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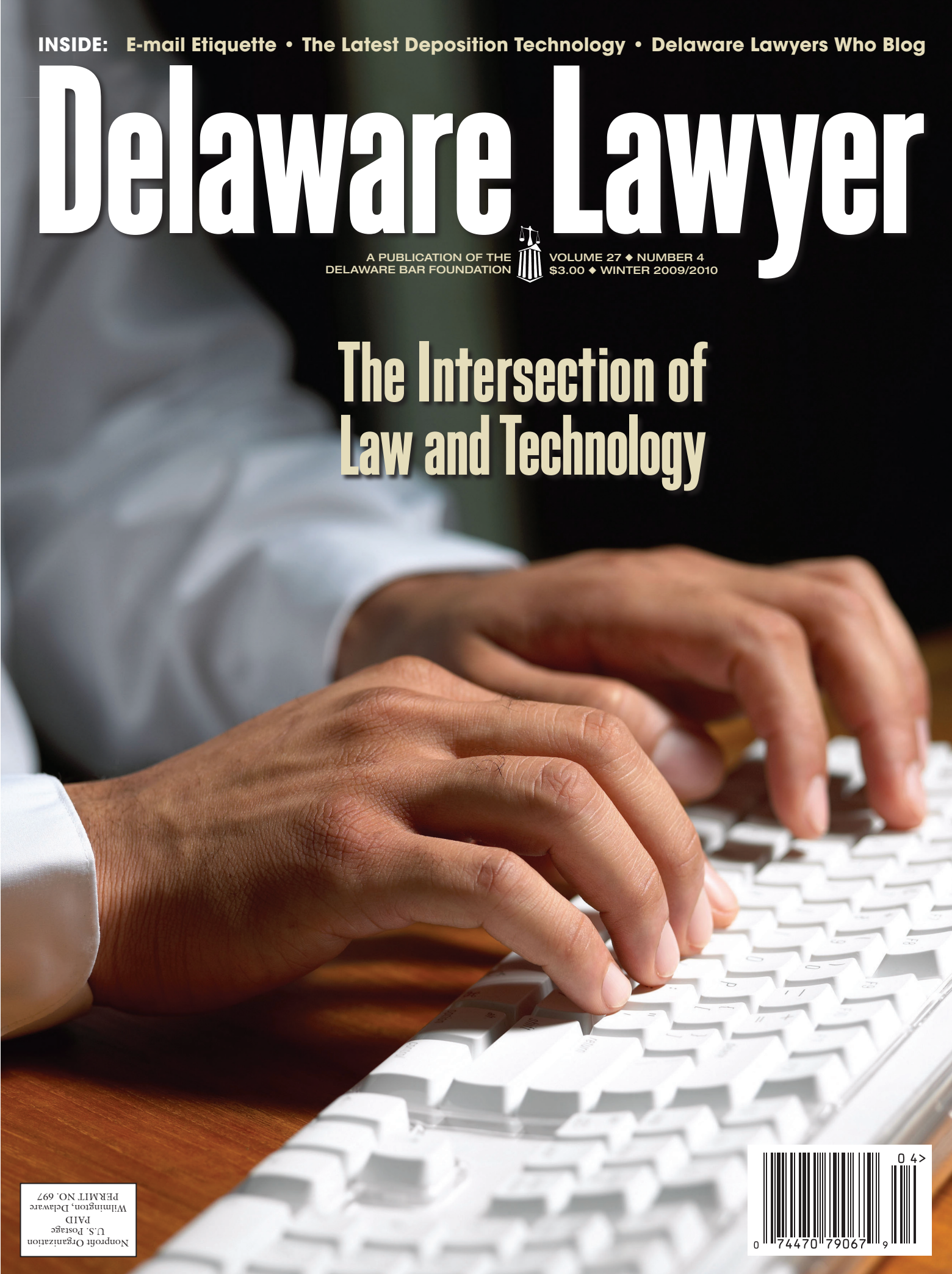

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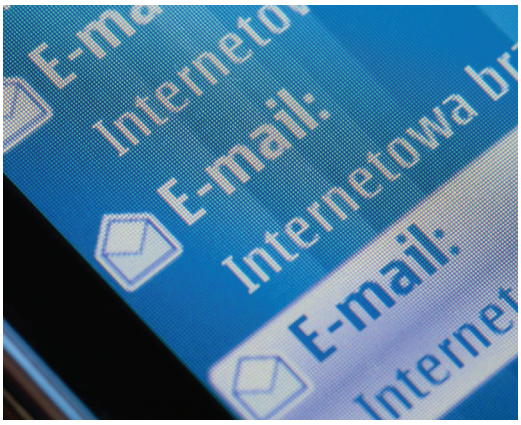
CONTENTS WINTER 2009/10



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Margaret M. DiBianca

This is the first time that an entire issue of *Delaware Lawyer* has been devoted to the subject of technology and, specifically, how technology affects the modern legal practice.

Technology has long been an important part of the State's legal community. Delaware was, after all, the first state to adopt a mandatory electronic-filing system. And, recently, Delaware became the first state to establish an American Inn of Court dedicated exclusively to the study of legal technology. The Inn was the idea of attorney Kevin Brady and is named for Richard K. Herrmann, a long-time proponent of the innovative use of technology as a way to promote efficiency and effectiveness of the law in our State.

The timing, then, made technology an obvious choice for the theme of this edition.

Our articles are intended to highlight some of the different ways Delaware lawyers are putting technology to use. Rich Rollo writes about videotaped depositions and real-time transcripts.

Ed Micheletti and Mike McGraw write about electronic discovery, which remains an elusive but mandatory component of litigation, often involving unfamiliar processes and cryptic terminology. The article discusses some recent examples of what can happen when lawyers and clients do not meet their e-discovery obligations.

John Paschetto and I discuss the components of an effective e-mail and offer tips for how to avoid the potentially disastrous results of today's most popular medium.

E-mail, of course, is not the only way to communicate. Since 2008, the number of AmLaw 200 firms that sponsor legal blogs has grown by an astonishing 200%. Nine of Delaware's legal bloggers share their experiences, offering some insight into the dedication that blogging requires and the rewards that can follow.

Finally, the results of the first Delaware Legal Technology Survey offer a glimpse into the specific ways in which firms of all sizes across the State are putting technology to work.

Margaret M. DiBianca

The Editorial Board notes with sadness the recent passing of Carroll F. Poole, a member of the Delaware Bar and Chairman of the Board of Editors of *Delaware Lawyer* magazine from 1989 until 1991.

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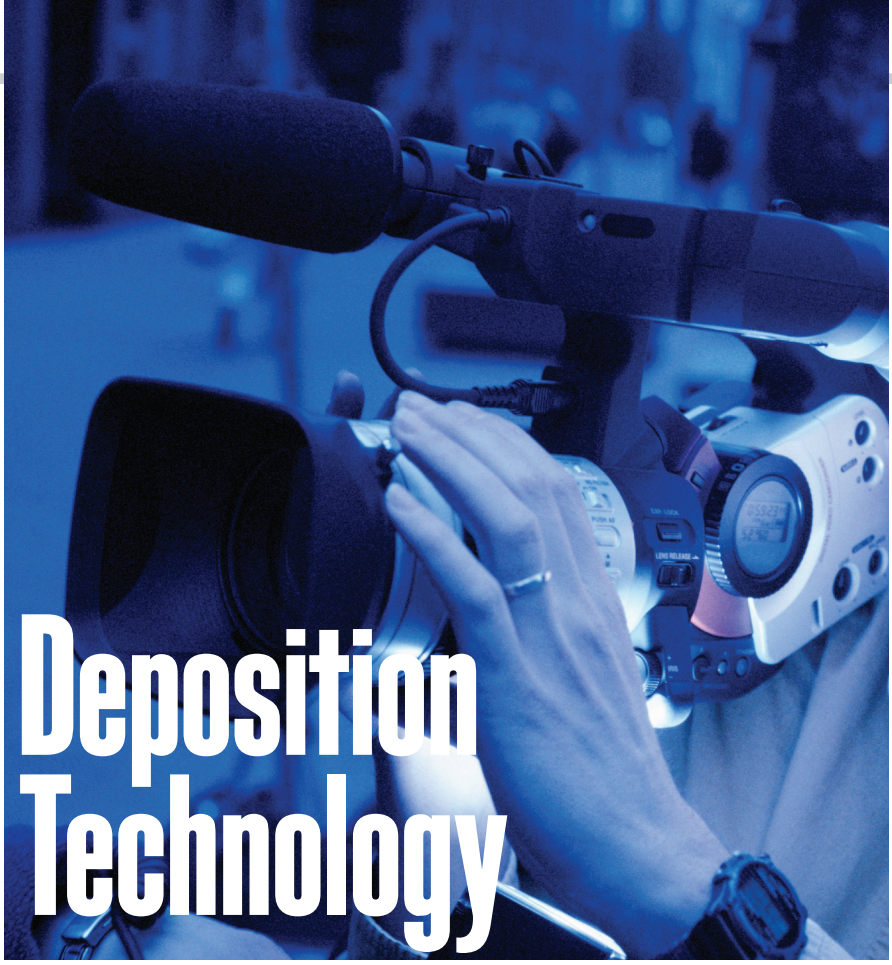
Richard P. Rollo



Practical Tips for Deposition Technology

Videotaping depositions and receiving real-time transcript feeds can yield big benefits when used smartly.

As an admitted technophile, I tend to adopt litigation-support technology sooner, and utilize it more often, than my colleagues. Even for the technology novice, certain litigation-support technologies have become standard in Court of Chancery practice. This is particularly true with depositions.

Technology is integrated with deposition practice in at least two ways. First, the videotaped deposition has become commonplace. Second, most court reporters can now provide a real-time feed of the transcript to assist both the examiner and counsel for the deponent.

While these technologies are certainly not "new," they have not yet been adopted by many practitioners. In this article, I offer some observations and practical tips derived from my use of these technologies over the past several years.

Why Videotape Your Depositions?

