choose the one you think you would like to emulate, or the one that gets the most hits, or you can do it yourself. I do not see any reason to spend too much time on this point.

Backup – You Can Lose All Your Files and Information In The Blink Of An Eye.

Paper is safe …. Or is it? Have you ever had a fire? A flood? An explosion? A burglary? The odds are probably pretty low that this will happen to your law office and result in loss of files (especially if they are stored off site). But … how about losing or misplacing a file? An important contact's information? A calendar or important date? An important message?

This is one of the scariest things for the transition to electronic file transition. Probably everyone has some experience with losing a file or two, or important information. Sure, it's on a smaller scale than a disastrous loss of an office in a fire or flood and would not bring your work to a halt. But what about a different line of thinking? Say you are a died-in-the-wool office junkie or a litigation attorney, consider what consequences a broken leg or any injury that requires bedrest, any major vehicle malfunction or loss, a snow or ice storm that prevents you from getting anywhere for days can have, resulting in the scenario where you end up where your important papers are ***not*** . That can be as completely debilitating as losing the office files. Even for you, having a ***PLAN B*** is not a new concept. Having somewhere to go or a different way of working (alone or with colleagues) to share or retrieve important information when and where you need it or if it is lost is a ***MUST*** in any world. But by

entering the electronic world there are many options for the file backup concerns, and also many options for the "I-can't-get-out-of- bed-or-the-house-or-out-of-the-airport-and-back-to-town-or to the office problems." Computer crashes and unanticipated events happen every day somewhere, but there are safeguards that can be taken. With regard to the electronic aspects, even simple programs can have glitches that cause you to lose what you are working on by the click of the wrong button (or, I believe, by giving your computer a dirty look), but you learn to save, save, save to prevent these things from taking your breath away. I have lost pages of information by working right in email to compose a note, letter or communication, get weird messages, and have my computer tell me I have to exit now and restart. I have lost word files. I learned from each one of these experiences what to do and what not to do. If you are an attorney that relies heavily on your secretary to do everything, including the electronic stuff, and she gets sick, gets married and moves away, or cannot come in to support you, and you know nothing about how to get what you need to go on that day, you need a Plan B, and it is the same for an electronic office. Luckily, backup comes in all forms.

Various Backup Devices-Since this is one of the biggest concerns, here is some additional information on what is available.

Floppies and Zip Disks – These are almost completely passè today. They are square disks of various thicknesses that hold information, and not much by today's standards. They get slipped into the computer in a hole.

CDs and DVDs – These are circular disks that get slipped into a tray that comes out from a computer and are commonly used to store information, like movies and music, and office documents.

Exterior Hard Drives – Today, we have an incredible array of choices for external (those outside the computer box) drives. They plug into USB Ports and firewire (much faster transfer times for information) Ports. Without getting technical, it is sufficient to point you to Best Buy or Frys or an electronics store or department for more information. All shapes and sizes are available, generally the smaller they are, the more expensive they are. My favorites for travel use are those that do not require a separate power source from the computer (less cords to carry, less outlets to locate when staying in a hotel). I can carry my law office in a backup disk that will fit in the palm of my hand. And I ***do, every single time I leave the house, uh, office, take my small backup disk. So I back up*** everything I do ***to in at least two places as I work***, the hard drive or an external drive on a firewire hooked up to the laptop AND my portable firewire drive. And I also have two alternating portable drives that I use for bank box backup. I back one up each week or every two weeks and take it to the bank, literally, and put it in my bankbox. I get the other one out and in a week or two, back it up and take it in. I have what would be considered a small practice listing about 400 clients, and I serve about 80-100 each month with some task. However these portable drives can hold 10 or 20 times or more on them than I ever put on one. Documents do not take up much space. Photographs and drawings take up much more space than text or numbers.

