

Litigation

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ELECTRONIC CASE FILING: IS FAILURE TO CHECK EMAIL RELATED TO AN ELECTRONICALLY FILED CASE MALPRACTICE?

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Abstract

This article explores electronic case filing and the duties of lawyers with regard to electronic filing. A recent federal district court case held that an attorney's failure affirmatively to check the status of his case via email or the court's PACER system, which resulted in dismissal of the case, did not constitute excusable neglect under Rule 60(b)(1) of the Federal Rules of Civil Procedure. This holding imputes a professional duty on lawyers who use the electronic filing system to check email and the status of their case, suggesting that breaching of such duty may constitute malpractice.

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INTRODUCTION

<1> Electronic filing has become a predominant method of filing court documents, and lawyers should be aware of the importance of understanding the rules of whichever system they use. By 2005, over 170,000 attorneys and others have filed court documents over the Internet.² Case Management/Electronic Case Filing (CM/ECF) systems are currently used in 69 of 94 federal district courts, 82 of 90 bankruptcy courts, the Court of International Trade, and the Court of Federal Claims.³ Many other courts have begun implementation of CM/ECF: 11 of 13 federal appellate courts, 21 district courts and 12 bankruptcy courts.⁴ Many state and local courts use or have plans to employ electronic case filing systems. While electronic filing of court documents offers convenience to attorneys and courts, it has changed filing rules and procedures. Failure to know and follow these rules can cause cases to be dismissed and result in claims of attorney malpractice.

BLACKBURN V. U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE

<2> The United States District Court for the Western District of Washington recently highlighted an important standard for attorneys using the court's electronic filing system. In *Blackburn v. U.S. Department of Agriculture and Forest Service*, the Court held that an attorney who failed to file a timely response because he did not check his email or the status of his or her case via the Court's PACER system, could not vacate final judgment on the basis of excusable neglect, Rule 60(b)(1).⁵

<3> Blackburn originally filed an action through the Court's electronic filing system on June 15, 2004, suing the U.S. Department of Agriculture under the Federal Tort Claims Act. The defendant filed a motion to dismiss based on lack of subject matter jurisdiction. In addition, the Court issued two orders: an order to reassign the case to an undersigned District Judge and an order for initial disclosures.⁶

<4> The plaintiff failed to respond to the motion to dismiss and the Court orders. As a result, the Court issued a default judgment dismissing the case. The plaintiff claimed that it never received copies of the motion to dismiss and Court orders and that dismissal should be overturned under Rule 60(b)(1), which allows a court to vacate final judgment on the basis of excusable neglect. The plaintiff's argument suggested that notification solely disseminated through the Court's electronic filing system did not constitute adequate notice.⁷

<5> The District Court held that proper notification took place through the court's electronic filing system and that the plaintiff's attorney had an affirmative duty to check his email and the status of his case. By registering for the Court's electronic filing system, the plaintiff agreed to be bound by its rules, which included an agreement to receive notices via email in lieu of paper mail, and an agreement to access court information via the Court's PACER system. Hence, case dismissal prompted by the attorney's failure to check status of the case was not grounds for vacating judgment on the basis of excusable neglect.

ELECTRONIC CASE FILING

<6> Attorneys need to know which electronic filing system is available in their jurisdiction and carefully educate themselves about its rules and procedures. While several systems for filing and making case information available over the Internet have been introduced, CM/ECF and PACER are the predominant systems used by federal courts. CM/ECF and PACER work in conjunction with one another. CM/ECF is interactive, allowing attorneys to electronically file over the Internet.⁸ PACER is merely an information provider, allowing public access to certain case and docket information.⁹

Case Management/Electronic Case Filing (CM/ECF)

<7> Both courts and attorneys use CM/ECF. In order for an attorney to be authorized to file documents and receive email notices of documents that are filed, the attorney must be admitted to practice and registered to file electronically within the specific court providing the CM/ECF system. Each court has its own requirements and procedures for registration. Typically, attorneys need to simultaneously register with the PACER Service Center. Once registered, attorneys are provided with an identification name and password which allow secure access to the system.¹⁰