I am a strong proponent of videotaping depositions.

While some attorneys may videotape depositions to make deponents feel uncomfortable or to keep their opposing counsel in check, I use them to "pan for gold." By that, I mean that I am trying to capture a few snippets of videotape that can be used to define the deponent.

I look for a telling facial expression, a voice inflection, an emotional response, an extended pause when answering a difficult question, or other non-verbal cues that would not typically be captured by the court reporter. These snippets, when used effectively, can materially influence the outcome of a case.

For example, I remember a case involving a dispute about whether an individual had received a document. At deposition, the individual was shown a Federal Express delivery confirmation

signed by his receptionist and asked whether, in light of the confirmation, it was still his contention that he had not received the document.

The individual admitted that he had no reason to believe that he had not received the Federal Express package, but then smiled and claimed that he could not be certain that the package actually contained the document in question.

A typical transcript of the foregoing exchange would not have revealed the 20-second pause between my question and the individual's answer. Had I requested a deposition transcript with time stamps, it would have revealed the extended pause.

Yet, simply noting the length of the pause in a court submission or at trial would not have communicated its true impact. As an aside, I invite you to take out your watch and see just how long 20 seconds truly is. Thankfully, the deposition was videotaped.

When cross-examining a witness at trial using deposition testimony, the typical approach is to read the relevant testimony into the record from the transcript. When doing so, you may or may not have the full attention of the fact-finder, and your reading of the testimony may or may not be noteworthy.

However, using videotaped deposition testimony to cross examine a witness at trial is more memorable. The video clip is projected onto an oversized screen, and everyone in the courtroom usually stops what they are doing and watches the video.

Perhaps it is because the video clip breaks the monotony of live testimony, or because watching a video in court is still somewhat novel; but, for whatever reason, playing video clips of key testimony tends to capture the attention of the audience.

At trial, the deponent was called as a witness and asked whether he recalled suggesting that the Federal Express envelope might not have contained the document in question. He testified that he did not recall making such a suggestion, which permitted me to play the videotape for the court.

On video, the 20-second pause seemed even longer, as the judge, the lawyers, and everyone else in the courtroom waited silently for the deponent's answer. During that pregnant pause, everyone was focused on the witness' facial expressions, which spoke volumes about the sincerity of his ultimate answer. While I cannot be certain, I believe that those 20 seconds of silence helped define the witness for the judge.

Another benefit of using videotaped depositions at trial is that it makes it more difficult for the witness to dispute prior deposition testimony, which is being repeated by a larger-than-life, televised version of the witness. For some reason, the videotaped testimony seems more believable than the testimony given live.

The foregoing is not to suggest that videotaping depositions is necessarily appropriate or cost effective in every case. Videotaping depositions is expensive. Most of what is recorded will never be used because you are searching for just a handful of key video clips that can be played.

Also, to prepare an effective cross examination using videotaped deposition testimony, you will need trial presentation software to organize the video clips so that they can be played "on demand" at the direction of the cross examiner. With that said, videotaped depositions can be a powerful tool for cross examination at trial.

Dos and Don'ts for Real-Time Transcript Feeds

As noted above, another prevailing practice is to have the court reporter provide a real-time feed of the deposition transcript. Basically, your laptop is connected to the court reporter's stenography machine, which enables you to receive a rough draft of the testimony as it is being taken.

Admittedly, the quality of a real-time feed will vary depending upon various factors (*e.g.*, the subject matter of the deposition, whether the witness has an accent, etc.). However, in most instances the real-time feed is clear enough to be of substantial assistance.

As the attorney defending a deposition, you are able to read along with a real-time feed as the deponent testifies. This enables you to identify transcription errors, misspelling (*e.g.*, difficult names or terminology), and other, similar issues so that they can be resolved before the parties depart.

Also, because you are both hearing and seeing the transcript, you are better able to assess the questions being posed. You are able to read and consider the question as a whole. This enables you to identify flaws in the examiner's questions that you might otherwise miss.

In turn, you are better able to interpose objections, such as "asked and answered," and "misstates prior testimony." You also can scroll back in the transcript to see what the deponent said instead of working from memory or asking for it to be read back. I can think of no downside to utilizing this technology when defending depositions.

Some attorneys argue that real-time technology detracts from their ability to question a deponent effectively. As the examiner, you want to eliminate any distractions or barriers between you and the deponent. Your goal is to develop a rapport with the deponent, thereby converting the examination into a friendly conversation. If you are successful, then the deponent will be less guarded and more forthcoming with information.

Critics argue that, by shifting your focus to the laptop and away from the deponent, you are: (1) reminding the witness that they are in a formal setting, and (2) creating an additional barrier to the rapport that you are attempting to establish.

These concerns can be mitigated if the technology is used properly. Moreover, using real-time technology enhances your ability to conduct the

deposition examination.

Unlike when you are defending a deposition, your focus as examiner should not be on the deposition transcript that is being created. Rather, your focus should be on the witness. You should set the laptop off to the side, so that the real-time feed is available to you if you need it but does not create a barrier between you and the deponent. Referring to the laptop should be no more intrusive than checking your outline or looking at the next exhibit.

Because there is a real-time transcript, there is little need to take notes of the testimony during the deposition — an act that would otherwise draw your attention away from the deponent. If the deponent gives a long answer, you can simply turn to the laptop, point to something the witness said, and ask "In your answer, when you said __, what did you mean?" This approach has several benefits.

First, it forces you to read the witness' longer answers and thereby determine whether there is anything that you want to follow up on.

Second, it reduces the potential objections that can be made by the defending attorney. If you quote the deponent's answer as part of your question instead of paraphrasing it, there is little room for a misstates-prior-testimony objection from opposing counsel.

Third, having the real-time transcript allows you to "self-monitor" the quality of your questions and correct them if an objection is made.

Fourth, and perhaps most beneficial, a real-time transcript enables you to quickly determine whether an answer is sufficiently responsive to your question.

Most of the real-time programs allows you to "mark" testimony as you proceed. In essence, you press the space bar (or some other key) to highlight or bookmark the current line of testimony, making it easy to locate later.

I have seen this feature misused by those who tap repeatedly at the spacebar at key times. This sends a signal to the deponent that his testimony is either important or a mistake. If the deponent has been prepared to spot this "tell," he may stop his response or, worse yet, consider rephrasing his testimony.

If you intend to utilize this functionality to mark important testimony, be discrete. You only need to mark one line of testimony by hitting the button only once to achieve your purpose.

And, remember, you do not have to refer to the real-time transcript with every question or answer. You can use this tool as often or as little as you feel comfortable. Simply having the capability to do so should enhance your deposition examinations. ◆

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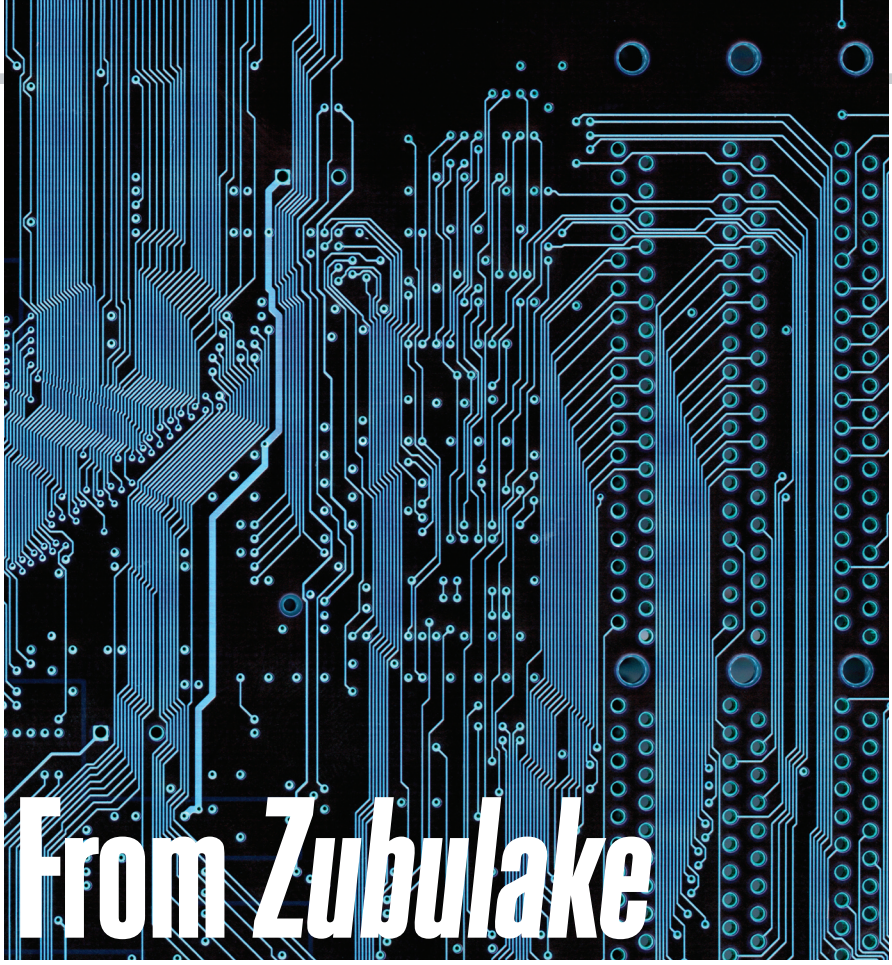

Forward From *Zubulake*

A careful and thorough approach to electronic discovery can avoid devastating results for your clients and you.

From videoconferencing to telecommuting to the BlackBerry that never stops buzzing, the technological revolution has impacted lawyers' professional and personal lives in countless ways. Among other things, increased reliance on technology by clients has led to an explosion in discoverable material and has forever altered the way lawyers approach discovery.

The document review experience, for example, is different now in light of technology than it was earlier this decade. Many of today's partners still tell document review "war stories" of paper cuts and late-night takeout food in windowless conference rooms packed with cardboard boxes.