Tape Backups – These are programs and devices that you can hook up to your computer that run in automatic intervals and backup information on a regular basis, commonly daily or weekly. The advantage is you to not have to manually start or stop them and you can be assured your information is stored in a backup format. The disadvantage of them is that you cannot generally or easily get "into" the information on them and pull documents or retrieve anything. You need an intervenor (someone who has special skills to do this) to put the stuff back into usable format. But, these are one of the fastest and most efficient forms of backup. But, if your office burns down, keep in mind that your computer and backup are going out together.

Outside (Internet) Storage – Like document storage companies, you can buy space through internet companies for storage of electronic data and files. In these cases, the companies set things up so once a day, week or month or at whatever interval you choose, they will come in and copy your hard drive files and preserve them somewhere else in a tape or in an identical format. Things to watch for are: ease in retrieval and retrieval format. You want to balance what best can handle the level of your document storage needs, with the most ease and least expense in retrieval. … and of course, the highest integrity/least risky provider. You can get "scammed" on the internet probably more easily than by someone who comes knocking at your door or calling and offering services. However, be aware that even a provider of storage for the ashes of the deceased can handle your boxes of important "stuff" with very little to no regard for its condition or protection in storage. Sprinkler systems in a storage facility can do a lot of damage to documents. Corrupt vendors or those that go out of business and leave behind trails of unhappy customers without access to their "stuff" do exist. Choose a reputable company to work with.

This aspect of backup might be the single highest area of concern in an electronic law office. But there is one more area that lawyers fear just as much or more…

Use of Email – Confidentiality Issue, And Other Concerns

Many attorneys worry about disclosure or discovery of electronic files and/or internet emails, including potential malpractice claims stemming from loss, misuse, or misplacement of information, and discovery of/use of confidential information, strategies, admissions and other types of damaging information contained in emails they send and receive from clients about their cases. There are many complicated issues that arise with use of technology such as electronic file storage and email. Your clients' cases can be compromised. You might say or send something that you are sorry for. A hacker might break in and read files. Either can create a myriad of legal claims against an attorney. However, the truth is that if you do not jump in the water, you may be completely and painfully phased out of **swimming with the sharks** (just a little lawyer humor here). And if you read the following passage from an internet article I found, you will see that avoiding the use of email if your law office is involved in any network system does not necessarily prevent discovery of confidential information and files.

At the following URL: http://www.kuesterlaw.com/netethics/bjones.htm ……

You can find a great article written by **Robert L. Jones** about Internet Email and even though it is a 1995 article, it has a lot of good information. The following quote is from just one section. He covers the following topics:

1. E-Mail v. Snail Mail
2. Hacker, Cracker, Phracker - Sniffer, Spoofer, Spy
3. Encryption to the Rescue?
4. Bad Things That Happen to Good Lawyers
5. Ethical Considerations
6. The Attorney-Client Privilege

This author discusses many things including ethical considerations and the possibility of inadvertently establishing an attorney-client relationship with anyone who communicates with the attorney via email in an attempt to establish an attorney-client relationship. He talks about disclaimers attorneys should use to notify people who find them on the internet about the possible lack of confidentiality email contacts hold. He talks about some of the cases that determined whether discussions over cell phones held an expectation of privacy. I will not reiterate entirely what is in the article here in my paper, because I am providing you with almost 20 pages of information to read already, but I found the following section particularly interesting (and will discuss some of these things briefly at the seminar):

"Hacker, Cracker, Phracker - Sniffer, Spoofer, or Spy

What's in a name? In these names -- trouble for the attorney who communicates with clients or potential clients over the Internet. These are names of several of the potential eavesdroppers on the Internet. A hacker is simply someone who is intensely interested in complex computer systems. But, much to legitimate hackers' dismay, the term has also become synonymous with cracker -- one whose interest includes unauthorized entry and modification of these computer systems. True hackers are often system operators and administrators who detect, repair and prevent the break-in and damage by crackers. Crackers may also be called phrackers or even uebercrackers. The "uebercracker" is a cracker with a reputation for superior cracking skills -- one who is extremely difficult to defeat. Crackers may be the computer equivalent of joyriders. They may just break in for a brief, exciting excursion through the files found on a computer. Coming across a file or document that seems particularly interesting, they may copy it, alter it, delete it, or simply read it. Their tools are myriad and new ones appear rapidly. Crackers can even present serious concerns for the attorney who, although connected to a network, does not even communicate by e-mail."

