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While the repercussions of e-filing failure can be severe, protecting yourself—and your client—is relatively simple.

New Risks Every Litigator Should Know

It sounds easy enough. A few clicks, and off it goes. No more running down the street, sometimes literally, to make a filing deadline. No more waiting frantically for a courier's call confirming that your filing made it on time.

No more time-consuming calls to the clerk's office verifying that your pleadings, which you mailed, were received and were actually and timely filed. The coordination of copies and couriers has now been replaced by simple, electronic tasks—tasks that you can do from your desk and that you do not even need to complete until minutes before the deadline. What could be easier and more convenient? You can rest easy.

But can you?

With the increasing use of electronic filing—indeed, sometimes mandatory use—in virtually all federal district and bankruptcy courts, many federal appellate courts, state courts and administrative agencies, what at first blush may seem convenient and practical has created risks that you may not fully appreciate until you or a colleague have a “close call” with missing a deadline. And while electronic filing is certainly convenient, attorneys practicing in forums requiring electronic filing now face new risks that did not previously

exist—risks with consequences for which the law is evolving. Some of those risks, of course, are inherent when you have to meet any forum- or rule-imposed filing deadline, but many unique risks have arisen by virtue of the use of computer technology. As one technology commentator put it, “A computer lets you make more mistakes faster than any invention in human history—with the possible exception of handguns and tequila.” Herb Brody, *The Pleasure Machine: Computers*, Tech. Rev., Apr. 1992, at 31 (quoting Mitch Ratcliffe), quoted in *United States v. Carelock*, 459 F.3d 437, 443 (3d Cir. 2006).

Many experienced practitioners may feel inclined to shrug their shoulders and think that e-filing is not a big deal because their associates or assistants will ensure that everything runs smoothly. But, as explained below, courts place the blame for mistakes on the attorneys of record, and blaming other staff will not insulate attorneys from adverse court decisions or having to tell cli-



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ents that they missed a deadline. Indeed, some courts have gone out of the way to express dissatisfaction with attorneys who fail to understand e-filing, regardless of who actually carried out the e-filing, even alluding to potential malpractice claims. In the words of one court, “For practitioners in the legal profession, unlike those in some others, he who fails to pay attention may one day have to pay up.” *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 414 (4th Cir. 2010) (Davis, J., concurring).

If attorneys recognize and address the risks of e-filing well before an electronic-filing deadline—and all persons involved in the process appreciate them, from clients to partners to associates to legal assistants to secretaries—attorneys can minimize the new risks and avoid adverse consequences.

Risks and Ramifications— A New Breed of Problems

“How hard can it be?” is a question that many of us have thought when told that we must file documents electronically. After all, many people manage lots of transactions, such as banking and shopping transactions, electronically every day. But whether you are a seasoned or novice filer—and whether you use the federal courts’ CM/ECF system, LexisNexis File & Serve, or another electronic system—you still need to recognize and avoid the new traps of electronic filing. Many of the risks in e-filing are obvious. Some are not. Yet, with some exceptions, most mistakes primarily result in one thing that makes all litigators shudder: missing a deadline.

Missing a Deadline by Miscalculating It

Surprisingly, e-filing can actually cause confusion about the actual filing deadlines. The exact time of e-filings matters with respect to deadlines. Does e-filing after the time that the forum’s office has closed for the day count as being filed that same day? Some forums deem pleadings e-filed after the time that the forum’s office closes as filed the *next* day. *See, e.g., L. R. 1840(a)* (Cal. Super. Ct. San Bernadino Co.) (a document is deemed filed “on the next business day the clerk’s office is open for business if the lodging occurred after normal business hours of the clerk’s office”). Another easy-to-overlook but fundamental issue is when service, as opposed to filing, must be

completed. Does e-filing after 5 p.m. (with contemporaneous e-service on opposing counsel) count as *service* on that same day? You must reexamine the rules and case law on filing and service for each court—and recalculate previously assumed deadlines—in light of the time of day that you must submit an e-filing.

