



# IN PRACTICE...with CNA®

A Practitioner's Perspective on Emerging Legal Trends | 2022 Issue 1

## You Missed a Deadline??? How to Avoid that Nightmare

### Introduction

The foundation of the attorney-client relationship is providing competent legal advice. In this era, competent lawyering includes the use of "relevant technology." See ABA Model Rule of Professional Conduct ("MRPC") 1.1, comment [7]. Most courts now send notices of court actions by email and require attorneys to file documents electronically. What happens if you miss an email or fail to check an electronic docket? The scenarios in a recent case are similar to a bad dream, but the consequences are real and can be quite severe.

### A "Cautionary Tale" Leading to Dismissal of a Case – *Rollins v. Home Depot USA*

*Rollins v. Home Depot USA, Inc.*, 8 F. 4th 393 (5th Cir. 2021), presents a "cautionary tale for every attorney who litigates in the era of e-filing." The facts are simple. The parties agreed on a deadline for dispositive motions in a pending personal injury suit. The defendant filed the motion. Counsel for the plaintiff received an electronic notification of the filing, but he never saw it. Purportedly, the email was placed automatically in a folder the attorney did not regularly monitor. He never checked the docket and, therefore, never filed a response to the motion for summary judgment. The court granted the motion. Counsel for plaintiff learned of that decision from his opponent about a week after the decision was entered. The lower court denied Rollins' motion to alter or amend the court's judgment under Federal Rule of Civil Procedure 59(e).

Rollins received no relief on appeal. The Circuit Court ruled that Rule 59(e) permits parties to "correc[t] manifest errors of law or fact or presen[t] newly discovered evidence" or argue that there has been an intervening change in the controlling law. Those reasons for the application of the rule did not apply in this case. The failure to file a response was in counsel's reasonable control. The Court cited a prior decision which upheld a district court's grant of an unopposed motion to dismiss where the opposing party explained that its failure to respond was due to "defective antivirus software" that "diverted court emails to a spam folder." *Trevino v. City of Fort Worth*, 944 F.3d 567, 570 (5th Cir. 2019).

### How Should Lawyers Avoid Errors Such As Those in the *Rollins* Case?

The *Rollins* case led to a terrible result for the client. The acts of the attorney essentially ended the case when additional court review otherwise may have been available. Opening and reading all court communications are imperative. Reading the text of all court orders – rather than relying on a description in an electronic notification – is essential. Having the case dismissed on summary judgment may have been completely avoided had the lawyer maintained simple but necessary docketing<sup>1</sup> and monitoring systems.

### Have a reliable calendar system

Maintaining a reliable calendar system is critical. Of course, you should have appropriate calendar maintenance and install updates as they become available. You also should have a backup calendar, which would activate in the event that the primary system becomes unavailable. In addition, maintaining calendars in a confidential manner on personal data equipment such as cell phones can also serve as a back-up.

<sup>1</sup> The terms calendaring and docketing are used interchangeably in this article.

### **Centralize**

It is recommended that you maintain a centralized calendar system. In a decentralized system, each attorney would input the information into his/her calendar. That calendar could not be accessed by others, such as colleagues working on the matter or support staff. Therefore, a decentralized system creates a risk exposure. For example, if the lawyer inputs the due date incorrectly or misses the filing date reminders, these errors cannot be remediated. A more centralized approach, however, would provide access to the calendar to the entire team, as well as staff members supporting that team. Such redundancy will help you ensure that the dates are accurate, and address sudden emergencies or unexpected absences or departures. Larger firms may wish to create a docketing department with personnel specifically trained to support the entire firm. Some lawyers professional liability insurers look favorably upon firms using centralized systems when determining premium rates.

### **Consider the options**

Outlook calendars may provide the answer for solo and small firms but not for mid-size and large law firms. For these larger firms, consider whether use of case management software designed expressly for law firms may be helpful and cost-effective for your practice. For example, there are systems that automatically calculate deadlines. These systems work on embedded rules and may result in time efficiencies, if the rules accurately calculate the deadlines. A vendor that uses attorney-employees, rather than non-attorney third parties, to formulate the rules may offer the best option. Such a vendor can best ensure the accuracy of the calculation formulas and monitor changes which should be implemented if the applicable rules of procedure are revised. The CNA Allied Vendor Program includes third-party vendors that offer calendaring and docketing services and practice management software to law firms. Some of these vendors offer an additional level of protection by monitoring various federal and state court dockets, court calendars, and court rules. Whenever an update or change occurs, these providers will notify their law firm customer. A list of the CNA's Allied Vendors may be accessed at [www.cna.com](http://www.cna.com).