So, you can see, there are forces inside and out that provide threats due to use of electronics in a law office, parties acting badly other than the attorneys, staff, witnesses, opposing parties and clients.

Use of and Disclosure/Discovery of Email: Putting ***anything into an email*** creates a permanent record that can come back to haunt an attorney, no matter what steps you go through to attempt to eradicate or safeguard it. That is because once it is sent, it goes into the

"universe" and travels through various servers that do have backup systems, over which you have no control. So while it may be taken off your computer, and that of the recipient, there are ways to retrieve it from the "universe". Emailed documents or communications that contain harmful admissions (inadvertent or not), discriminatory statements, confidential and private information about clients, attorney-client privileged files and other things typed, embedded, or attached to those emails can serve as a basis for legal claims against an attorney. I intend to discuss email issues and at the program including a list of "what not to dos" as a handout for those who attend this session because this, as it seems from my research discussions, and investigation of the experiences of colleagues, is an area where ***almost everyone has some kind of notable experience,*** not necessarily leading to a lawsuit, but certainly leading to a great big "***oops***", or "***I wish I had not done that***," or "***I wish he or she had not done that***" kind of brain freeze. Something as simple as hitting the wrong key for the email address thereby sending a communication to the wrong party can spell disaster. Simply attaching the wrong document to a communication can create a problem. Sending something out to all board members including the one that just resigned (and oops, no one remembered to tell you) can be a big problem. Sending an email string that contains inappropriate statements from others, admissions, quotes or comments of a harmful or derogatory nature can create a big problem. In fact, email "threads" (what I call these strings that attach by hitting "forward" instead of "reply") create all sorts of problems for clients and attorneys. Failing to read through the entire thread (which can happen if you focus just on the email that came to you with the penultimate question) can really be a problem. Hitting "Reply All" is another very risky business, because there may be a recipient that was included in the former email thread that you would not want to see what you wrote. Not taking enough care to separate the client email addresses for any client from the opposing counsel email addresses can lead to disaster – such as accidentally sending a strategy or opinion letter meant for the Board to opposing counsel instead. And, sometimes, you are "cc'd" on a communication to other parties, not addressed directly, and then you do not know what to do with the information. I have a solution for this that will be disclosed at the seminar. But even if you do not come, you can probably figure out that failing to review an email that you get, even as a copied recipient, or failing to let the client know that (1) you bill for all time needed in reviewing emails and (2) you need to clarify the intention of including you in the email can lead to malpractice issues later down the road is just as risky.

Questionable Confidentiality: Early on as email came into vogue, some feared that fact finders would conclude that there was no reasonable expectation of confidentiality in unencrypted email messages because they were sent over vast third party systems that were accessible by people other than the attorney or client.

It is still a concern. There are two schools of thought: (1) that email should ***never ever be used*** for anything you would not want the client, the opposing party, the judge, or God to see and (2) **that email use is necessary, beneficial, timely and the future and is a reasonable means of communication, just like letters and the phone**, so long as some protections are engaged. (To what extent protections are needed is a subject of great debate). Just plug into Google or any other search engine the key words "attorney confidential ethics email communications" or such and you will pull up hundreds of articles and websites.