The deadline may also change depending on the type of pleading that you file. In the District of Minnesota, for example, the local rules state that a document is timely if filed electronically by midnight, but it must be filed by 5 p.m. if it is conventionally filed. D. Minn. CM/ECF Civ. P. I.B.1 (timeliness). Another local rule from the same court, however, states that “new cases” shall be filed by 5 p.m. D. Minn. CM/ECF Civ. P. II.A.2.d (filing new cases). E-filing a “new case” under those local Minnesota rules was at issue in *PHL Variable Insurance Co. v. U.S. Bank National Ass’n*, Civ. No. 10-1197 (RHK/AJB), 2010 WL 3926310 (D. Minn. Oct. 4, 2010). The plaintiff’s attorney in that case e-filed a complaint on the last day of a two-year limitation period at 5:33 p.m. The court deemed the complaint untimely because it was a “new case” filed 33 minutes after the court closed, and the plaintiff lost the ability to prosecute its claim. The *PHL Variable* court is not alone in holding that an electronic filing completed after the court’s business hours—but before midnight that same day—was untimely. *See, e.g., Stark v. Right Mgmt. Consultants*, 247 F. App’x 855 (8th Cir. 2007) (holding that a complaint electronically filed at 11:27 p.m. did not meet the 5 p.m. deadline for new case filings); *but cf. People ex. rel. Madigan v. Ill. Commerce Comm’n*, 899 N.E.2d 227, 232–237 (Ill. 2008) (“[I]n the absence of a specific regulation, we cannot read a 5 p.m. deadline into the... rules.”).

Missing a Deadline by Underestimating the Time That It Takes

The “convenience” of having what would ordinarily be an end-of-the-business-day deadline, when the courthouse closes, turn into an end-of-the-actual-day deadline, midnight, can be a blessing and a curse. While having extra time can be useful, of course, the idea that a pleading can be electronically filed often encourages, in reality, editing up to a point that is dangerously

close to the deadline. For some reason, as all litigators know, work on pleadings often tends to occur right up until the absolute deadline.

For the uninitiated, filing electronically can be more difficult than expected. You must take several steps *before* you can e-file your document: setting up an account and obtaining a password, which may require human approval and might take longer than 24 hours; converting your documents to the court-approved format, often a .pdf or a .pdf/a; selecting and attaching all of the correct documents and exhibits; clicking your way through all the drop-down menus and check-boxes while ensuring that you make the right selections; and then reviewing your selections to ensure accuracy. This process takes more time than you may foresee, which can endanger your timing if not anticipated. Additionally, even if you initially meet a deadline, a court can reject a filing if in filing it you did not choose from among the electronic fields properly, which can cause you to miss the deadline if you do not receive a rejection notice with sufficient time to correct mistakes.

Missing a Deadline by Trying to File a Document That Exceeds File-Size Limits

A deadline can also be missed by attempting to file a document that is too big—megabyte-size-wise, not page-wise. Depending on the court, you will probably have to file pleadings in different manners to adhere to different filing system limits. For example, the Northern District of Illinois system allows you to e-file pleadings of up to five megabytes in size; otherwise, you have to break a pleading into separate pieces and upload each individually. General Order on Electronic Case Filing, VII(B) (N.D. Ill. Apr. 30, 2009). The District of Colorado permits you to e-file pleadings of up to two megabytes. *Filing Civil Suits*, <http://www.cod.uscourts.gov/Filing.aspx> (last visited Feb. 28, 2011). Other courts have different or do not have file-size limitations, such as the District of Columbia. *See, e.g., D.D.C. L. Civ. R. 5.4* (providing no limit on electronic file sizes, but allowing traditional filing for exhibits and attachments greater than 500 pages). While you can address these limitations relatively easily if you know about them ahead of time, discovering that your pleading file size is too

big with only minutes to spare is risky. In other words, receiving a rejection notice from a court at 11:59 p.m. or even earlier is not something anyone wants. Courts have rejected excuses when attorneys miss deadlines because they tried to file pleadings that did not comply with the rules on oversized pleadings. See, e.g., *Satterlee v. Allen Press*, 455 F. Supp. 2d 1236, 1244 (D. Kan.

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2006) (“[C]ounsel bears responsibility for this oversight.”).

