

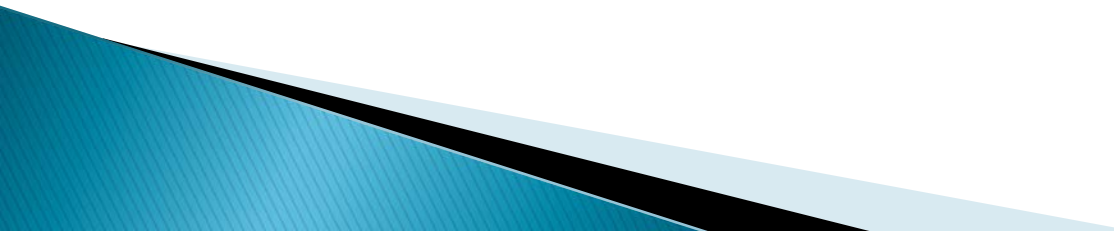


IV. Case Delays and Insufficient Client Communications

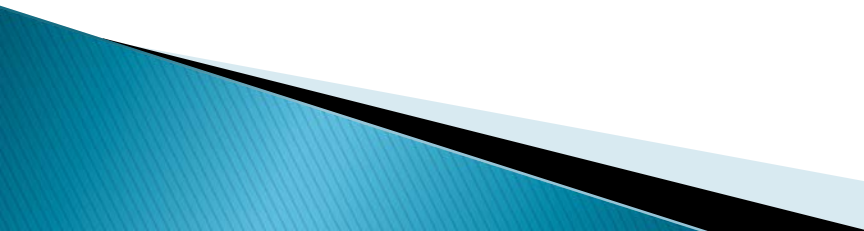
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About Ms. Faklaris

- ▶ Cori Faklaris is a graduate student in the Indiana University School of Informatics and Computing, IUPUI, in Indianapolis, and is currently serving as Professor Hook's research assistant.
 - ▶ She is a long-time journalist and communicator on social media who regularly provides advice to non-profit organizations, companies and professionals on how to use online networking efficiently and for maximum impact.
 - ▶ She has provided most of the content for the first two sections of this section of the seminar manual.
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Legal Ethics of Email

- ▶ As provided in Rule 1.4 of the Indiana Rules of Professional Conduct:
 - ▶ Rule 1.4. Communication
 - ▶ The comment to this Rule goes on to note that “Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.” Such communications today as a matter of course will include those via electronic means. The foremost of these means remains email.
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Recommendations

- ▶ Clients expect their attorneys and their offices to be regularly reachable via email.
 - Make sure you or a staff member monitors your email inboxes on a regular basis to ensure that you do not miss any client communications.
 - Set a policy of responding (as an office) to emails within a set period of time during a weekday, even if only with a reply that postpones a full response: “That’s an interesting question. Let me do some research and get back to you.”
 - Alternately, you could set up an automatic reply to incoming client email that thanks them for the message and includes the office’s main telephone number for those who require an immediate response.
 - If you know that you will be unreachable at certain times or during periods such as an out-of-town vacation, make this clear to clients in advance and set an “Out of Office” message on your email that includes the name, email and phone number of an attorney or staff member to contact in your absence.

Recommendations, cont.

- ▶ Ask clients upfront about their communication preferences and make a note of them with their case files.
 - Some clients might want all communications to be made via telephone and/or U.S. mail, while others will prefer email or text messaging.
 - It is important to provide an overview of the risks of waiving attorney–client privilege if communication methods are not secure or if confidential information is revealed or provided to third parties.
 - For communications with the latter groups about serious or substantial matters regarding a case, you may choose to enclose a written statement within an email or text message as an attachment.

Recommendations, cont.

- ▶ Your email communications should strike a professional tone and be easy to read.
 - Proper grammar and spelling should be used throughout.
 - If you struggle in these areas, ask a staff member with these skills to review your emails before they are sent.
 - Similarly, if you are questioning the appropriateness of a turn of phrase or overly technical legal language, get a second pair of eyes on your email draft before hitting Send.
 - Some attorneys may find it prudent to set up a system of review in which they save emails in Draft or otherwise put them on a delay to be reviewed by a staff member or themselves prior to being sent out, to guard against badly worded or erroneous messages.