Some (nonlawyer sites) joke about how ridiculous the email disclaimers are. For example, I pulled the following thread from a blog (short for weblog) site simply to illustrate what the "nonlawyer" community thinks about the email disclaimers, which from my experience and research I believe to be the most widely used and accepted as common form of reasonably protecting the confidentiality of emails of any. If you want to know, the URL (that is the string that you cut and past into the website address line using the web for those of you who are still in the "dark ages") is:
http://discuss.joelonsoftware.com/default.asp?biz.5.588844.18

"What's up with E-mail Confidentiality Notices?
Over the years I have been seeing more and more e-mail confidentiality notices. Mainly from not so bright head-hunters and HR types. Some even parade as being legally binding somehow. Who thought these up? Some lawyer looking to make a buck? Are they of any use? Should we all be using these on our business email?
...
Here is an example of one I got from a body shop looking to place me with some crap-hole company:
"Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and/or privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message."

**********Tuesday, January 29, 2008***

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I have seen these too. They put them at the end of the message. Usually after their signature. So I have to review the entire email to finally get to this statement? That is ridiculous! I also don't see how they can legally stop you from disclosing or distributing it. The intended recipient is obviously the email address they entered. That's how email works.

********Tuesday, January 29, 2008***

…

"Any unauthorized review, use, disclosure or distribution is prohibited."
That is laughable!
…
FWIW, IANAL, YMMV, but I don't think you can usually be forced to keep something confidential unless you signed a contract to, you have a duty to, or you obtained the info by improper means. I can't see how any a footer to an email would create such a requirement - so I believe that they're just intended as intimidation.

****** -Tuesday, January 29, 2008***

On second thoughts, there probably are some circumstances where there might realistically be something to it.

Imagine persons X and Y both have some kind of duty to a company. Employees. Professional advisors. Contractual relationship. Anything like that.

Then the company sends an email to person X when they meant to send to person Y...
******* -Tuesday, January 29, 2008***

I see these every now and then, but have NEVER heard any sort of legal explanation about them. I therefore believe that they are entirely BS.
******* -Tuesday, January 29, 2008***

…
Here are some good replies when you get an email that was supposed to go to someone else:
Just ask them [the sender] politely to replace their notice with:
'We don't know how to use the security and encryption features of our e-mail server. We are so confused that we cannot even be certain that this e-mail was delivered to the proper person. So, if you received this e-mail because of our incompetence, please delete it and notify us as soon as possible. Notice that this is being written in the most scary legalistic way, so no one notices how incompetent we are.' … and tell them that this would be more honest than their current one.

Or, reply to the mails with:
'By sending an email to ANY of my addresses you are agreeing that:
1. I am by definition, "the intended recipient"
2. All information in the email is mine to do with as I see fit and make such financial profit, political mileage, or good joke as it lends itself to. In particular, I may quote it on usenet.
3. I may take the contents as representing the views of your company.
4. This overrides any disclaimer or statement of confidentiality that may be included on your message.'
****** - Wednesday, January 30, 2008***
…
I once got a worker's compensation claim for injuries, with supporting documents filled with private medical details, faxed to my desk by a law firm when I worked at Quill. (Approximately 100 pages long, too.) The law firm had no relation with us -- most probably, someone transposed a number when dialing. I shredded it, called our tech team to make sure the electronic copy of it got purged before it made it into the daily backup, called my supervisor to verify that I had taken those two steps, and then called the law firm.

"Hello, this is ********* calling for ******* Corporation..."**
"WE DON'T WANT ANY. *hang up*"

I redialed.
"Hello, this is ****** calling for ********** Corporation..."**
"WE DON'T TAKE SALES CALLS! *hang up*"

I redialed.
"123-45-6780. That is your client, ******* social security number*. Do I have your attention? My name is _____, I work at ******** Corporation, and I just got your fax which you meant for the state workers comp agency."**

I then got read the riot act about how I was supposed to purge every extant copy of that document, and it was five minutes before I could convince the man that I had already done so, and was only calling him as a courtesy to make sure he didn't fax us any more personal information.