Tomorrow's partners, however, will tell stories of sitting in front of their monitor, reviewing a seemingly endless stream of e-mails and other electronic material, and worrying about how to treat "family groups."[1]

Understanding Electronically Stored Information

What constitutes discoverable information is also different than it was before. Electronically stored information (ESI) can involve vast amounts of information in a variety of formats. As noted in a handbook designed to assist judges, ESI potentially includes, among other things: e-mails, webpages, word processing files and databases stored in the memory of computers, magnetic disks (such as computer hard drives and floppy disks), optical disks (such as DVDs and CDs), and flash memory (such as "thumb" or "flash" drives).[2]

This information can be found in multiple locations, such as a local server in a company's office, an off-site server, backup tapes, or optical or magnetic disks. ESI may also be found on personal laptops, home computers, or hand-held electronic devices, and may involve numerous drafts of the same document.[3]

Experts have estimated that the

average employee sends or receives 50 electronic messages per working day.[4] Depending on the number of custodians and the time frame requested, this means that thousands, if not millions, of potentially discoverable e-mails may exist.

The proliferation of ESI also raises a number of document-preservation issues. As one commentator noted, "although the possibility that paper documents may be damaged, altered, or destroyed has always been a concern, the dynamic, mutable nature of ESI presents new challenges."[5]

ESI may be lost through automatic purging and recycling of memory space on company servers or backup tapes. Thus, critical ESI could be lost without the knowledge or intent of the custodial party.

As the courts begin to weigh in on the potential ramifications for failing to properly preserve ESI, one thing is clear — failure to take timely steps to preserve ESI can lead to unexpected consequences for both client *and counsel*.

The cases also make clear that being proactive, communicating with your clients[6] and opposing counsel,[7] and staying alert to new trends and ESI decisions will go a long way toward protecting the interests of all involved.[8]

Lessons from *Zubulake:* The Seminal Case on Spoliation

The seminal case that addresses the importance of preserving ESI is *Zubulake v. UBS Warburg LLC,*[9] which imposes rigorous requirements on counsel and clients to ensure that relevant documents are preserved and produced, particularly in the context of e-mails and other electronic documents.

These obligations go beyond an initial instruction to preserve documents, and require the implementation and maintenance of a document retention policy that includes periodic reminders to those responsible for preserving documents.

The issue, as framed by the court, was whether the defendant "failed to preserve and timely produce relevant information" and if it did, whether it acted "negligently, recklessly, or willfully?"[10]

The opinion specifically addresses the discovery of electronic documents, hard copy files, and backup tapes maintained by IT personnel. The Court required that such discovery materials not be deleted, and that any document destruction policies that may apply to those documents be suspended.

As explained in the background section of the ruling, promptly after plaintiff filed an administrative complaint, UBS's in-house attorneys orally instructed employees not to destroy or delete material potentially relevant to the plaintiff's claims and to put any such material into separate files for counsel to review.[11]

Shortly thereafter, outside counsel for UBS reinforced the instructions, reminding them to preserve relevant documents, "including e-mails." After plaintiff propounded a document request for e-mails stored on backup tapes, UBS's outside counsel instructed UBS's information technology personnel to stop recycling backup tapes.

But, by this time, more than a year had elapsed since litigation became foreseeable. Despite the diligent efforts and repeated warnings of counsel, the court held that UBS's document preservation strategy resulted in the deletion of e-mails by employees, the loss of backup tapes, and withholding of relevant information until two years after the initial request was made.[12]

The court noted that counsel's initial obligation is "to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information," and a client's obligation is to "heed" the instructions given.[13]

The first step in ensuring that such information is preserved is to communicate with a client (preferably in writing) about such issues as soon as possible after being engaged. Counsel should instruct their client to place a "litigation hold" on all material from potentially relevant custodians. If a party reasonably anticipates litigation, or if litigation has already commenced, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" policy to ensure that relevant documents are preserved, including backup tapes that are actively used for information retrieval.[14]

Simply notifying all employees of a "litigation hold" is not enough to meet the standard in *Zubulake*. Counsel and client must take additional affirmative steps to monitor compliance and ensure that all sources of potentially relevant information are identified and retained. The Court provided guidance on the steps that counsel must take to satisfy their e-discovery obligations:

> [C]ounsel must become fully familiar with a client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information.... Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected.[15]

Other means of ensuring compliance may include: sending out reminders about the "litigation hold" on a periodic basis; instructing employees to produce electronic copies of all relevant active files; and/or identifying and storing backup media.[16]

The court noted that it did not expect perfection in locating additional sources, but reasonable steps must be taken to locate such evidence.[16]

Zubulake-Approved Sanctions

The appropriate sanction for any spoliation of evidence is in the discretion of the trial judge and may include the following: default judgment; fines; and/or an adverse inference instruction to the finder of fact. Mere negligence or

recklessness can be enough for a judge to mete out these sanctions, if plaintiff can show the material is relevant. A showing by plaintiff that the acts were willful will lead to a conclusive presumption of relevance.[17]

The court in *Zubulake* determined that several sanctions were warranted, including an adverse inference instruction with respect to the lost/deleted emails; and order to pay the costs of any depositions required by late production, the costs of plaintiff's motion, and the costs associated with restoring back-up tapes.[18]

Zubulake is notable because counsel attempted to ensure that relevant information was preserved from the outset of litigation. The failure of counsel in *Zubulake* did not represent a complete inattention to the discovery process, but rather counsel's belief that instructing a client to preserve documents at the outset of litigation was sufficient.

As the court made clear, continued diligence is required to ensure that documents are preserved and compliance with discovery obligations is achieved.

Spoliation in the Delaware Courts

The principles of *Zubulake* have been applied in Delaware, in both State and Federal courts. The Delaware Court of Chancery recently addressed preservation and spoliation of e-discovery evidence in *Beard Research, Inc. v. Kates*[19] and *TR Investors, LLC v. Genger*. The District Court ruled on e-discovery issues in *Micron Technology, Inc. v. Rambus, Inc.*[20]

Beard Research, Inc. v. Kates

In *Beard Research*, Vice Chancellor Parsons addressed a party's request for sanctions for alleged spoliation of ESI. The underlying claims alleged misappropriation of trade secrets, tortious interference with business relations, and breach of contract claims raised by Plaintiffs against a former employee (Kates) and two of his subsequent employers. Shortly before the trial on the merits of the case, the Court heard oral argument on Plaintiffs' motion for sanctions.

Plaintiffs claimed that Kates' laptop was irretrievably altered after a duty to preserve had arisen and that Kates and his subsequent employers were responsible for the alteration. Kates used the laptop for business purposes at his old and new jobs and used it to store relevant information, including a presentation that may or may not have included Plaintiffs' proprietary information.

After litigation began, Kates resisted producing his laptop in response to Plaintiffs' discovery requests despite the filing of three motions to compel. Along the way, Kates deleted files from the laptop, and also reformatted the laptop's hard drive with the understanding that this could wipe out old data.

At one point, after the laptop crashed, Kates gave it to his new employer's in-house technology expert to see if it could be fixed. The expert determined the hard drive could not be fixed and replaced it. He then returned the old hard drive and the laptop to Kates, who thereafter misplaced the old hard drive. Thereafter, the new hard drive in the laptop stopped working. Kates removed it from the laptop and put it in a drawer.

Kates' counsel expected that the Court would order the laptop to be produced at the hearing on Plaintiffs' third motion to compel. Kates re-installed the hard drive the day before the hearing, and turned it over to his counsel.

After the Court ordered the laptop be produced, Plaintiffs' technology experts determined that Kates had deleted many relevant files, including the presentation that Kates made to one of his subsequent employers that may have contained Plaintiffs' proprietary information.

The Court noted that "[a] party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit. Whether a person has reason to anticipate litigation depends on whether the facts and circumstances . . . lead to a conclusion that litigation is imminent or should otherwise be expected."[21] The Court further noted that it had the discretion to sanction a party who breaches this duty by destroying relevant evidence or by failing to prevent the destruction of such evidence.

Plaintiffs sought sanctions for Kates' conduct in the form of a default judgment or, in the alternative, asked the Court to draw a negative inference. Plaintiffs also sought attorney's fees and expenses in connection with its motion for sanctions. The Court declined to grant a default judgment but granted in part Plaintiffs' request for an adverse inference.[22]

The Court explained that "drawing an adverse inference is appropriate when an actor is under a duty to preserve evidence and takes part in the destruction of evidence while being consciously aware of a risk that he or she will cause or allow evidence to be spoiled by action or inaction and that risk would be deemed substantial and unjustifiable by a reasonable person."[23]

Applying this standard, the Court concluded that "it is appropriate to draw an inference against the defendant" for failing to preserve his original hard drive and to further sanction that defendant for deleting documents. The Court further found that the defendant knew of and consciously disregarded his duties to preserve evidence.

Thus, the Court drew an adverse inference against Kates and his subsequent employers that the presentation containing a catalog of compounds included information taken from Plaintiffs' catalog. The Court also left open the possibility of drawing other adverse inferences after the completion of post-trial briefing on the underlying substantive issues in the case.[25] Finally, the Court awarded Plaintiffs attorney's fees and expenses associated with the motion for sanctions.

Also notable in the *Beard Research* decision is the Court's comment that, in addition to communicating with one's own client, attorneys should begin an early dialogue with one another to quickly resolve any e-discovery disputes

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and ensure that valuable information is not inadvertently lost.

Although the Court stated that the parties were free to "reach agreements recognizing and permitting routine destruction of certain types of files to continue during litigation," failing to communicate would not be overlooked in the event of a later dispute. The Court stated:

> [I]f the parties do not focus on the handling of e-discovery in the early stages of a case, the Court is not likely to be sympathetic when, for example, one party later complains that stringent measures were not instituted voluntarily by her adversary to ensure that no potentially relevant information was lost.

Micron Technology, Inc. v. Rambus, Inc.

The United States District Court for the District of Delaware also has come down strongly against parties that did not properly preserve evidence.

