

## Legal Profession Blog

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### Ethics Of Spam Filters

By Legal Profession Prof

The best Florida ethics blog - sunEthics - has a recent post of interest

**Firm had duty to have sufficient procedures to ensure timely receipt of orders, and in using email system without safeguards or oversight firm could not claim excusable neglect under Fla.R.Civ.P. 1.540 when it failed to timely appeal emailed order it allegedly did not receive. [Added 10/18/17]**

A trial court rendered an order assessing fees against Law Firm's client. The order was emailed to the mail addresses designated by each party's counsel. The clerk's records showed that the email sent to Law Firm was accepted by the recipient server. Law Firm, however, claimed that it never received the emailed order. Accordingly, Law Firm's client missed the deadline to appeal the order. Law Firm filed a motion for relief from judgment under Fla.R.Civ.P. 1.540(b), alleging excusable neglect.

A consultant who had provided IT services for Law Firm testified that the Firm's system "was configured to drop and permanently delete emails perceived to be spam without alerting the recipient that the email was deleted." He had advised the Firm against this. The Firm rejected the consultant's recommendation to hire a third-party vendor to handle spam filtering "because [the Firm] did not want to spend the extra money." The Firm also rejected his recommendation to get an online backup system for about \$700 to \$1200 per year. The consultant eventually ceased working for the Firm "because the firm rejected his recommendations."

An expert witness testified that Law Firm "did not properly implement and utilize its email filtering system." He understood that the Firm's email system "was set to drop and delete emails identified as spam." The expert stated that, if the Firm was his client and wanted to implement such a system, "he would require the client to sign a waiver exonerating him from responsibility."

The trial court denied the motion for relief from judgment. The First DCA affirmed, concluding that no excusable neglect was demonstrated. The appeals court stated that, based on the testimony, the trial court could conclude that [Law Firm] made a conscious decision to use a defective email system without any safeguards or oversight in order to save money. Such a decision cannot constitute excusable neglect." See, e.g., *Bequer v. Nat'l City Bank*, 46 So.3d 1199 (Fla. 4th DCA 2010) (reversing an order setting aside a default final judgment based on excusable neglect where the bank's inaction was not the result of a 'system gone awry,' but rather of a 'defective system altogether')."

The court concluded: "Counsel has a duty to have sufficient procedures and protocols in place to ensure timely notice of appealable orders. This includes use of an email spam filter with adequate safeguards and independent monitoring of the court's electronic docket. In cases where rendition of an appealable order has been delayed for a significant period of time, it might also include the filing of a joint motion for a case management conference to ensure that the order has not slipped through the cracks. [Law Firm] made no effort to do any of these things, reflecting an overall pattern of inaction and disengagement. In short, there was an absence of 'any meaningful procedure in place that, if followed, would have avoided the unfortunate events that resulted in a significant judgment against' [Law Firm's client]." ***Emerald Coast Utilities Authority v. Bear Marcus Point, LLC***, \_\_ So.3d \_\_ (Fla. 1st DCA, No. 1D15-5714, 10/6/2017) (on rehearing), 2017 WL 4448526.

(Mike Frisch)

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