Missing a Deadline by Inadvertently Filing the Wrong Document

Although it sounds basic, with e-filing you should always confirm whether you uploaded the correct documents and attachments *before* you hit “submit.” *Craig v. Police Jury of Grant Parish*, 347 F. App’x 119 (5th Cir. 2009), involved an attorney who attached the wrong .pdf file as his electronic notice of appeal, and the clerk did not send a deficiency notice. But the docket noted that the pleading was “[f]iled in error—counsel advised to resubmit with corrected .pdf document attached.” *Id.* at 120. The clerk had e-mailed the attorney stating, “[w]e have edited the text of the previous docket entry and no further action regarding this submission is required at this time.” *Id.* at 121. The filing attorney—unaware that the original .pdf was the wrong document—assumed that the filing was proper. Once the problem surfaced, the attorney filed a corrected notice. Nevertheless, the Fifth Circuit held that it was untimely, noting that reliance on misinformation generated from an electronic filing system will not vitiate the time requirements for appeal. *Id.* at 124; see also *Kinsley v. Lakeview Reg’l Med. Ctr.*, 570 F.3d 586 (5th Cir. 2009) (holding that a deadline set by the federal rules was not extended by a deficiency notice stating that

an incorrectly filed pleading could be filed again after the deadline).

Similarly, an electronic file titled “Notice of Appeal” was in fact a notice of appeal from *another case*, which caused the attorney to miss an appellate deadline when he filed it instead of the correct notice of appeal. *United States v. Carelock*, 459 F.3d 437 (3d Cir. 2006). Upon receiving a “quality control message” noting the errors from the court, the attorney reviewed the correct notice in his personal computer files, but not the notice that he actually filed. *Id.* at 439. Concluding that nothing was wrong, the attorney ignored the court’s notification. He discovered the problem several months later. The Third Circuit noted that an attorney must be super-diligent in e-filing:

[W]e note that the cause of this error was that [plaintiff’s] counsel had unfortunately failed to double-check the document he had successfully transmitted to the District Court. Although the modern use of the computer is a good time-saver, its ease of use should not assuage the almost obsessive attentiveness that is required when filing any document with a court.

Id. at 443. Having chastised the attorney, the Third Circuit dismissed the appeal for lack of jurisdiction.

Missing a Deadline by Misinterpreting E-Filing Notices

When you physically file a pleading at a courthouse, you usually receive in return a file-stamped copy of the actual, filed document. The equivalent notice obtained when e-filing—even one that notes that the pleading was “filed”—may not always provide that much comfort. In *Kellum v. Commissioner of Social Security*, 295 F. App’x 47 (6th Cir. 2008), the plaintiff had 30 days to file a judicial challenge to the denial of disability benefits. On the last day of the filing period, the plaintiff’s attorney e-filed the complaint but did not include credit card information for the filing fees. He received an e-mail notification that day stating that the complaint was “filed” on the deadline. The next day, the clerk informed the plaintiff’s attorney that the required fees were not paid, which the attorney then paid a few days later. The complaint, however, was then date-stamped by the court on the day of payment—after the filing deadline.

Despite the “filed” notification, the Sixth Circuit held that the plaintiff’s complaint was untimely.

Missing a Deadline Due to Technology Glitches

Paper filing and e-filing have one thing in common: Murphy’s Law. Traffic jams, broken-down cars, and snow storms have been replaced by viruses, deleted files, and system crashes. Software and hardware can and do malfunction, including electronic filing systems mandated for use by courts. Unfortunately, placing blame on technological trouble can fall on unsympathetic ears: “Computer failures, not unlike human failures, must be anticipated.” *Martinelli v. Farm-Rite*, 785 A.2d 33, 36, 345 N.J. Super. 306, 312 (2001). At least one other court has equated the failure of computer equipment to the classic dog-ate-my-homework excuse, noting that “[i]mperfect technology may make a better scapegoat from the family dog in today’s world, but not so here.” *Fox v. Am. Airlines*, 389 F.3d 1291, 1294 (D.C. Cir. 2004). Even so, courts have not been entirely unsympathetic, and some have recognized that computer problems may occur. Federal courts typically have rules explaining the hoops that an attorney must jump through if a court’s CM/ECF system is down. See, e.g., L. Civ. R. 5.1 ¶15 (D.N.J.) (requiring an affidavit stating filer attempted “to file electronically at least two times at least one hour apart after 12:00 noon”). Those rules will not protect you, however, if your own computer system crashes or has other problems.

When that happens, courts have seemed very willing to pinpoint the carelessness of counsel as the real reason for filing failures based on technical glitches. For instance, the plaintiff’s attorney in *Robinson v. Wix Filtration Corp.* was unaware of defendant’s motion for summary judgment and never responded to it. 599 F.3d 403 (4th Cir. 2010). The attorney contended that severe computer problems prevented receipt of electronic notice of the motion. The court denied the attorney’s argument for relief because it found that his failure to receive notice resulted from his “conscious choice not to take any action with respect to his computer troubles.” 599 F.3d at 408.