In *Micron Technology, Inc. v. Rambus, Inc.*,[26] the court, presiding over a patent dispute, relied upon *Zubulake* to impose harsh penalties against the defendant, who was found to have destroyed relevant documents after litigation had become reasonably foreseeable, but before litigation commenced.

Among other things, the court found that, for more than two years after litigation became foreseeable, the defendant shredded material documents and purged hard-copy and electronic patent files, as well as e-mails.[27] In some cases, these purges resulted in the destruction of the only available copies of documents.[28]

Ultimately, in light of the defendant's conduct, the court held that the appropriate sanction for the spoliation was to declare the patents in the suit unenforceable against the plaintiff.[29]

TR Investors, LLC v. Genger

The Court of Chancery levied significant sanctions for e-discovery violations in *TR Investors, LLC v. Genger*, which was decided in December 2009. The Court found that a party intentionally erased potentially relevant ESI with sophisticated "wiping" software. Relying on *Beard Research* and *Triton*, the Court found that the conduct violated the standing status quo order, warranting sanctions for both contempt and spoliation.

The "stringent" sanctions included (1) requiring the party to produce certain documents to which he may otherwise have been able to claim privilege; (2) elevating the burden of persuasion for any defenses or counterclaims that he intended to raise; (3) preventing him from prevailing on any factual issue where the only evidence introduced on the issue was his own testimony; and (4) paying at least $750,000 in attorney's fees and expenses to the plaintiff's counsel.

The Court held that, "[e]ven if [the defendant] did not act with malevolent intent to limit the universe of evidence available to [the opposing party], he was certainly reckless in charging [his technical advisor] to erase all the information of the unallocated space of [the company's] computer system in the face of pending litigation and a judicial order not to destroy or tamper with [the company's] information."

The Court further stated that, if the defendant "believes that running wiping software without advice of counsel or court permission in this context does not constitute recklessness, he has an unusual dictionary. The law uses a more traditional lexicon." This opinion is a powerful example of the perils of intentionally spoiling electronic evidence.

Other Lessons For Counsel: *Qualcomm, Inc. v. Broadcom Corp.*

These cases are examples of Delaware courts relying on the opinion in *Zubulake* to impose sanctions against a party that fails to properly preserve relevant ESI. Such a result can, of course, be devastating for a client. The possible repercussions for an attorney who does not diligently observe ESI obligations, however, go beyond the concern of losing a case.

In *Qualcomm, Inc. v. Broadcom Corp.*,[30] the United States District Court for the Southern District of California found that Qualcomm had violated its discovery obligations by failing to produce over 46,000 e-mails that were requested in discovery and that Qualcomm had agreed to produce.

As a result of this "monumental and intentional discovery violation," the court ordered Qualcomm to pay Broadcom more than $8.5 million in attorney's fees and costs.[31]

In addition, six of Qualcomm's attorneys were sanctioned and referred to the California state bar for disciplinary proceedings. The court held that, while there was no evidence that Qualcomm's outside counsel worked in conjunction with the company to commit such a massive discovery violation, it was likely that Qualcomm's counsel "chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate [and] not to press Qualcomm employees for the truth."[33]

The court sanctioned the attorneys who handled or supervised Qualcomm's discovery responses and production of documents for failing to conduct a reasonable inquiry into Qualcomm's electronic files using search terms that were fundamental to the issues in the case.[34]

The court also sanctioned those attorneys who discovered the existence of certain e-mails that had not been produced and failed to inquire as to whether any additional such e-mails existed, and those who made factual and legal arguments to the court without conducting a reasonable inquiry into Qualcomm's document production.[35]

As these cases make clear, paying close attention to ESI preservation obligations is critically important. Though there is no blueprint for ensuring that preservation obligations have been satisfied, all of these cases make clear that counsel and client must be proactive and attentive when it comes to preserving ESI.

An attorney who fails to adequately work with clients to ensure that discovery obligations are met puts his client at risk of an adverse inference and puts himself at risk of sanctions.

For these reasons, being proactive, communicating often and early with both client and opposing counsel about preservation issues, and staying alert to new trends and decisions are the absolute necessities in the modern world of discovery. ◆

FOOTNOTES

1. A "family group" is another way to describe an e-mail with attachments.

2. Barbara J. Rothstein, Ronald J. Hedges & Elizabeth C. Wiggins, Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, 2007, p.2.

3. A recent ruling suggests that information stored on hand-held electronic devices (such as a BlackBerry) must be preserved, and that failure to do so can lead to an adverse inference based on spoliation of data. *Southeastern Mech. Servs., Inc. v. Brody*, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009).

4. Rothstein, p. 3.

5. *Id.*

6. A recent Court of Chancery opinion suggests that merely inquiring into a client's document retention and e-mail communication practices is insufficient to determine if relevant electronically stored information exists and that some inquiry must occur with respect to the content of electronically stored information itself. *Grace Bros., Ltd. v. Siena Holdings, Inc.*, C.A. No. 184-CC, 2009 WL 1547821 at *1 (Del. Ch., June 2, 2009).

7. Discussing electronic discovery issues with opposing counsel is not only prudent, it is required in many jurisdictions and is also required under Rule 26(f) of the Federal Rules of Civil Procedure. To date, no analogous provision exists in the Court of Chancery Rules but, in light of the movement toward communicating on such issues with opposing counsel, it is reasonable to expect such a rule may develop in the near future.

8. An excellent starting point on this subject is *The Sedona Principles*, which provides "best practice" recommendations for numerous issues relating to electronic discovery. The Court of Chancery has indicated that it would "tak[e] into account" the *Principles* when ruling on electronic discovery issues. *Beard Research Inc. v. Kates*, C.A. No. 1316-VCP, 2009 WL 2997984, at *7, n.66 (Del. Ch., May 29, 2009). More information about the work of the Sedona Conference is available at http://www.thesedonaconference.org.

9. 229 F.R.D. 422 (S.D.N.Y. 2004).

10. *Id.*

11. *Id.* at 425.

12. *Id.* at 429.

13. *Id.* at 424.

14. The Court of Chancery has indicated that it may require a party to search backup tapes should it appear likely that backup tapes contain relevant data that cannot be accessed from another source. *Omnicare, Inc. v. Mariner Health Care Mgmt Co.*, C.A. No. 3087-CN, 2009 WL 1515609 at *7 (Del. Ch. May 29, 2009).

15. *Zubulake*, 229 F.R.D. at 432.

16. *Id.* at 432.

17. *Id.* at 431.

18. Other courts have imposed similar sanctions based on similar facts. *See Metro. Opera Assoc., Inc. v. Local 100, Hotel Employees Int'l Union*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003) (ordering default judgment against defendant as a discovery sanction); *United States v. Phillip Morris USA Inc.*, 371 F. Supp. 2d. 21, (D.D.C. 2004) (granting motion for sanctions where defendants' employees deleted emails in violation of employer's retention policies, precluding any person who failed to comply with the document-retention program from testifying as a witness and ordering monetary sanctions of more than $2 million).

19. C.A. No. 1316-VCP, 2009 WL 2997984 (Del. Ch. May 29, 2009).

20. 255 F.R.D. 135 (D. Del. Jan. 9, 2009).

21. *Id.* at *5.

22. *Id.* at *10-11.

23. *Id.* at *11.

24. *Id.*

25. In another recent opinion, the Court drew an adverse inference with respect to the contents of missing evidence based on the fact than an employee "intentionally or recklessly" failed to preserve a thumb drive and home computer. *Triton Constr. Co., Inc. v. Eastern Shore Elec. Servs., Inc*,. C.A. No. 3290-VCP, 2009 WL 1387115 (Del. Ch. May 18, 2009).

26. 255 F.R.D. 135 (D. Del. Jan. 9, 2009).

27. In fact, the defendant's document-destruction efforts included "shred days" when employees destroyed nearly 700 banker's boxes of documents.

28. *Id.* at 144.

29. *Id.* at 151.

30. 2008 WL 66932 (S.D. Cal. 2008).

31. *Id.* at *9.

32. *Id.* at *17.

33. *Id.* at *13.

34. *Id.*

35. *Id.* at *13-14.

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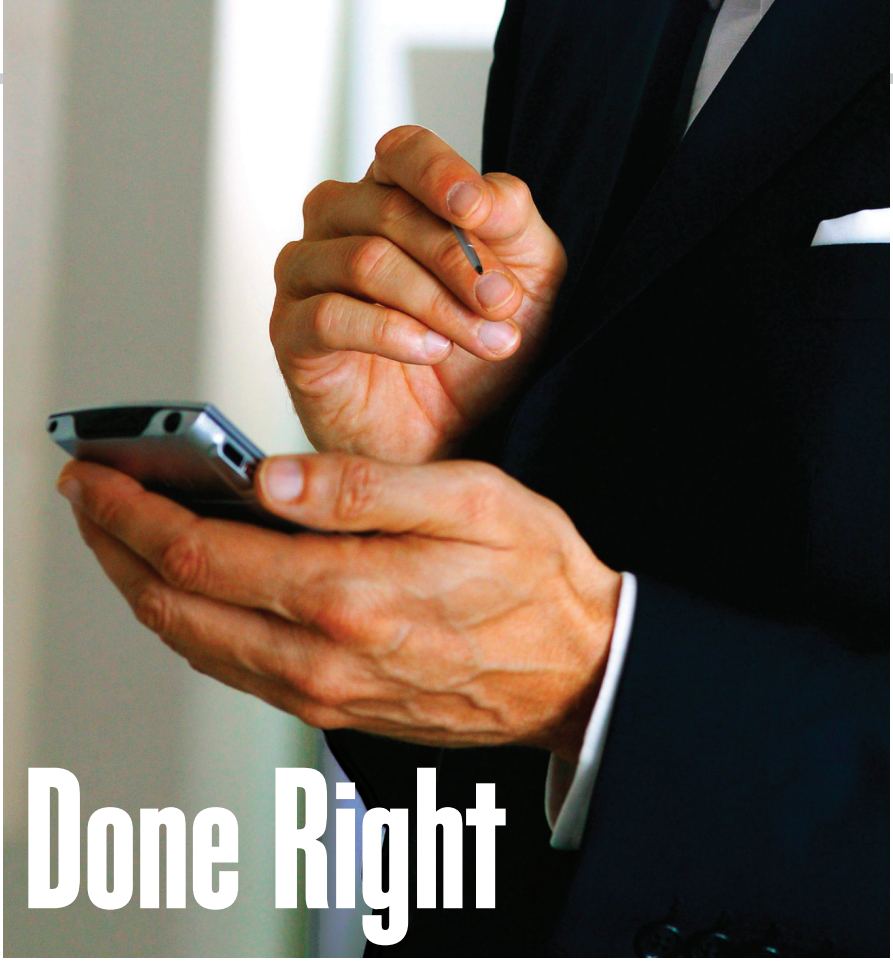

Digital Ink Done Right

Law firms can minimize risk, confusion and embarrassment by setting style and usage rules for professional e-mail.