<8> Attorneys can file using CM/ECF by uploading a PDF document into the system. Whenever a document is filed, the CM/ECF system automatically generates a Notice of Electronic Filing (NEF). The NEF is an email message containing a link to the filed document to registered attorneys involved with the case. The link allows email recipients to access the electronically filed document once for free. The link expires after fifteen days, after which attorneys can still access the document, but they must do so through PACER and will be charged a fee of eight cents per page to view.¹¹

<9> CM/ECF is available in many district and bankruptcy courts, but not yet in federal appellate courts.¹²

<10> Procedural rules exist which address electronic filing and service for electronically filed documents. The Federal Rules of Civil Procedure, Bankruptcy Procedure, Appellate Procedure, and Criminal Procedure authorize individual courts to permit electronic service of documents if parties consent.¹³

<11> Courts offering electronic filing generally issue local rules regarding service through electronic means, and these rules are generally available on court websites.¹⁴ For example, the Western District of Washington has a link to its electronic filing procedures on its website.¹⁵ The procedures state that electronic filing through CM/ECF is mandatory for all counsel, and that it is the filing party's responsibility to "maintain an electronic mailbox sufficient to receive the orders and other paper transmitted electronically to counsel."¹⁶ Additionally, the rules state that if counsel is a registered CM/ECF user, then electronic "receipt of the Notice of Electronic Filing shall constitute service pursuant to the Federal Rules."¹⁷

Public Access to Court Electronic Records (PACER)

<12> PACER is used solely for accessing and viewing previously filed court documents (such as those filed through CM/ECF), court orders, and docket information over the Internet. PACER is not used to electronically file court documents.¹⁸ Unlike CM/ECF, which is only used by courts and registered attorneys, PACER is available for use by the general public. PACER is a service of the United States Judiciary and contains case and docket information from federal appellate, district, and bankruptcy courts.¹⁹ Because each court separately maintains its own PACER databases, each jurisdiction has its own URL or modem number for accessing case information.²⁰

RULE 60(B)(1) AND EXCUSABLE NEGLIGENCE

<13> Typically, registering for the CM/ECF systems requires the registering party to agree to electronic service of court orders and documents.²¹ Courts interpret electronic case filings as a green light to send all future notifications to the filing attorney electronically and have little tolerance for registered CM/ECF attorneys who electronically file but fail to check email or case status via PACER. In *Blackburn*, the inattentive attorney claimed "excusable neglect," provided for in Rule 60(b)(1), which allows a court to reopen a final judgment where the attorney's mistake was "excusable."²² In this case, the court did not find the attorney's behavior "excusable."

<14> Courts interpret the "excusable neglect" exception very narrowly. In *Pioneer Investment Services Co. v. Brunswick Associates Ltd.. Partnership*, the United States Supreme Court provided guideposts for determining what sorts of neglect will be considered "excusable" under Rule 60(b)(1).²³ The court stated that "[t]he determination is at bottom an equitable one, taking into account all of the relevant circumstances surrounding the party's omission."²⁴ These circumstances include the following four factors: (1) the danger of prejudice to the debtor, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.²⁵ Several Ninth Circuit Court of Appeals cases have used this four-factor test in determining cases of excusable neglect.²⁶

<15> *Blackburn* failed the excusable neglect test because he could not pass the third prong of the *Pioneer* test. As the court explained, the Plaintiff could provide no justifiable reason for the delay:

Plaintiffs fail to explain why they didn't call the Court to check on the status of the case, why they didn't visit the court in person and look at the case file, why they didn't call the USCA attorney in Washington D.C., with whom they'd been talking about the underlying complaint, why they didn't call the U.S. Attorney's office in Seattle, and ask which attorney was handling the case, or why they didn't use the Court's PACER system, which is accessible from the counsel's office via the Internet, to check the status of the case.²⁷