Likewise, even in light of an *unopposed* motion for an extension of time after a

memorandum of law, declaration and exhibits in support of a motion to disqualify were filed several minutes after a midnight deadline, the Southern District of New York recently found that the motion was untimely filed. *Graves v. Deutsche Bank Sec., Inc.*, No. 07 Civ. 05471, 2011 WL 1044357 (S.D.N.Y. Mar. 4, 2011). Although the filing attorney provided a detailed explanation as to how his computer system malfunctioned and such malfunction was beyond his control—an explanation that caused the court to conclude that the attorney “acted in good faith”—the court still found that the attorney failed to show good cause to justify his neglect in filing before the midnight deadline. *Id.* at *4.

Improperly Handling Confidentiality Issues

Missing deadlines is not the only potentially harmful ramification of e-filing. As required even with traditional filing, you must ensure that confidential information is not improperly included in e-filings by redacting, when allowed or required, or filing under seal. E-filed documents are typically immediately publicly available, and generally, they cannot be “unfiled” without court permission. Courts will presume that every attorney understands the consequences of clicking “submit” when filing. Failure to take the proper precautions to preserve confidentiality when dealing with sensitive information in an electronically filed document could lead to sanctions or other liabilities, such as in *Baella-Silva v. Hulsey*, 454 F.3d 5 (1st Cir. 2006). In that case the First Circuit affirmed a \$50,000 sanction against a party for electronically filing the terms of a confidential settlement.

Similarly, in *Allstate Ins. Co. v. Linea Latina de Accidentes, Inc.*, No. 09-3681, 2010 WL 5014386 (D. Minn. Nov. 24, 2010), a plaintiff failed to redact birth dates, names of minors, financial account information, and one social security number from some 160 pages of an exhibit to an amended complaint. After defense counsel moved to seal the amended complaint, the attorney “showed no sense of urgency or comprehension of what had been done” and blamed the problem on a “misunderstanding between [him] and his staff.” *Id.* at *2. The attorney then filed another set of exhibits, but this time the redactions were

made with an electronic redacting tool that could be deleted, “exposing the underlying information.” *Id.* The court noted that there was no excuse for not complying with the Federal Rule’s requirements of redacting certain personal information from pleadings or their attachments:

Every federal district court has now embraced electronic filing. The days of attorneys being able to ignore the computer and shift blame to support staff in the event of an error are gone. The consequences are too serious. To the extent there are attorneys practicing in federal court who are under the impression that someone in the Clerk’s office will comb through their filings for errors and call them with a heads-up, the Court delivers this message: ‘It is the responsibility of counsel to ensure that personal identifiers are properly redacted.’ The days of paper filings—with accessibility to files limited not by law but by the practical challenges of driving downtown, paying for parking, checking out the file, and paying the friendly clerk of court to make copies—are gone.

Id. Finally, the court noted that attorneys “who are slow to change run the very real risk of sanctions.” *Id.* The court then sanctioned the attorney.

Message from the Courts—Meet E-Filing Expectations—No Excuses

When it comes to e-filing mistakes, courts repeatedly have rejected excuses based on someone’s unfamiliarity with filing procedures. For example, in *Harman v. McAfee*, 691 S.E.2d 586 (Ga. Ct. App. 2010), the plaintiff’s counsel did not respond to the defendant’s motion for summary judgment because he did not review the docket during the filing period and did not receive an e-mail notification of the filing. The plaintiff’s counsel claimed that he was out of town during the filing period and that his e-mail inbox reached capacity and “bounced” the notification back to the sender. The court rejected this excuse and found that it was the counsel’s responsibility to ensure that his e-mail account was set up properly. *Id.* at 589.