Miracle of miracles, he actually became pretty conciliatory at that point. I got both an apology and a thank-you. I should have gotten an order for office paper, too, but there is no justice in telephone customer service. ***
…**
[and]
I had to look into this because of something that happened at a former job.
The story I got was this: in the case of misdirected/leaked emails, the legal questions of who is responsible, liable, etc., are basically untested. Hence, companies put disclaimers in emails not because it grants some legal protection or meets some legal requirement, but because courts may someday rule that it grants some protection or meets some requirement. The byproduct of this is, there is no way of knowing what sort of text should or shouldn't be in such a disclaimer.

******* -Tuesday, January 29, 2008"***

****

The blogs do go on and perhaps I included too much information (lawyers, can you imagine your staff being quite so rude as was the example from the Quill Corporation blog?), but they are actually quite funny, hearing how the nonlawyer public perceives the things lawyers create with some vague legal hope or intention in mind. These bloggers discuss whether the disclaimer puts a burden on the recipient to make sure the email is purged from existence on their computers and the company servers and perhaps even further out, and what legal responsibility the recipient of a misdirected email has to contact the sender (there is a funny dialogue from one blogger who made some calls to the law office that sent him an email by mistake and how he handled it), whether the language creates a contract between parties or creates a one-sided obligation, whether emails can or cannot be freely published or whether they are actually original copyrighted material (extending the discussion to whether they held value or not and whether and republishing of an email without the consent of sender is a violation of copyright law), and the comments illustrate some very creative thoughts that we as lawyers might not readily get to. This last statement in Andy's post is perhaps the most thoughtful because questions remain as to exactly what text might pass scrutiny if challenged on the question as to whether it is "enough protection". (If anyone out there in any state has a

court approved clause to offer, don't be shy, let me know please.)

What we do know is that failing to reasonably and adequately preserve the limit/extent of circulation of ***attorney-client privileged information in any form*** can, as we all know, destroy the confidentiality of it. A legal "test" was suggested early on by commentators when the question arose about electronic attorney communications and whether they were discoverable. The test was based on the case ***U.S. vs. Carroll Towing*** (1947) 159 F.2d 169, a case having nothing to do with computers or the internet, obviously (it was well before these concerns came to light). The facts in this case were that a barge broke away from its mooring and sank, causing losses. The court determined that because the barge company failed to use readily available resources, i.e., a bargee or attendant, the barge owner was liable for the losses. From this case came a "test" that commentators assumed would likely be used to test failure to use available technology to protect confidentiality e-mail messages. That "test" is:

Owner/business duty to protect against injuries/losses is a function of three variables:
The probability of the event
The gravity of resulting injuries, and
The burden of adequate precautions.

I have seen nothing to lead me to believe that this is not still a good way to look at the measure of protection taken vs. the risk, cost and availability of the various types and levels.

FEDERAL RULE OF EVIDENCE SECTION 502 – Liability With Regard to Inadvertent and Intentional Disclosure of Confidential Attorney-Privileged Information. (As learned via web article (paraphrased below) found at http://westlegaledcenter.com/program_guide/course_detail.jsp?courseId=17787892&title=Waiving_Attorney-Client_Privilege_and_Work-Product_Protection_after_FRE_502)

The Federal Rule of Evidence 502, which became effective September 19, 2008, addresses a longstanding issue throughout the court system regarding the consequences of the intentional vs. inadvertent disclosure of materials protected by the attorney-client privilege or work product doctrine. It is believed by commentators that the purpose was to alleviate the burdensome discovery costs placed on litigants in guarding attorney-client privileges and work product, especially as the volume of electronically stored information continues to grow exponentially. The costs of discovery were exacerbated by the uncertainty faced by litigants as to how disclosures of protected information were treated from case to case and from court to court. Rule 502 both strengthens and melds the rules regarding intentional and inadvertent disclosure of privileged and work product information. Rule 502(a) limits the scope of a waiver of privilege or work product when those materials are intentionally disclosed in a federal proceeding.