Recommendations, cont.

- ▶ As you might have guessed, you should also avoid sharing via email any overly personal information, partisan language or otherwise potentially offensive content, such as off-color jokes.
 - Never start drafting a message in your email program while angry, either.
 - If you are feeling strong emotions and have an urge to fire off a sharply worded email, open up an offline word-processing program such as Microsoft Word and start writing in that program instead.
 - Then put the document away for an hour or two.
 - You may find that the act of writing it was sufficient to cool your head and thus easily send that document to the Recycle Bin instead of the intended recipient.

Recommendations, cont.

- ▶ It is important to implement a method for preserving emails and other electronic client communications so that they are easily accessed when needed.
 - Many case-management systems will offer email archiving along with other features such as calendar and billing management.
 - Alternately, Microsoft offers an email plugin called Credenza that will add this functionality to Outlook.
 - The American Bar Association offers a comparison chart of different software options on its website at <http://www.americanbar.org/content/dam/aba/migrated/tech/ltrc/charts/pmtbchart.authcheckdam.pdf> (accessed 10/29/15).

Recommendations, cont.

- ▶ When answering client emails, avoid the use of the Reply All button.
 - It is far too easy to accidentally include parties who are not part of your direct attorney–client relationship, especially if clients have cc'd friends, family or coworkers on their original emails to you or your office.
- ▶ Similarly, avoid using Forward to share client emails with staff members or other parties, which could expose confidential information in the email chain that was never intended for their eyes.
 - Instead, copy the relevant section (e.g. a request to schedule a meeting) into a new email message.
 - You may want to disable the Reply All and Forward actions in your email software to head off any problems before they occur.

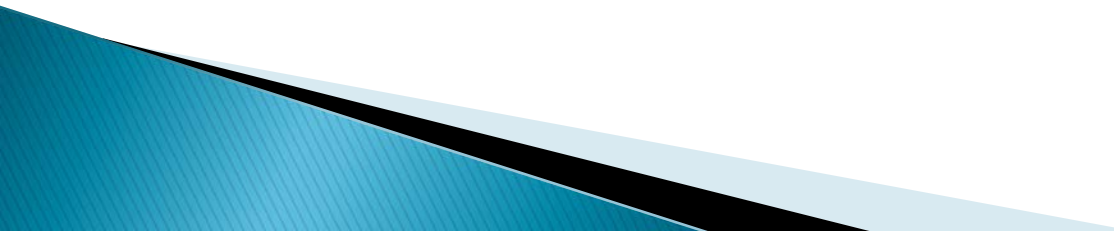
Recommendations, cont.

- ▶ If you do hit Send on an email that you belatedly realize was sent in error or included information or an attachment that violates confidentiality, immediately attempt to cancel it using Recall this Message (Microsoft Outlook) or similar commands.
 - Many times, however erroneous emails cannot be recalled.
 - In these cases, be sure to apologize promptly to both your client and the erroneous recipient(s) and ask the recipient(s) to delete the message.
 - One feature of email that was intended to be helpful can in fact result in ethical breaches, which is the ability of the email system to fill in the rest of an email address after you have typed only a few characters.
 - Thus, a quick glance to be sure of the recipient's identity is worth the bit of extra time you might take to do this.

Recommendations, cont.

- ▶ Clients also should be cautioned to exercise care themselves in handling emails and other electronic communications in order to preserve their confidentiality.
 - For instance, a client should be advised never to use an employer–provided computer, mobile phone or email address to send, read or download substantive emails about legal matters.
 - The risk is high that employers or other third parties will access them.
 - Note that this may also result in a waiver of the attorney–client privilege, as illuminated by a number of recent cases as well as ABA Formal Opinion 11–459, Duty to Protect the Confidentiality of E–mail Communications with One’s Client, August 4, 2011.

Recommendations, cont.