Even courts that were once amenable to requests for leniency arising from computer problems have apparently changed their tune. The District of Kansas in

Geer v. Cox, 219 F.R.D. 527, 528 (D. Kan. 2003), noted that the plaintiff’s counsel did not receive electronic notification of the defendant’s opposition to class certification because the local counsel’s computer system was “in a transition period.” Thus, the plaintiff’s counsel failed to timely respond and filed a motion to reconsider the court’s order denying class certifica-

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tion. Because the court’s e-filing system was only a month old at the time, the court gave the “plaintiff the benefit of the doubt” and granted its motion. *Id.* at 528. The precedential effect of *Geer*, however, was undercut by *Satterlee*, decided three years later. 455 F. Supp. 2d 1236 (D. Kan. 2006). While it did not specifically abrogate *Geer*, the *Satterlee* court, citing the same local rules, held that “[p]roblems on the filer’s end... will not constitute a technical failure under these procedures nor excuse an untimely filing.” *Id.* at 1246 (internal quotation marks omitted).

As courts’ expectation that attorneys will achieve technological proficiency grows, claiming ignorance can lead to embarrassment, and judges may go out of their way to criticize counsel:

Compliance was not achieved because counsel failed to educate himself about a sea change in filing requirements that had taken place more than three years before the relevant events of the instant case.

Kanoff v. Better Life, 350 F. App’x 655, 658 (3d Cir. 2009). Likewise, another “I cannot figure it out” excuse fared no better:

[Counsel] appears to persist in believing that his decision not to learn to e-file absolves him from the rules applicable to

all attorneys practicing in this district. The court understands that [counsel] has taken the position that he is computer-illiterate and cannot use a computer in any way, and is thus incapable of learning how to e-file.... [The court] expects that all counsel appearing before the court will either learn to e-file or arrange for someone to do so for them.

Paper filing and e-filing have one thing in common: Murphy's Law. Traffic jams, broken-down cars, and snow storms have been replaced by viruses, deleted files, and system crashes.

Arrington v. La Rabida Children's Hosp., No. 06 C 5129, 2009 WL 928922, at *3-4 (N.D. Ill. Apr. 3, 2009).

"Excusable Neglect" Excuses Unlikely to Succeed

When a filing error is based on an attorney's inattentiveness to or negligence regarding e-filing procedures, courts have left the attorney little leeway—repeatedly rejecting arguments for equitable tolling of a filing period or excusable neglect:

- An attorney's failure to receive electronic notice of summary judgment because of known computer problems does not constitute excusable neglect. *Robinson*, 599 F.3d at 409-10, 412-13.
- Rejecting excusable neglect because an attorney's failure to familiarize himself with filing procedures led him to missing a deadline. *Kanoff*, 350 F. App'x at 657-58.
- An attorney's failure to comply with local e-filing rules "can hardly be considered the result of excusable neglect." *McDowell-Bonner v. D.C.*, 668 F. Supp. 2d 124, 126-127 (D.D.C. 2009).
- Failing to attach supporting documents to motion for summary judgment

response was not excusable neglect. *Satterlee*, 455 F. Supp. 2d at 1243-45.

- Mere belief that a jury demand was timely filed electronically by counsel familiar with the electronic filing system was deemed "either carelessness or an oversight on the part of counsel," and the jury demand was denied as being untimely. *Richardson v. Image Sensing Sys., Inc.*, No. C10-5629, 2011 WL 917523, at *3 (W.D. Wash. Mar. 16, 2011).
- Equitable tolling was not available to the plaintiff because by waiting until "last possible day" to file, the plaintiff's attorney's filing errors—which led to missed deadline—were not beyond his control. *Kellum v. Comm'r of Soc. Sec.*, 295 F. App'x 47, 50 (6th Cir. 2008).
- Equitable tolling of the filing period was not available when the post office incorrectly told the plaintiff's attorney that a complaint would reach the courthouse by the deadline when the plaintiff's attorney knew that electronic filing was available. *Ward v. Astrue*, Case No. 5:09cv380/RS/EMT, 2010 WL 4386544 at *2, *6 (N.D. Fla. Oct. 29, 2010).
- Arguing that the court should consider a document timely filed because the attorney mistakenly believed that document was timely failed because "counsel's unfamiliarity with an electronic filing system" does not support a finding of equitable tolling. *Perry v. Accurate Staffing Consultants*, Civil No. 3:10-CV-201-FDW-DCK, 2010 WL 2650881, at *4 (W.D.N.C. June 30, 2010); *Johnson v. Astrue*, Civil Action No. 3:09-CV-46, 2010 WL 2365527, at *3 (D. W. Va. June 8, 2010); *Arrington*, 2009 WL 928922, at *2-4.