E-mail is the most frequently used method of communication in the modern law office.[1] Throughout the day, we e-mail clients, co-counsel, opposing counsel, colleagues and co-workers. We even send e-mails to people who sit in neighboring offices or right outside our door. Just think about the number of e-mails you receive in a typical day as opposed to the number of letters or phone calls.

The popularity of e-mail can be explained, in large part, with an examination of the medium's many benefits. For example, e-mail provides a way to share information with multiple people simultaneously, thus minimizing the need for duplicative and repetitive communications.

E-mail also can reduce the bothersome game of phone tag, thereby giving its recipient the opportunity to respond at a time convenient to him or her.

Furthermore, e-mail enables workplace mobility. Users can "talk" to one another without regard to the particular time zone in which they are located, and the need for meetings where the only purpose is to share information is eliminated.

Additionally, internal communications can be made quickly, enabling colleagues to share information without the formality of letter or memorandum.

Finally, e-mail provides a written record of decisions made and agreements reached. This is a particularly compelling benefit given the nature of our profession.

But, as with any powerful tool, e-mail also is fraught with associated risks and inherent dangers. For example, the potential for misunderstandings is greatly enhanced by the absence of body language, facial expressions and vocal tone that would otherwise provide important social clues.

Further, poorly drafted e-mail can

reduce, instead of enhance, productivity by muddying the intended message. The risk of lost professional credibility inherent in an e-mail that contains errors in grammar, usage or spelling, or is written in an inappropriate tone or style, should be of primary concern to the lawyer and his firm.

Standard telephone etiquette long has been a routine component of workplace training. But e-mail etiquette (*i.e.*, "netiquette") is not yet a part of most firms' training programs. Despite e-mail's potential dangers and the frequency with which we use it, most firms do not have a style guide or provide best practices to users.[2]

The typical firm has, at most, a standard confidentiality statement that is automatically tacked to the end of every e-mail, along with a stern (and routinely disregarded) warning not to use the firm e-mail system for personal business.

Given the lack of firm-wide guidelines and the absence of any meaningful training, we can hardly claim surprise when lawyers and staff send e-mails that are sloppy, overly chummy, unintentionally rude, or incomprehensible.

A well-planned style guide can help guard against the potential perils of e-mail.[3] When properly disseminated, it can help new hires develop professional e-mail habits. It can also remind more experienced personnel of what constitute best practices when composing electronic correspondence.

In the sections that follow, we provide practical tips to consider as your firm creates a style guide of its own or just the next time you're inclined to press "send."

A Malleable Medium: Audience Matters

E-mail presents particular challenges because it is used in such a wide range of contexts. At its most formal, e-mail can almost take the place of a letter. But e-mail also serves for extremely informal communications, the kind that could just as well be made by a quick phone call. The different e mailing styles appropriate for more and less formal situations need to be understood for firm personnel to avoid pitfalls.

One way to view the different styles is in terms of how the recipient stands in relation to the writer. For example:

Most formal style:

- where the recipient is unknown to the writer (*e.g.*, a client or attorney one has not previously met)
- where communication with the recipient is governed by procedural rules (*e.g.*, communicating with opposing counsel regarding a pending matter)

Moderately formal style:

- where the most formal style is not called for, but the recipient is not a peer or close friend (*e.g.*, a person substantially older or more senior in the firm who is not a close friend)

Least formal style:

- where the recipient is a peer or, if not a peer, is a close friend (*e.g.*, communication between associates, between partners, or between an attorney and a client who is also a friend)

To use e-mail effectively, firm personnel need to understand that one size does not fit all. A closing or turn of phrase that would be perfectly appropriate, and perhaps even advisable, when e-mailing another attorney at one's level of seniority could be insulting to a client or a senior partner.

Importantly, moreover, a substantial difference in seniority or age can call for increased formality even when the sender is older or more senior than the recipient, rather than vice versa. We cannot assume that a person much lower in the pecking order will welcome "down-stream" informality, particularly if there's any doubt that informality would be welcomed in the opposite direction.

The Postcard Predicament

With one's audience in mind, the next question should be whether an e-mail is an appropriate choice at all. For example, complex information should not be sent in an e-mail because it is not likely to be given the attention it requires. Sensitive information also should not be communicated with e-mail. Bad news should be given in person, as should personnel discipline and performance counseling. Keep in mind the public outcry when, in 2006, RadioShack laid off 400 employees via e-mail.[4]

There is a helpful litmus test when considering whether e-mail is an appropriate medium. E-mail is the electronic equivalent of a postcard. If you were sending your message through the postal service, would a postcard or a letter in an envelope be more suitable? If a postcard would suffice, then an e-mail is likely a safe choice.

Recipients and Subject Line

Who will receive your message may seem to be an obvious consideration. After all, we decide to send an e-mail *to* someone, not *about* something. Without the "someone" in mind, there would be no reason to consider crafting an e-mail at all. In fact, however, the matter of recipients is a bit more nuanced than that.

These nuances are reflected in the sheer number of options. The standard e-mail message provides for three different categories of recipients — a "To" category, a "Cc" (carbon copy) category, and a "Bcc" (blind carbon copy) category. These categories are often misused due to a misunderstanding of their varied purposes.

The e-mail should be addressed to (*i.e.*, those in the "To" category should include) only those from whom you want a response. An individual in the "To" category should be expected to take some action as a result of your message.

If, on the other hand, no action is being requested, the individual should be moved to the "Cc" category. You "Cc" a recipient only because you want her to be kept up to date — not because you expect or desire some additional action. In other words, a message sent to a recipient in the "Cc" category is the equivalent of an electronic "FYI."

Do Not Mourn the Death of Bcc

The proper purpose of the "Bcc" category is not so simply described. Although reasonable minds may differ, we believe that the only time the

"Bcc" function should be used is to copy someone internally, such as a legal assistant, for a reason other than communicating the message (*i.e.*, for filing). To "blindly" copy someone for other purposes, simply forward a copy of the message after it has been sent.

The reason for this perhaps brazen suggestion is the false sense of security offered by the "Bcc" function. To test the idea, send a test e-mail to a colleague and "Bcc" your assistant. Ask your assistant to "Reply to All." You may be surprised to see that her reply and the fact that she had been "blind copied" on the original message is revealed to you and your colleague.

Another trap — one that practitioners seem to be falling into more and more often — involves the "AutoComplete" function in Microsoft Outlook and some other e-mail programs. As you type in the first two or three letters of a recipient's name, the software automatically completes the rest of the name with the closest equivalent in its "memory." Often, however, the software guesses wrong without your realizing it, and you unwittingly send your e-mail to the wrong person. This error not only can disclose client confidences but also can result in the intended recipient's never getting the message, if the mistaken recipient does not notice the wrongly sent e-mail and advise you of it.

The Importance of *"Re:"*

As many a litigant has learned to his chagrin, e-mail is forever. E-mail is stored, filed, searched and produced in discovery. Ideally, e-mail not only is free of unprofessional and inappropriate material but is composed in such a way that it will be of maximum utility in the future.

Users should be cautioned not to underestimate the importance of an e-mail's subject line. It is the first thing that, after the sender's name, the recipient of the message will see. It also is critical to the continued utility of the message. Without an informative subject line, an e-mail is easily lost in the vast morass of electronic data that resides on our computers.

An effective subject line accurately identifies the case or matter it pertains to and its topic. It should, in short, be short. Leave out unnecessary words and, if your message includes multiple topics, consider sending separate messages instead.

The perfect e-mail subject line summarizes the message's bottom line. If you want the recipient to take some action, that action should be the first word in the subject after the case or matter is identified. To better understand the power of an effective subject line, compare the examples below.

Before: Urgent
After: Gambini: Received counter-offer from opposing counsel

Before: Tomorrow
After: Gambini: Confirm client mtg. Wed. 9 a.m. *re:* counter-offer

Before: Quick question
After: Gambini: Move Wed. meeting to 11 a.m.?

Before: Meeting
After: Gambini: Directions to Wed. meeting attached

Thus, when replying to an e-mail, do not automatically recycle the subject that the sender used. Often, the sender will not have provided a helpful subject — writing simply "Question" or "Draft." Change such vague subject lines to state first the case and then the topic: "Gambini — Question about contempt."

One question for your firm to consider is the use of acronyms in subject lines. Productivity experts advocate the use of acronyms to help readers quickly determine what action, if any, they are expected to take. Examples include:

- RRR: Read, review, and respond
- NRR: No reply required
- AR: Action required
- RR: Reply requested
- EOM: End of message

An e-mail with "EOM" included in the subject line warns its readers that the subject line *is* the message and that they need not open the message at all because it contains no additional text. The usefulness is easily understood if you consider a message with the subject line: "Reminder: Meeting today at noon in Room 100. EOM." Readers know that no additional information is contained in the body of the message.

The trouble with acronyms, of course, is that they are counter-productive unless the reader understands their meaning. Whether their use should be encouraged or prohibited is a decision to be made on a firm-wide basis.