The traditional view of subject matter waiver was that the intentional disclosure of one communication holding the privilege could result in the waiver of privilege as to all documents regarding the same subject matter and could constitute a waiver of this information in the litigation at hand as well as subsequent federal or state proceedings. Rule

502 limits the scope of waiver to the actual communications or documents disclosed unless three prongs are met: (1) the waiver was intentional; (2) the disclosed and undisclosed information concern the same subject matter; and (3) the disclosed and undisclosed information ought, in fairness, to be considered together. The Advisory Committee Notes on Rule 502 indicate that the protections against subject matter waiver are not absolute. The rule retains some flexibility to allow courts to find broad subject matter waiver in exceptional circumstances, where fairness requires further disclosure. Advisory Committee discussions contemplated a broad subject matter waiver if the disclosing party intentionally uses protected information in a selective and misleading manner to the disadvantage of an adversary.

Inadvertent Disclosure Paragraph (b) addresses waiver of privilege in the context of inadvertent disclosures, i.e., where a party has unintentionally disclosed privileged or work product materials. Rule 502 states that the inadvertent disclosure of privileged or work product materials in a federal proceeding will not operate as a waiver in a subsequent federal or state proceeding so long as the privilege holder took reasonable precautions to prevent disclosure and promptly took reasonable steps to rectify any disclosure once discovered.

Prior to Rule 502 different federal and state courts took a variety of approaches to address waiver for inadvertent disclosure, which created great uncertainty for litigants as to the consequences of any given document production or privilege review strategy. There were strict interpretations one way or the other, and a “middle test” approach that requires examining the facts and circumstances of the situation and paragraph (b) of Rule 502 adopts the "middle test" approach for the federal courts which resulted in a melding of the analysis the various outstanding state and federal decisions.

The Federal Rule goes on to address “Court-Approved Agreements” and anyone interested in further information can find this Rule through Westlaw or Lexis or other programs, or simply by inserting key words for a search on the internet.

Because of contradictory language in Rule 502 and in the Advisory Committee’s Notes about it, how Federal vs. State legislation controlling aspects are analyzed, and other factors, it is still unclear as to what level of deference State Courts will give this Federal Rule. But it is something that should be considered in the analysis of what punishment should be vetted with regard to an attorney that disclosed (inadvertently or otherwise) key information. Something I believe is clear from the research I did is that an important safety factor if the information sent via email could, if discovered, cause an adverse effect to the client, that the attorney get from the client in writing a statement that the client approves communication of sensitive information via email. And the form of such a statement and reasonable expectation of protection from client consent leads to a discussion as to what the client needs to know to fully understand the risks involved, and that discussion is just as important a discussion as basics, i.e., what the disclaimer should or should not say on the use of any email for any confidential communications, and whether it is protection enough.

One case I could find on the web relating to the Federal Rule is an Oregon case. In it, the Federal District Court of Oregon ruled that under the 2008 amended Federal Rule of

Evidence (FRE) 502, the attorney-client privilege was waived when privileged materials were produced bec***ause of the disclosing party's careless privilege review.*** **Relion, Inc. v. Hydra Fuel Cell Corp., 2009 WL 5122828 (D. Or. 2008).**

There are cases that deal with the privacy and confidentiality issues and expectations of privacy with regard to monitoring telephone conversations and wire-tapping that had opposing outcomes so they are not especially definitive or helpful (and they came before this ABA rule). There are commentators like Mr. Jones (cited above) who discusses cases related to cell phone use and confidentiality concerns, and who promote the use of encryption programs as a critical aspect of protecting emails. There is a list of links to Bar Opinions addressing the confidentiality of email that can be found at ***http://www.Hricik.com***.

Destroying or Losing Evidence/Discovery of Confidential Information: Again, if you think wiping some bit of sensitive information off your computer will eliminate its existence, and thereby remove all chance of legal claims, or loss of defenses, think again. There are computer hackers and contractors out there who can find information someone never thought possible and so a litany of claims might exist when information is lost, damaged or destroyed intentionally or inadvertently, not the least of which might be a malpractice claim. An attorney who loses or destroys emails, whether or not they are later located somewhere out in the "web-universe" might be defending a spoliation of evidence claim or a malpractice lawsuit, or might be spared from judgment in a claim based on negligent loss of information. There are more serious ramifications to attempting to destroy evidence than to simply have misplaced it, and if the subject is loss of that information, any court examining the situation will assess the "level of negligence" and the actions taken to preserve or save it, and the circumstances surrounding the loss before passing judgment.