Apparent outliers to the trend of rejecting excusable neglect are found in *Flagship West, LLC v. Excel Realty Partners, L.P.*, No. CV-F-02-5200 OWW/DLB, 2007 WL 1574967, at *7-9 (E.D. Cal. May 30, 2007) and *Pace v. AIG*, No. 8 C 945, 2010 WL 4530357 (N.D. Ill. Nov. 1, 2010). In *Flagship West*, defense counsel timely filed a post-trial motion but did not meet the court's deadline to file a memorandum in support of that motion. When filing the memorandum, the attorney "failed to complete the technical steps required for electronically filing of documents" by not clicking "next" on the "last screen necessary to commit

the transaction." *Id.* at *7. He correctly filed the following day, after the deadline. *Id.* The court was persuaded that excusable neglect existed because the filing attorney "attempted to comply" with the order of the court. *Id.* In *Pace*, the court found excusable neglect after an electronic notice was diverted into a blocked e-mail folder at appellant's counsel's law firm because the firm's e-mail system classified the notice as spam. 2010 WL 4530357, at *1. Although the court called the question "close" and questioned why the notice evaded all six attorneys of record for the appellants, it found no reason to "doubt the veracity of counsel's explanation here, [that was] supported by an affidavit and evidence from his firm's information technology manager." *Id.* at 2.

Neither *Flagship West* nor *Pace*, however, may provide shelter for counsel in similar predicaments. Federal courts—on the whole—seem to take the attitude that "counsel's decision to represent a [party] in federal court obligate[s] [counsel] to become familiar with electronic filing." *Johnson v. Astrue*, 2010 WL 2365527, at *3.

Failure of "Form" Is an Uncertain Defense

Despite their willingness to hold attorneys' feet to the fire on e-filing mistakes, some federal courts have taken a pragmatic approach to certain types of mistakes. Those courts have generally reasoned that an e-filing misstep that would have been corrected by a court clerk if presented in paper form should receive the same protection it would receive if it had been filed traditionally. Cases that have drawn on this reasoning use procedural rules that prevent a failure in "form" that was not willful from defeating a party's rights. *See* Fed. R. Civ. P. 5(d)(4), Fed. R. Civ. P. 83(a)(2) and Fed. R. App. P. 3(c)(4), 25(a)(4). This approach was illustrated in *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703 (7th Cir. 2007). There, when the electronic filing system rejected the plaintiff's petition because it had the wrong docket number, and it was too late to file conventionally, the Seventh Circuit reasoned that "the computer's reaction does more to show the limits of the programmer's imagination than to render the suit untimely." *Id.* at 707. The court, in allowing the late-filed pleading, juxtaposed the electronic and conventional filing processes:

Had a paper copy of the complaint been handed over... a deputy clerk would have crossed out the old docket number, stamped a new one, and filed the document; there is no reason to throw this suit out of court just because the e-filing system did not know how to take an equivalent step.

Id.; see also *Darouiche v. Fidelity Nat'l Ins. Co.*, No. 10-30554, 2011 WL 777874 (5th Cir. Mar. 7, 2011) (allowing corrected motion for new trial to be filed two days after deadline when original motion was filed on deadline but proposed order was not electronically filed as a separate attachment); *Vince v. Rock Cnty., Wis.*, 604 F.3d 391 (7th Cir. 2010) (using the wrong event code was a failure in form); *Phx. Global Ventures, LLC v. Phx. Hotel Assocs., Ltd.*, 442 F.3d 72 (2d Cir. 2005) (district court deemed motion timely filed when system rejected it because of large exhibit files and invalid hearing date); *In re Last Will & Testament of Zill*, C.A. Co. 2593-MA, 2009 WL 3465375 (Del. Ch. Mar. 23, 2009) (rejection of documents for improper formatting of exhibits had no legal effect; petition was deemed filed on the day of initial filing).

Despite the possible shelter provided by a failure-of-form defense in some cases, you should not use it as a crutch because the federal courts have not reached consensus on which types of e-filing mistakes constitute a failure of form. For instance, the Second, Seventh, and Ninth Circuits have held that incorrectly filing a submission, either on paper or electronically, when the local rules required otherwise was merely an error in form. *Contino v. United States*, 535 F.3d 124 (2d Cir. 2008); *United States v. Harvey*, 516 F.3d 553 (7th Cir. 2008); *Klemm v. Astrue*, 543 F.3d 1139 (9th Cir. 2008). The Tenth Circuit, however, has held that attempting to submit court documents electronically was noncompliant when paper copies were required. *Le Williamson v. Deluxe Fin. Servs., Inc.*, 216 F. App'x 728 (10th Cir. 2007).