An advisable middle-of-the-road option is to recommend the use of acronyms but only for internal e-mails, where the firm can ensure that all recipients are versed in the acronyms' meanings and purpose because they will have read the firm's style guide and received best-practices training.

The subject line becomes especially important when the same e-mail thread has ranged over a variety of topics. A subject line that may have started as an accurate statement of content can become completely inaccurate after several replies back and forth, as the topic moves from the date when answers are due, to the pro hac rules, to whether the client wants to review briefs, to how much of the retainer is left.

If all of these e-mails say "Response date" in the subject line, it will become much more difficult later to put your hands on the one e-mail in which you were given the name of the client contact who is to receive advance drafts of all court filings.

Another practice that can keep e-mail threads from becoming useless is to begin the text of each response with the name of the person or persons addressed. Unless the thread is between only two people, the person(s) addressed may change from one response to the next. The primary addressee may sometimes appear in the "cc" line rather than the "to" line, contrary to the expectations of future readers.

Making clear who is being addressed at each step in the thread will save your current and later audiences' time in deciphering what is meant.

Hello and Goodbye: Salutations and Closings

Above we mentioned the usefulness of beginning the body of an e-mail with the primary addressee's name when an

e-mail is sent to a group. A salutation that names the addressee is also an important feature of all formal e-mails.

The most formal salutation is the same as one would use in a letter, *e.g.*, "Dear Ms. Jones:" or "Dear Harry:" by itself on the first line. Older people tend to address anyone they have not previously met by title and last name, and then either request permission to use first names or wait to see how the addressee signs off in response. Younger people seem to be more comfortable using an addressee's first name from the start.

A less formal opening consists of only the addressee's first name, without a salutation ("Cynthia: . . ."). Least formal is omitting an opening altogether and launching immediately into one's message. This last style is usually unobjectionable between peers (assuming there is no risk of confusion about who is being addressed), or within a series of e-mails going back and forth like two sides of a conversation.

However, personnel should be made aware that omission of the addressee's name can come off as rude in other settings. An e-mail from an attorney to a paralegal that says simply, "Did you send out the escrow agreement?" has a connotation very different from an e mail containing the same text but opening with the paralegal's name.

Closings also present a range of choices, some more formal than others. Bryan Garner, in his *Dictionary of Modern Legal Usage* (2d ed. 1995), includes the following options in his list of complimentary closings to letters, presented in order of decreasing formality:

- Yours very truly (or Very truly yours)
- Yours truly
- Sincerely (or Sincerely yours)
- Best wishes (or Best regards)
- Regards
- Best

"Thanks" should also be included as one of the less formal closings, for use when an e-mail makes a request of the addressee. As with many policies, the best guidance may be given by explaining what users are expected *not* to do. For example, do closings such as "Cheers," or "All the best!" accurately portray your firm's desired image?

As with openings, the least formal choice is omission of a complimentary closing entirely, and possibly the sender's name as well. While omission of both the closing and the name can come across as dismissive, it is not as jarring to most people as the omission of an opening. Therefore, users should be instructed to include a closing of some sort in every message.

Every e-mail to someone outside the firm should end with the sender's contact information and (in most cases) a confidentiality statement.[5] The contact information should include the sender's full name, firm name, mailing address, phone and fax numbers, and e-mail address. It is customary not to include the suffix "Esq." on an attorney's name when he or she is the sender.

In order to avoid clogging up in-house e-mails or long threads among the same participants, you may want to give users the option of omitting the confidentiality statement.

Getting to the Point: The Body of the Message

For reasons unknown, users tend to view electronic communication as more informal than is appropriate. This casual approach translates into an overall carelessness, which leads to errors big and small. E-mail should be written with the same attention and consideration given to correspondence sent on firm letterhead.

Proofreading an e-mail before sending it, for example, may seem as alien to some as looking up the name of Grover Cleveland's Secretary of State in a hardbound encyclopedia. Users will need to be told, therefore, that in all but the most informal settings, e-mail must be drafted, edited and proofread just as carefully as a letter.

Typos and grammatical errors are no less embarrassing to the firm, and harmful to one's reputation for professionalism, because they appear in an e-mail.

Another bad habit that can result from years of texting and instant-messaging is the failure to provide full information to the recipient. Time permitting, an e-mail should be reviewed not only for typos but also to make sure that all necessary information is provided and that any likely sources of misunderstanding have been corrected. As with any other business writing, the sender should anticipate the reader's questions and keep the reader's, not the writer's, convenience foremost in mind.

Formatting for Effectiveness

People tend to scan e-mail, instead of reading it word for word. Authors should consider this fact when drafting their messages to ensure that the desired information is received. The single most important way to ensure optimum effectiveness is by keeping the e-mail short and to the point. Complex, lengthy discussion is best left for more formal channels.

Not only should the overall message be brief but so should the paragraphs and sentences within the message. Additionally, the use of bullets and headings is an effective way to highlight important information and quickly convey key points. The quintessential sign of a poorly drafted e-mail is the overuse of run-on sentences punctuated only by multiple ellipses, written in a stream-of-consciousness style.

Finally, good e-mail etiquette dictates that certain formatting should be avoided altogether. For example, normal sentence capitalization should always be used, not "ALL-CAPS" or all lowercase.[6] Similarly, emphasis should be made by effective word choice, not with colors (especially red), oversized font, or bold or italic style. Formatting should be kept simple, particularly because many recipients may be viewing the message on a device that affects appearance.

When Not to LOL

Deciphering the different levels of formality can be especially important for younger hires. Recent graduates who have spent years instant-messaging and texting their friends are accustomed to communicating in a style that many old-

er people have never seen. Continually evolving abbreviations abound. TTYL ("talk to you later"). LOLZ (plural of "laughing out loud"). ROTFL ("rolling on the floor laughing"). PWND ("owned," *i.e.*, beaten in a competition, with an "incorrect" P instead of O to show irony). Similarly, emoticons are employed liberally to make one's tone clearer: the smiley face — :-), the smile with a wink— ;-), etc.

Most new hires seem to readily understand that this type of thing is not appropriate in traditional business correspondence. But it will be up to the firm to clarify when, if at all, these colloquialisms may be used in work-related e-mails.

Firms needn't ban them outright, however; they do have their place. Indeed, they can often be useful to defuse tension or avoid offense when writing to peers. The firm's job, then, must be to determine such instances in advance and communicate them to users unequivocally so that errors can be avoided.

Be Wary of Reply All

Stories of lawyers in trouble because of an e-mail in which they "replied to all" are plentiful. There is the 2004 story of a Dewey Ballantine partner whose "reply to all" of the 350 lawyers in the firm's New York office included a racially insensitive comment.[7] In January 2009, Nielson removed the "Reply All" button from all company computers used by its more than 35,000 employees after a similar incident.[8]

To prevent the potential embarrassment, liability, and strain on productivity, some law firms have implemented software that generates a pop-up warning any time a user presses "Reply All."[9] You may be surprised to learn that, according to the most recent survey of technology use in law firms with 50 or more attorneys, 93% of respondents reported that this type of warning was currently being used.[10]

All law firms instruct their new hires in the importance of maintaining client confidences. Such instruction should include a discussion of e-mail and the ways in which confidentiality can be most easily breached. More than other professionals, lawyers need to be mindful of the "Reply All" option.

Since we communicate frequently with both opposing counsel and our own clients and co-counsel, it is all too easy to send a confidential message inadvertently to a group of recipients that includes someone on the other side. Users therefore need to be instructed to review lists of recipients before hitting send and not to send an e-mail to any recipient whose role in a matter is not known.

The "Reply All" option should be employed only when it is necessary for the original sender and all original recipients to receive your reply. Conversely, the "Reply All" option should not be used when only the original sender or the original sender and a few but not all of the other recipients need to know your reply.

Conclusion

E-mail plays such a large role in the delivery of legal services that the development of good e-mail habits should not be left to chance. We cannot assume that our colleagues will simply know, without guidance, what is and is not appropriate. An e-mail style guide addressing the issues we've discussed above will help raise the professional quality of e-mail and reduce confusion and miscommunication between senders and recipients. ◆

FOOTNOTES

1. *See* International Law Technology Association 2009 Technology Survey, available at http://www.iltanet.org ("ILTA 2009").

2. *See* Survey of Technology Use in the Delaware Legal Practice 2009 ("Delaware Survey"), published in the Winter 2009/2010 edition of *Delaware Lawyer* magazine, No. 32 (75% of responding firms do not provide users with education or written guidelines for e-mail use).

3. For other resources, *see* Nancy Flynn, *The e-Policy Handbook: Rules and Best Practices to Safely Manage Your Company's E-Mail, Blogs, Social Networking, and Other Electronic Communication Tools*, AMACOM (2d ed. 2009).; Janis Fisher Chan, *E-Mail: A Write-It-Well Guide, How to Write and Manage E-Mail in the Workplace*, Write It Well (Updated ed. 2008); David Shipley & Will Schwable, *Send: the Essential Guide to Email for Office and Home*, Knopf (2007); Jeffrey Steele, *E-mail: The Manual: Everything You Should Know About Email Etiquette, Policies and Legal Liability Before You Hit Send*, Marion Street Press, Inc. (2006).

4. *RadioShack lays off employees via e-mail*, usatoday.com (Aug. 20, 2006), available at www.usatoday.com/tech/news/2006-08-30-radioshack-email-layoffs_x.htm.

5. A typical confidentiality statement: "This message may contain confidential attorney-client communications or other protected information. If you believe you are not an intended recipient (even if this message was sent to your e-mail address), you may not use, copy, or retransmit it. If you believe you received this message by mistake, please notify us by return e-mail, and then delete this message. Thank you for your cooperation."

An additional statement that most firms now include addresses possible liability under Internal Revenue Service Circular 230. A typical such statement is: "To ensure compliance with requirements imposed by the Internal Revenue Service in Circular 230 on tax practitioners, we inform you that, unless we expressly state otherwise in this communication (including any attachments), any federal tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or other matter addressed herein."