And by the way, the most common conversations about e-file management and confidential emails center around loss of important information or disclosure of confidential information. It's not a stretch to consider that spoliation of evidence (or attempts) could lead direct charges – it is a serious offense. I have not yet seen discussed in any electronic file management or email cases but it does not seem out of the realm of possibility that any attempt to eliminate what might otherwise be seen as evidence in a case against a lawyer (or anyone else for that matter) such as emails or confidential incriminating notes to or in the file could be serious.

According to **Wikipedia, the free encyclopedia**
on the internet that is internet customer driven:

"Lawyers and courts use the term ***spoliation*** to refer to the *intentional* or *negligent* withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding, and it is a criminal act in the United States under Federal and most State law. Spoliation has two consequences: first the act is criminal by statute and may result in fines and incarceration for the parties who engaged in the spoliation, secondly case law has established that proceedings which might have been altered by the spoliation may be interpreted under a spoliation inference. The spoliation inference is a negative evidentiary inference that a finder of fact can draw from a party's destruction of a document or thing that is relevant to an ongoing or

reasonably foreseeable civil or criminal proceeding: The finder of fact can review all evidence uncovered in as strong a light as possible against the spoliator and in favor of the opposing party.

The theory of the spoliation inference is that when a party destroys evidence, it may be reasonable to infer that the party had *consciousness of guilt* or other motivation to avoid the evidence. Therefore, the factfinder may conclude that the evidence would have been unfavorable to the spoliator. Some jurisdictions have recognized a spoliation tort action, which allows the victim of destruction of evidence to file a separate tort action against a spoliator.

Retrieved from "http://en.wikipedia.org/wiki/Spoliation_of_evidence"

The American Bar Association has addressed the issue of electronic communications in a 1999 Opinion 99-413 by saying:

> *A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation.*

The Formal Opinion is Worth Reading. It goes on to say:

> The Committee addresses in this opinion the obligations of lawyers under the Model Rules of Professional Conduct (1998) when using unencrypted electronic mail to communicate with clients or others about client matters. The Committee (1) analyzes the general standards that lawyers must follow under the Model Rules in protecting "confidential client information"[1] from inadvertent disclosure; (2) compares the risk of interception of unencrypted e-mail with the risk of interception of other forms of communication; and (3) reviews the various forms of e-mail transmission, the associated risks of unauthorized disclosure, and the laws affecting unauthorized interception and disclosure of electronic communications.
>
> The Committee believes that e-mail communications, including those sent unencrypted over the Internet, pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy. The level of legal protection accorded e-mail trans-

…" [read the opinion for more – its on the American Bar Association website].

I will leave you to do your own electronic research via Westlaw or Lexis or some other provider to do the research on "spoilation of evidence" and "malpractice cases" stemming from the loss of files or discovery of attorney-client privileged materials for failure to practice adequate protection. And what if you lose "the smoking gun" document? Yes, that would be bad. Maybe you want to keep a copy of or **the original of that document in your paper files,** bank box or other safe place, along with the "smoking gun." This is one of the reasons I talk about a "paper-less" as opposed to "paperless" office. There may be reasons to keep copies of certain documents (as a PLAN C).