In addition, the Blackburn Court states that by registering for the Court's electronic filing system, the Plaintiff agreed to be bound by the system's rules. These rules include consent to receive notice electronically, waiver of the right to receive notice by personal service or first class mail, and access to court information via the Court's PACER System.²⁸

Malpractice

<16> Although a malpractice action has not been filed in response to Blackburn, one could certainly foresee the possibility. Legal malpractice laws differ from state to state. Generally, in order to establish a malpractice action for breach of fiduciary duty, the plaintiff must prove four elements: (1) the existence of a client-lawyer relationship, (2) breach of a professional duty of care, (3) causation, and (4) damages.²⁹ There is no intent requirement.³⁰

<17> Hypothetically, in the case of Blackburn, elements (1), (3) and (4) would be relatively easy to prove: a client-lawyer relationship existed; the failure of the attorney to check email and therefore file a response certainly caused, both actually and proximately, the case to be dismissed, which robbed the plaintiff of the opportunity for recovery from the fire damage, and; because the plaintiff's case was dismissed, he was unable to pursue his civil claim for \$562,909 in damages. To find damages, however, the plaintiff must additionally "prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment."³¹

<18> In order to prove the second element, a breach of professional duty of care, the plaintiff must prove the lawyer had an affirmative duty to check his email or the status of the case using the PACER system, and that failing to do so amounted to a breach of the lawyer's professional duties. A lawyer's duty of care involves exercising the competence and diligence normally exercised by lawyers in similar circumstances.³² Additionally, lawyers are required to "devote reasonable diligence to a representation" which involves performing tasks "reasonably appropriate to the representation."³³ Courts measure "reasonable diligence" through a balancing test, weighing the client's instructions, the importance of the matter to the client, the cost of the effort, customary practice, and the time available.³⁴ Failure to check email and failure to inquire into the status of a case will likely be interpreted by courts as a failure to perform tasks reasonably appropriate to the representation. The large sum of damages, the well-entrenched practice of attorneys checking their email, and the very small amount of time and effort required to check email or the status of a case on PACER, heavily indicate that checking email falls within the reasonable diligence duty.

<19> Technical problems with equipment do not excuse lawyers from their duty to check email. In the Western District of Washington, lawyers who use the electronic filing system and rely upon email notifications are responsible for their own computer and email systems. In cases of technical failures, whereby computer or email systems go down or do not properly deliver notifications, the lawyer must find other means by which to access the status of the case using PACER or a telephone call to the court.³⁵

<20> Although no case has yet elucidated exactly when a lawyer will be liable for malpractice for not checking email related to electronic case filing, attorneys should take extra precautions in order to avoid this very plausible scenario.

CONCLUSION

<21> Electronic case filing and case status checking are proliferating throughout the courts. Eventually, they will be the predominant methods of filing documents and checking case status in a federal court. Thus, it is increasingly significant that lawyers understand and keep up-to-date with its rules. Blackburn illustrates that failure to check email or keep up with pending cases through the court's electronic case filing system will not be excused by courts, and that such behavior could result in case dismissal or possibly malpractice.

PRACTICE POINTERS

- Be familiar with your jurisdiction's electronic case filing system and its rules. Set a time every month to review any updates to the court and system rules.
- When registering with an electronic case filing system, carefully read the agreement, noting everything to which you are agreeing, e.g., electronic notice and service of documents.
- Keep a separate, independent email account for work correspondence, and check that account at least once daily.
- If your email software allows it, make a rule that everything coming from the court is automatically filed into its own email folder, e.g., "W.D. Wash." That will make daily checking of that specific folder fast to see if you have received anything from the court instead of having to scan or sort your general email Inbox for critical emails.
- If you have a "Junk Mail" or "Spam" folder, check it daily to be sure that nothing important was filed there in error. If so, set your spam filter to accept any email from the courts as a trusted email source.
- If you have cases pending, check the status of the case via the PACER system (or the relevant website for your court's jurisdiction). Set this as a regular reminder on your computer calendar.
- Check with your state, county, and/or local Bar Association to see what they consider the standard of duty of a lawyer checking email regarding electronic case filing and case status online.