### **Contemplate a separate email account/inbox for court notifications**

Busy litigators may receive more than 100 daily email messages. As a result, the high email volume may cause lawyers to miss important court notifications. Some law firms minimize that risk by creating a separate email account/inbox dedicated solely to court notifications. In order to be effective, however, this type of email account/inbox must be monitored and reviewed on a daily basis.

### **Upon intake, ensure that the statute of limitations is calendared**

Upon intake of any new matter that involves a claim which must be filed within a certain time period, input the established statute of limitations date.

### **During an engagement, calendar all upcoming deadlines**

Upon receipt of any scheduling order from any court, all appearances and due dates should be listed on the appropriate electronic calendar system. Similarly, in a corporate practice, due dates for corporate filings, corporation renewal dates and stockholder and director meeting dates, among others, also should be documented in the calendar. Users should be encouraged to enter any new or revised calendar dates as soon as they receive them or as soon as practical. Notably, procrastination in calendaring may serve as the origin of a missed deadline or statute of limitation that leads to a professional liability claim.

### **Synchronize**

Select a calendaring software system that permits users to access the calendar from any device, such as a laptop or cellphone, and from any location. Calendars should be synchronized across platforms and updates should be visible as soon as they are entered into the system. The calendaring system also must permit changes to those dates without requiring re-entry of each item.

### **Use a "tickler system"**

In addition to the actual due date, a notification prior to that date also should be entered. This procedure is sometimes referred to as a "tickler system." For example, if a motion for summary judgment is due on June 15, you should receive a reminder on June 1 and again on June 7. For a statute of limitations date, notifications should be sent monthly, beginning six months before the expiration date. Consider preparing a weekly report of all upcoming statute dates. Such tickler systems help ensure that you have sufficient time to properly complete any task and do not miss any deadlines.

### **Check the docket periodically**

At regular intervals, the case docket should be checked to confirm that there is no activity of which you are unaware.

### **Include non-billable events**

The information calendared should include time off for vacation and other non-billable matters. This information will assist team members in scheduling appropriate coverage for an event. Prior notice to the client also will help to promote attorney/client relationships.

### **Create and implement a plan for regular and certified mail**

As more law firm personnel work remotely, designated on-site employees should handle regular and certified mail and communicate any important case information, including calendaring and docketing details, to the appropriate lawyers and support staff. Not all communications are electronic, and law firms must account for data in both electronic and paper formats.

### Follow up

A method to determine if the work due actually was completed should be included. For example, you may require that a note be inserted in the calendared appointment on the due date denoting that the particular document was filed. In a centralized system, a member of the litigation team could then send a copy of the requisite filing to the docketing department, which would include the information in any of its reports of completed activities.

### Set expectations

Law firm management must emphasize to all attorneys and staff members that compliance with the firm's calendaring and docketing system is mandatory. A rogue attorney or technologically-challenged support staff member may try to circumvent the law firm's calendaring and docketing procedures. Therefore, law firm leadership should explain the potential adverse consequences to the law firm that may result from non-compliance.

### Train the users

Training on these systems is essential to their proper implementation. Both attorneys and staff should be trained on the importance of accurate docketing, as well as proper use of the docketing system. Its mandatory use also should be emphasized. Accurate recording of deadlines and fulfilling those deadlines represents a core competency for all attorneys. See ABA MRPC 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Failure to accurately record and meet deadlines can result in claims against the firm, as well as disciplinary complaints against individual attorneys. Indeed, one study revealed that 19% of legal malpractice claims are due to administrative errors including missed deadlines and/or calendaring errors.<sup>2</sup>

More specific requirements should be included in the law firm's operations manual.

<sup>2</sup> See, ABA Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims, 2016-2019; the administrative error category includes errors such as: procrastination/failure to follow up; failure to calendar properly; clerical error; failure to file document; failure to react to calendar; and lost file/document.

### Conclusion

Substantial risks exist for law firms that fail to diligently monitor case dockets, read court orders and adhere to filing deadlines. The risk management tools to avoid these mistakes are available and are not difficult to implement. You should review your procedures in this area and employ calendaring and monitoring systems that are appropriate to your law firm's size and areas of practice. You will sleep better at night, avoiding the nightmare of a missed deadline and dissatisfied clients.

### This article was authored for the benefit of CNA by:

#### Hope A. Comisky

Hope A. Comisky is a Member and the General Counsel of Griesing Law LLC. Prior to joining Griesing Law, Ms. Comisky was the General Counsel of a 450+ attorney firm and then General Counsel Emeritus of an AmLaw 100 firm. She serves on the ethics committees for both the Philadelphia and Pennsylvania Bar Associations and just concluded her term as co-chair of the Philadelphia Bar Association Fee Dispute Committee. She can be reached at [hcomisky@griesinglaw.com](mailto:hcomisky@griesinglaw.com).

For more information, please call us at 866-262-0540 or email us at [lawyersrisk@cna.com](mailto:lawyersrisk@cna.com)