6. There are numerous scholarly papers and books that support this conclusion. *See e.g.*, Seventh Circuit, Requirements and Suggestions for Typography in Briefs and Other Papers, at 6, available at http://www.ca7uscourts.gov/rules/type.pdf (last visited Oct. 20, 2009) ("Capitals all are rectangular, so the reader can't use shapes (including ascenders and descenders) as cues."). *And see* Robin Williams, *The PC is Not a Typewriter*, Peachpit Press (1990).

7. http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005537837 (Jan. 29, 2004).

8. http://www.techcrunch.com/2009/01/31/nielson-deletes-reply-to-all-button/ (Jan. 31, 2009).

9. *See* ILTA 2009. Ninety-six percent of firms with 49 or fewer attorneys, 94% of firms with 50-149 attorneys, and 90% of firms with 150-349 attorneys reported using a "Reply to All" prompt.

10. *Id.*

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Margaret M. DiBianca

Delaware Lawyers Who Blog

Sharing your expertise through a blog can help other attorneys, generate new business, and actually be fun!

As of June 2009, forty-one percent of the AmLaw 200 law firms, 82 in total, sponsor legal blogs authored by their attorneys. At the same time, there were more than 227 blogs written by firms in the AmLaw 200, up from just 74 blogs in 2007.[1] This number is expected to continue to grow as more law firms and practitioners begin to recognize the value of engaging in the blogging discussion.[2]

Contrast these statistics to those on Delaware legal blogs ("blawgs"). At the time this article was written, there were just 10 blawgs in the First State, sponsored by just 6 firms. In this article, the authors of 9 of those blawgs share their experiences with the medium and offer insight to others who want to know more or are considering starting a blog of their own.

The bloggers who graciously participated in this roundtable include:

- **Larry D. Sullivan**, Delaware Law Office of Larry D. Sullivan, *DE Law Office*, www.DELawOffice.com/news.html
- **Francis G. X. Pileggi**, Fox Rothschild LLP, *Delaware Corporate and Commercial Litigation Blog*, www.DelawareLitigation.com
- **Karen E. Keller** and **Andrew A. Lundgren**, Young Conaway Stargatt & Taylor, LLP, *Delaware IP Law Blog*, www.DelawareIPLaw.com
- **Edward M. McNally**, Morris James, LLP, *Delaware Business Litigation Report*, www. DelawareBusinessLitigation.com
- **Margaret "Molly" DiBianca**, Young Conaway Stargatt & Taylor, LLP, *Delaware Employment Law Blog*, www.DelawareEmploymentLawBlog.com
- **Charles Snyderman**, Law Offices of Charles Snyderman, P.A., *Delaware Business Lawyer Blog*, www.DelawareBusinessLawyerBlog.com
- **Xiaojuan "Carrie" Huang**,

Law Office of Bruce L. Hudson, *Delaware Immigration Lawyer Blog*, www.DEImmigration.com

- **Cassandra Roberts**, Young Conaway Stargatt & Taylor, LLP, *Delaware Detour and Frolic Law Blog*, http://law.lexisnexis.com/practiceareas/ Delaware-Detour-and-Frolic-Law-Blog/
- **Christopher Spizzirri**, Morris James, LLP, *Delaware eDiscovery Report*, www.DelawareEDiscovery.com

The participating bloggers are listed above by descending seniority. Solo practitioner Larry D. Sullivan has been blogging since at least 2001, making him the most experienced in the group by several years. Francis X. G. Pileggi, author of the widely read *Delaware Corporate and Commercial Litigation Blog*, began in 2005. Karen E. Keller and Andrew A. Lundgren, co-authors of Young Conaway's *Delaware IP Law Blog*, were next to take the plunge in the Fall of 2006.

Edward M. McNally began *Delaware Business Litigation Report* in 2007. In 2008, DiBianca, Huang and Snyderman, starting posting at the *Delaware Employment Law*, *Delaware Immigration Lawyer* and *Delaware Business Lawyer blogs*, respectively.

Cassandra Roberts, who blogs about workers' compensation issues, and Christopher Spizzirri, of the *Delaware eDiscovery Report*, are the most recent addition to the Delaware blawging community, both beginning in July 2009.

Finding Time to Blog

When asked about the pros and cons of blogging, there were many common answers. Resoundingly, the most common negative was the time commitment that blogging requires. As Keller of *Delaware IP Law Blog*, explained, "The main downside to blogging is the amount of time it takes to both maintain the blog and to generate new content in a timely fashion."

To counter the heavy burden, several bloggers share the duties. Keller and Lundgren, for example, have added other authors over time to help keep up with the work. Pileggi, author of *Delaware Corporate and Commercial Litigation Blog*, expressed gratitude for the frequent guest contributions by Delaware attorney Kevin Brady.

DiBianca said that she often writes posts at night. This enables her to be available for her clients and manage her cases during the day, while still providing readers with regularly updated content.

"Because I have a full case load, blogging must take a back seat to clients and billable work. But, at the same time, I'm so passionate about the blog and enjoy it so much, I try to make time to write whenever I can. It's a balancing act." This, she said, is a double-edged sword, increasing the potential for typos or less-than-perfect writing.

Sullivan, of *Delaware Law Office*, discussed how this desire to squeeze blogging into our already over-packed schedules can have disastrous results: "It is so quick and easy to write something that you later regret. Sometimes it is best to save a draft of your post, and look at it the next day."

The Benefits of Blogging

Admittedly, blogging can require a substantial time commitment. So why do these bloggers keep doing it? When asked about the benefits of blogging, there was no shortage of enthusiastic responses. The most common benefit was, by far, the substantive knowledge that the blogger develops by regularly reading and writing about her particular practice area. Some of the other responses may come as more of a surprise.

Develop (and Maintain) Expert Knowledge

Lundgren discussed how blogging provides a structured mechanism by which lawyers can stay on the cutting edge of the constantly evolving legal landscape: "By following and writing about cases, you are focused on the substantive development of the law in your practice area and forced to articulate in a clear and concise manner what those developments are."

Several others echoed this sentiment. McNally, author of *Delaware Business Litigation Report*, said that blogging is "a good way to keep up on developments in our areas of the law." Pileggi explained it this way: "Maintaining the blog helped me to become a better lawyer because the process of reading and writing on cases allows for closer and more frequent review of the most recent decisions in my practice area."

Connecting With Readers

Many of the bloggers also said that blogging was a way for them to "humanize" or "personalize" their legal practices. Although this may surprise those who are not familiar with the blogosphere, this response does make sense. The word, "blog," after all, is short for "web log," which reflects the journal-like way blogs are written and listed in chronological order. Blogs also offer readers the ability to comment on posts, which can create a conversation between writer and reader, and among the readers themselves.

Immigration attorney Huang described blogs as a way to reach a specific audience in a way that is more personal and, it's hoped, more connected. "Compared to a website, a blog is less formal, easier to update, and generally a better approach to communicate, inform and educate visitors," she said.

Client Development and Professional Networking

The human element of blogging can also be seen in the relationships that a blogger develops with those in his practice area. Pileggi, for example, reports that his blog has enabled him to "strengthen existing professional relationships" with members of the legal community, and to develop new relationships with experts and practitioners locally and nationally.

These relationships lead to referrals.

As Spizzirri explained, blogging is "a good way to demonstrate expertise." This, in turn, helps create a professional reputation as the go-to person in your particular practice area.

Sullivan and Keller expressed a similar

appreciation for the opportunity to keep clients and potential clients informed and up to date as the law evolves. For Keller, who specializes in intellectual practices litigation, her potential audience includes lawyers in private practice, law clerks and in-house counsel. Because her practice regularly involves working with out-of-state counsel, Keller's focus on the decisions of just one court, the U.S. District Court, helps her to demonstrate a depth of knowledge when it comes to local practice.

For Sullivan, whose many years of experience cut across a variety of practice areas, potential readers are primarily local businesses and individuals. Sullivan's goal is to provide content with a human-interest angle that will be interesting and relevant for current and prospective clients alike.

Improved Web Presence

Increased online visibility is another benefit of blogging. The more "search-engine friendly" your site is, the more likely it is to appear on the coveted first page of results from a Google search. But this is a lofty goal.

If you're curious (and you should be) to know how findable your website is, run a search in Google including several keywords that a potential client or referral source may use if trying to find a lawyer in your practice area.[3]

Blogs can have a tremendous impact on the online visibility of its authors and firm. This is due, in large part, to the regular addition of new and relevant content. The more content that is posted containing relevant keywords, the better the blog will fare in search results.

Advice and Suggestions

If this article has you interested in blogs and wanting to learn more, our bloggers have lots of suggestions.

The first step is to actually start reading blogs. There are more blogs, on more topics, than you can imagine.[4] You can find blogs online in several ways. Keller, Sullivan and McNally suggest a simple internet search using Google and including "blog" in your search terms.[5] Our other bloggers offered these alternatives:

- Pileggi and Huang use Google's blog-search function, which can be accessed directly from the main Google.com homepage by selecting "More" at the top of the page and then "Blogs" from the drop-down list that appears, or by going directly to http://blogsearch.google.com and typing in your desired search terms.
- Lundgren and DiBianca also suggest Technorati.com, which is the "Google of blog searches," according to Lundgren.
- Spizzirri points readers to Alltop.com, which links to countless blogs, categorized into hundreds of topics. DiBianca notes that there is a "law" category for blawgs (http://law.alltop.com), as well as more specific legal categories, such as Legal Holds (http://legal-holds.alltop.com), Media Law (http://media-law.alltop.com), and Family Law (http://family-law.alltop.com).
- Huang reminds us that you can narrow your search to blawgs only at legal blog directories, such as www.blawg.com or the ABA *Journal's Blawg Directory* (www.abajournal.com/blawgs).

Our bloggers unanimously agreed that the key is to find just one blog that interests you. From there, you can easily find others through links in the blog's posts, as well as "blogrolls," which are lists of blogs that the author recommends or reads himself.