Footnotes

1. Jessica Belskis, University of Washington School of Law, Class of 2006. Belskis can be reached at jbelskis@u.washington.edu.
2. *Case Management./Electronic Case Files (CM/ECF)* 1, at <http://pacer.psc.uscourts.gov/documents/press.pdf> (last visited Apr. 29, 2005).
3. <http://www.uscourts.gov/newsroom/cmecf.htm> (last visited May 18, 2005).
4. *Id.*
5. *Blackburn v. U.S. Dep't of Agric. and Forest Serv.* No. C04-1404RSM (W.D. Wash, 2005).
6. *Id.* at 3.
7. Fed. R. Civ. P. 60(b)(1).
8. CM/ECF Frequently Asked Questions, at <http://pacer.psc.uscourts.gov/cmecf/ecffaq.html> (last modified Jan. 24, 2005).
9. Public Access to Court Electronic Records, at <http://pacer.psc.uscourts.gov/faq.html> (last visited Apr. 18, 2005).
10. CM/ECF Frequently Asked Questions, at <http://pacer.psc.uscourts.gov/cmecf/ecffaq.html> (last modified Jan. 24, 2005).
11. *Id.*
12. For a complete list of all the CM/ECF courts, see <http://pacer.psc.uscourts.gov/announcements/general/ecfnews.html> (last visited Apr. 25, 2005).
13. *Id.*; Fed. R. Civ. P. 5(b)(2)(D); Fed. R. Bankr. P. 7005, 9014(b); Fed. R. Crim. P. 49(c); Fed. R. App. P. 25(c)(1), (2).
14. CM/ECF Frequently Asked Questions, at <http://pacer.psc.uscourts.gov/cmecf/ecffaq.html> (last modified Jan. 24, 2005).
15. Amended Electronic Filing Procedures, at <http://www.wawd.uscourts.gov/wawd/welcome.nsf/main/page> (last visited Apr. 25, 2005).
16. *Id.*
17. *Id.* at [http://www.wawd.uscourts.gov/WAWD/CourtInfo.nsf/1f1a15887e6a34d48825643c000aef8c/12dd20bce45cfce988256e6800044ecc/\\$FILE/Amended%20Electronic%20Filing%20Procedures.pdf](http://www.wawd.uscourts.gov/WAWD/CourtInfo.nsf/1f1a15887e6a34d48825643c000aef8c/12dd20bce45cfce988256e6800044ecc/$FILE/Amended%20Electronic%20Filing%20Procedures.pdf) (last visited Apr. 1, 2005).
18. Public Access to Court Electronic Records, *supra* note 8.
19. *Id.*
20. To register, go to the PACER Service Center at <http://pacer.psc.uscourts.gov> (last visited Apr. 25, 2005).
21. Amended Electronic Filing Procedures, *supra* note 16.
22. Fed. R. Civ. P. 60(b).
23. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993).
24. *Id.* at 395.
25. *Id.* at 395.
26. See, e.g., *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997); *Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000).
27. *Blackburn*, No. C04-1404RSM, at 4.
28. *Id.*
29. Restatement (Third) of the Law Governing Lawyers § 48 (2000). See also *Ang. V. Martin*, 154 Wn. 2d 477 (Wash. 2005); *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194 (Cal. 2001).
30. See *id.* § 49 cmt. d.
31. See *id.* § 53 cmt. b .
32. See *id.* § 52.
33. See *id.* § 52 cmt. c.

34. See *id.*

35. Amended Electronic Filing Procedures, *supra* note 16.