Electronics and The Courts

The courts in many states, and the administrative agencies, are making plausible attempts at shifting to electronic filing systems. Heaven only knows, the world of law eats ***way too many trees and something has to be done.*** The enticing efficiency and cost savings aspects are nothing to sneeze at either. HOWEVER, many courts (including the State Court System in California) have spent millions of dollars for systems that major kinks, and to those using them (or attempting to use the electronic systems) have proven less than efficient or cost-saving. In the Superior Courts in California for example, I understand it to work like this (as told to me by colleagues – I do not go near the courts anymore as I have eliminated litigation from my repertoire): the courts still require an **original signature on all pleading**s to be filed except those filed by certain designated companies. These companies work under Government contracts, but the lawyers pay for use of them too, in fact, often paying considerably more than it would take to hire a courier to hand carry papers to the court.

The judges apparently are willing to receive some information via email but any document that an attorney wants to make sure becomes part of the court record will not be recorded in the court file without an **original signature or receipt from one of these specifically designated companies**. (Some of the administrative agencies have a lower standard than the courts and will accept documents without original signatures but you would have to check out what is okay in your own geographic area on any of this). The "outside understanding" is that these companies receive scanned information and print it out and then hand carry to and file it with the courts (no trees saved there). The companies charge dearly for these services, and, even though they receive the information via electronic means (before printing it out), they charge extra for distance and delivery. A colleague told me the charge is sometimes more than one would pay a courier to pick up the originals and deliver them to the court. Some believe these charges are made even when (this has not been confirmed by me – it is simply conjecture by the practitioners with whom I spoke) they believe these companies may actually be allowed to electronically send the faxed documents they receive without printing them and taking them manually to the courts, directly to someone in the courts to be filed directly. I spoke with a couple of friends so it is not a large sampling, but it was their belief the "electronic filing system" in the courts was not working very well. They went back to using couriers for most court filings. I was not able to find anyone ecstatic with the California system, but maybe you have had or heard about better experiences.

There is so much more I could write about, and as a helpful addition, I will include a companion article I wrote for the Conference last year about blogging, and I will look forward to the seminar, which will be an interactive session where we will explore such things as

- How Will Clients Find You if You Leave An Office?
- Training Clients to Trust the Process Dealing with the Notoriety – Keeping Your Reputation Positive Tips for Managing The Risk Aspects
- Insurance Coverage Questions
- Avoiding Defamation and Lawsuits
- Easing the Burden of Prolific Email Addict Clients and Website Inquiries
- Enhancing Protections for Email including disclaimer products and encryption
- Establishing Attorney-Client Relationships Without Ever Meeting the Client
- Budgeting/Best Use of Money and Time (And Resources)
- Choosing To Be Proactive vs. Remain Reactionary in Publications
- Offering Something Valuable (Such As Free Information/Education)
- Reaching Outside Your Own Box
- Choosing The Proper Electronic Options For Your Office – Office Systems, Software Programs, Off-site Access, Use of a Website, Blogging, E-Newsletters, Web Classrooms, Audio – Conferencing and Putting Them to Good and Valuable Use

GLOSSARY OF TERMS FOR THOSE LESS "HIP" IN THE E-WORLD (See above for paragraph on hackers, crackers, pfrackers and uebercrackers)

- Blog – WEBlog or diary on the internet
- Email – Electronic Mail …. Snail Mail – Mail sent through the post office
- Key Words – those used in an internet search which would be likely to appear in the items that you want to find in the search
- Thread – list of emails, blogs, or other items web-related
- Post – Put something up on the web or via email or a blog or send something out (just like "posting" a letter but faster
- SPAM = spam
- FWIW, IANAL, YMMV – I have no idea
- URL - Uniform Resource Locator

Beth A. Grimm is an HOA attorney and represents homeowners associations and homeowners who live in them. She is a mediator, author, speaker and problem solver. She has written two books and several other publications to help everyone including those who otherwise might have to spend hundreds or thousands of dollars on attorney fees to find out basic information about HOA living and how the law affects those living in HOAs, and those serving HOAs as vendors and professionals, and those selling HOA properties to the general public. She hosts a website at www.californiacondoguru.com that provides an incredible amount of helpful information and also low cost publications covering a myriad of topics HOA-related. And, she is an avid blogger, utilizing that means of communication to answer the public's basic questions about HOAs.