Recommendations—Avoid Turning Your E-filing into E-failures

While the repercussions of e-filing failure can be severe, protecting yourself—and your client—is relatively simple. In the first place, make sure that all involved know and understand the risks and take appro-

priate steps to prevent them from turning into missed deadlines or other problems. There are some steps to take *before* any e-filing is due:

- Know the local rules governing what, specifically, is required regarding e-filing.
- What e-filing system does the court use?
- How do you submit a filing fee, if required, for electronically filed pleadings?
- Predetermine the deadlines. Can pleadings or submissions be filed after the physical close of the forum's office and be considered filed that day? In other words, can a submission truly be filed up to midnight? If timing of *service* is important, does electronic *filing* after 5 p.m. (with contemporaneous e-service on all other parties) count as service on that day?
- Ensure that you, or whoever will do the filing, are a registered user with a valid password, and that you or someone who will be with you when you file are trained on how to use the electronic filing service. More than one person on your team should be able and ready to e-file. The e-filer may in some cases need to be listed on the signature block of the filed document.
- Once registered to electronically file, adjust your spam filter to ensure that you receive all electronic notices from the forum. Make sure that you review all electronic notices to ensure that you do not have to take any specific action.
- Know which documents you have to or should file manually (pleadings that you need to file under seal due to confidentiality issues, pleadings that are too large), and the size limitations on electronic filing if they exist. Plan to take steps to break up "large" electronic documents into appropriate sizes to meet any court-imposed file-size requirements. Do not forget to mark exhibits appropriately and consider the bulk that they might add to the size of documents.
- Know which types of documents you must file in imaged form and which you may file with an electronic signature. Documents requiring verification or affidavits may need to be filed as an image of the original rather than as electronically signed documents.
- Know whether you must file documents in a searchable format. Be sure ahead of

time that your scanner or conversion tool can create the right kind of electronic documents. Keep in mind that documents scanned in an image format and then converted using certain OCR tools may have a larger size post-conversion.

- Do not forget necessary redactions for both the primary pleading and all attachments.

Courts have generally reasoned that an e-filing misstep that would have been corrected by a court clerk if presented in paper form should receive the same protection it would receive if it had been filed traditionally.

- Remember time zone differences. Do you really have until 11:59 p.m. in your time zone?
 - Understand the length of time that it will take to file a pleading, including exhibits. Can you start the filing process at 11:55 p.m. and still meet a midnight deadline?
 - Verify that the title of your pleading matches with proximity the court's e-filing event code names. This is especially important for courts using the ECF system. It is a good idea to consider the court's electronic code-name list well before your deadline.
 - Verify that the correct document and attachments are uploaded before you hit the "submit" key. Verify that all appropriate drop-down menus and other required fields are completed. Have the documents been properly described in the required electronic fields? If you are uncertain which fields you must check or complete, talk to the court clerk during business hours before the deadline.
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- Know ahead of time whether one member of a joint-defense can file a pleading for other joint-defense members. Often, electronic filing allows you to electronically file a pleading only for the party for whom you are registered as counsel. If the pleading is to be filed for parties other than those you represent (such as, for example, in the case of a motion filed by a group of defendants participating in a joint defense), can you file it for all joint-defense members?

- As soon as possible, verify that you filed the correct document and exhibits. If someone made a mistake, immediately contact the court clerk, and opposing party, if necessary, to rectify or follow any court-imposed rules for fixing a mistake.
- Continually monitor the docket, especially during times of e-mail or computer problems. Do not rely exclusively on a court's electronic notices.

Many of these suggestions make common sense, which is why they may be easy to dismiss. But even seasoned litigators can

be surprised by the unexpected pitfalls—and possible adverse consequences—of e-filing. While some case law suggests that courts appreciate the rigidity of e-filing when computer filing systems reject what courts otherwise would consider a proper submission if filed conventionally, given the risks and costs of attempts to rectify e-filing mistakes, banking on a court's pragmatism and mercy is not a wise strategy. The best practice, of course, is to anticipate and deal with these issues before you e-file, getting it right the first time. 