Spizzirri's blogroll includes approximately 20 blogs; *Delaware Employment Law Blog* has several hundred, grouped into numerous categories. Be warned, Spizzirri says, "blogs are addicting. Once you get started, you'll likely find more interesting blogs than you can possibly keep up with. That's OK — they're free."

And what blogs do our bloggers read? For legal blogs, Delaware authors excluded, the clear favorites include the *Wall Street Journal Law Blog* (http://blogs.wsj.com/law/) and the legal tabloid, *Above the Law* (http://abovethelaw.com). Here are a few others:

- Sullivan regularly reads *Ernie the Attorney* (www.ernietheattorney.net) and *Overlawyered* (http://overlawyered.com).
- Sullivan and Pileggi both suggest *Bag and Baggage* (www.bagandbaggage.com).
- Keller and Lundgren turn to *Patently-O* (www.patentlyo.com), the nation's most popular blog about patent law.
- Huang finds great legal blogs at the *Law Professor Blog Network* (http://lawprofessors.typepad.com). DiBianca reads several of those blogs, including, *First Amendment*, *Legal Writing*, *Civil Procedure & Federal Courts*, and *Adjunct Law "Prof Blogs*," as they're called.

Before You Make the Leap

If you find blogs as exciting and interesting as our panelists and are considering starting one of your own, there are a number of things to consider be-

fore taking the plunge. For one, be certain that you are writing for the right reasons.

"Be sure that you are committed to adding something useful," says Lundgren. Spizzirri agrees. If you "want to share your views on a topic or area, and are interested in getting feedback," then blogging may be for you.

If, on the other hand, "you're considering blogging only because you think it's a good marketing tool," then you should probably pass, he adds.

The bloggers agreed that the best authors are those who truly love to write. If writing is a chore for you, then your posts will likely be a chore to read and the effort is wasted.

And all of the bloggers recommend that you decide in advance how much time you are willing to commit. Lundgren suggests that "the key to blogging is being able to keep it up on a daily or weekly basis. When thinking about creating a blog, realistically assess whether you are willing to maintain this pace."

The amount of time required varies substantially between authors. Sullivan believes that a minimum requirement is 15 minutes a day, three times a week. He limits the time he spends by providing readers with an introduction of the topic and then linking to other sources where readers can find additional, more detailed information.

DiBianca estimates that she spends approximately an hour per post and tries to consistently post no less than 5 posts per week. She notes that she spends many more hours scouring the web looking for the most interesting and relevant news and content.

Defining Success

Interestingly, all of the bloggers said that their hard work was worth it if they helped others. Keller says that her blog is successful when they "hear from a judge or a client or another lawyer that they read the blog and that it is helpful to them." Huang and Roberts gave similar responses, with Roberts noting that her "primary goal is to have it serve as a resource for practitioners." She hopes that attorneys will turn to the site to find out what the "'hot topic' is in Delaware workers' comp."

One common thread in the discussions among our panel was their sheer enthusiasm for, and satisfaction from, blogging. Their efforts have resulted in new clients and business development for some. For others, their posts have been the source of publicity and interviews.

For most, there is a deep sense of community and engagement that comes with continued blogging, especially when blogging about a specific practice area or topic. And, despite the amount of work that blogging requires, the word "fun" was used over and over.

The word *fun* being repeatedly used to describe *work*. A modern idea, indeed. ◆

FOOTNOTES

1. *See* 2008 LexBlog State of the AmLaw Blogosphere, summarized by Kevin O'Keefe on *Real Lawyers Have Blogs*, available at http://kevin.lexblog.com.

2. In the 2009 Delaware Legal Technology Survey, three firms reported that, although they did not have a firm-sponsored blog, they had at least one in the works.

3. I put this challenge to the test and did my own search-engine-optimization experiment. Because I represent employers, I searched at Google.com for "Delaware HR lawyer" and "Delaware employers lawyer." In the first search, *Delaware Employment Law Blog* was returned as the second hit on the first page of the results. For the second search, Snyderman's *Delaware Business Lawyer* was the third result, *Delaware Employment Law Blog* came up as the fifth, seventh, and ninth, results, and *Delaware Detour and Frolic* as the eighth result on the list. All three, notably, returned results on the first page of the search results listings — the gold standard for SEO purposes. *Detour and Frolic's* appearance is particularly remarkable in light of it's relatively recent creation but not surprising, given its selection as a LexisNexis Top 25 Blog for Workers' Compensation in October 2009.

4. According to the *2008 State of the Blogosphere Report*, there were 133 million blogs as of October 2008, available at http://technorati.com/blogging/feature/state-of-the-blogosphere-2008/.

5. Or, as Roberts put it, "I do what I do to find anything — Google it!"

(Continued from page 28)

correspondence to be scanned and saved in the firm's DMS but another 20% reported that they expected to have one in the future. Nearly 70% of firms have no policy to ensure that all correspondence received is preserved and accessible digitally.

Even more surprising is that only 4% of responding firms have a policy that requires users to save the signed copy of all outgoing correspondence in PDF format, although 42% permit users to save the unsigned or signed version. This seems to be inherently inconsistent with the purpose of providing remote access.

Nearly 40% of firms have a policy in place regarding the retention of electronic records, and more than 50% have a policy for how e-mails should be managed. Thirty percent have a litigation-hold mechanism in place in the event they should receive notice of a potential claim. Thirty-five percent did not have any of these three policies in place.

Despite the absence of a firm-wide policy, many attorneys apparently are putting best practices to use on an individual level. More than one-third of firms reported having at least some attorneys whose filing system is entirely digital.

Social Media and Knowledge Management

Just over half of the firms reported having an intranet that they used for internal communication. Less than 20% use a wiki or internal blog as a way to share knowledge within the firm.

One-quarter of firms have a written social-media policy in place that governs attorneys and staff use of social-media sites like Facebook, LinkedIn, and Twitter. An additional 13% are working on a policy, but 60% of firms don't have a policy at all.

Only 30% block or restrict access to social-media sites. Users in 83% of firms have Internet access for unlimited periods of time. ◆

FOOTNOTE

1. Available at www.iltanet.org.

Margaret M. DiBianca

BY THE NUMBERS: Technology Use by Delaware Law Firms

A recent survey offers insights into how technology is changing our profession.

In October 2009, 30 Delaware law firms responded to a 40-question survey about their use of technology. The results have been collected and are presented in this article, providing a great deal of insight into how law is practiced in our State today.

About the Survey

The survey is modeled on an annual survey administered by the International Legal Technology Association (the "ILTA Survey"). Several questions from the ILTA Survey were used in the Delaware Survey to enable a comparison between the practices of Delaware firms and firms across the country. Results from the ILTA Survey are noted wherever they are markedly different from those given in the Delaware Survey. Of the 30 responding firms:

- Approximately 35% have fewer than 10 attorneys;
- Approximately 27% have 10 to 39 attorneys;
- Approximately 27% have 100 or more attorneys firm-wide but just 15% have 100 or more in Delaware.

Hardware

Dell is, by far, the most popular brand of desktop PC, having 87% of the market share. Dell is also the most popular brand of notebooks but IBM/Lenovo has staked a claim in the laptop market, and is used in 25% of responding firms.

Approximately 70% of firms have a loaner pool of laptops that users can "check-out" for as-needed use. Miniaturized laptops, called "netbooks," have made only small inroads with legal users; they are used at fewer than one-third of the responding firms.

More than half of firms report that some users have a dual-monitor setup. That compares to more than 80% of respondents to the ILTA Survey who reported having users with two (or more) monitors.

Approximately 70% of responding firms currently utilize video-conferencing equipment.

Software

Sixty-nine percent of firms keep their documents in a document-management system ("DMS"), and, of those, 32% report using Interwoven. When saving documents, approximately 38% of firms have firm-wide naming conventions. An additional 21% have department-wide standards. But 41% leave it up to the individual user to name documents based on individual preference.

When it comes to document creation, the Word-Word Perfect debate seems to have been put to rest in Delaware. More than 90% of firms reported that Microsoft Word is their primary word-processing software. Results from the ILTA Survey were similar.

And more than one-third of respondents put their word-processing software to work for document comparison, known as the "Track Changes" feature in Microsoft Word. But nearly 60% reported using third-party software. Workshare Delta View was the clear winner in this category and is being used in more than 45% of responding firms.

Workshare maintained its most-popular title as the software that was used for checking and removing metadata in 35% of responding firms. But Payne's Metadata Assistant was reported in almost 22% of firms, making it a closer race.

E-mail

Respondents to the 2009 ILTA Survey identified e-mail as a primary "pain point" when it came to technology-related woes.

In 41% of firms that have a mailbox limit, the typical limit is 1,000 MB or more. The comparable figure for ILTA was 26%.

Sixty-four percent put no limits on mailbox size, which may be reflective of the smaller firm demographic. More than one-third of responding firms said that they had one or more attorneys with personal mailboxes that were 20 GB or larger. One-third of firms automatically delete e-mail after a designated period of time.

Approximately half of firms allow users to create and manage their own e-mail archives.

Only one-quarter of responding firms provide users with education or written guidelines for professional e-mail use. The article on e-mail style guides in this edition of *Delaware Lawyer* will be of particular interest to the 75% of firms that do not currently provide any such guidance.

More than 60% of firms filter incoming e-mail based on word content and approximately 40% filter outgoing e-mail for inappropriate content, viruses and spam.

Twenty-one percent prevent access to personal web-based e-mail services like AOL, Yahoo! and G-Mail.

Remote Access & the Digital Office

Mobile access is a necessity, according to the 71% of firms that give their attorneys mobile e-mail access via a wireless e-mail device. Just 26% of firms, on the other hand, give staff access via Blackberry or similar mobile e-mail device. Even then, fewer than 10% of the firm's staff are affected.

Mobile devices aren't the only way attorneys stay in touch from outside the office. Nearly 85% of firms give attorneys remote access via Citrix, Outlook Web Access, or other programs.

The move to digital recordkeeping is a slow one. Less than 20% of firms have a policy that requires all incoming

(Continued on page 27)

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