- ▶ Similarly, in a divorce or custody action, the client may not realize the need to change passwords or reinstall their mobile phone software to prevent the estranged spouse or partner from accessing their emails.
 - ▶ You may need to walk the client through the process of setting up a new, private email address with a provider such as Google.
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Recommendations, cont.

- ▶ The advent of push notifications of emails (as well as text messages, social media posts and other online content) to mobile phone screens also adds a new concern for how client communications are handled.
 - Attorneys are strongly cautioned to avoid enabling such notifications to their mobile phones' lock screens because of the volume of confidential messages they receive.
 - With particularly sensitive matters, clients also may need to be cautioned to disable such notifications to avoid the chance of tipping off anyone in the vicinity of their mobile phones as to the legal issues in play.
 - Some attorneys may also want to avoid the use of specific details or keywords in subject lines and in the first few lines of the email body, to avoid the disclosure of confidential or sensitive material in an email app's preview pane on clients' mobile screens.


Recommendations, cont.

- ▶ The information on the previous slides does not mean that you should avoid using a disclaimer notice at the bottom of your email template.
 - Many attorneys include such notices to warn against unauthorized use, alert recipients to attorney–client confidentiality and possible legal privilege for contents, disclaim loss or damages from any viruses, and caution about tax advice per IRS Circular 230.
 - However, these stock disclaimers are no “substitute for discipline and good judgment,” as John Hutchins wrote in his Feb. 12, 2013 article “Do Email Disclaimers Really Work?” for the American Bar Association website.

Recommendations, cont.

- ▶ “Training, communication, and reinforcement offer your best hope of ensuring that your emails—and those of others in your organization—end up only where you intend to send them.” (Hutchins)

Texting, Online Chat, “Friending” Clients on Facebook

- ▶ Increasing numbers of people now prefer text messages and mobile messaging apps to phone and email for their communications.
 - ▶ The Pew Research Center report “Mobile Messaging and Social Media 2015” found that 67 percent of adults now are smartphone owners, and 37 percent of smartphone owners are using messaging apps such as WhatsApp or iMessage. Your clients may well be among them.
 - ▶ Moreover, clients who are employed often can’t talk with an attorney via phone or email during working hours. Unfortunately, these are likely to be the times when you most need to reach them.
 - ▶ Texting may be the only way to communicate quickly in these situations.
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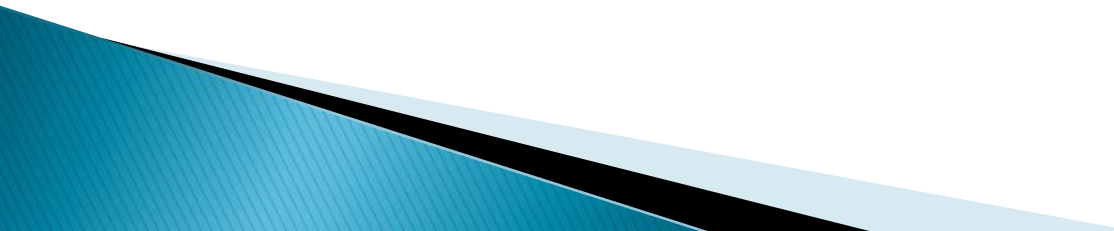
Recommendations, cont.

- ▶ Not every type of client communication is suitable for text messaging.
 - The best uses are for reminding clients of upcoming meetings (similar to how doctors and dentists are now texting appointment confirmations) and providing quick case updates.
 - For more detailed matters, send an email (or written attachment via email) but text to let the client know to check for it.
 - If you get into a lengthy back-and-forth with a client about a case update, it may be best to set up a time to call them directly to discuss the matter in more depth.

Recommendations, cont.

- ▶ As with other forms of communication, texts with clients should be preserved -- and, moreover, billed for.
 - But unlike with email, no easy options yet exist that integrate text messaging with case management software for documentation and archiving.
 - One option is to use Google Voice to send text messages to clients so that the date, time and other information about the message is preserved.
 - Another is to document the text message exchange in a similar fashion to how you document phone calls for preservation and billing purposes.

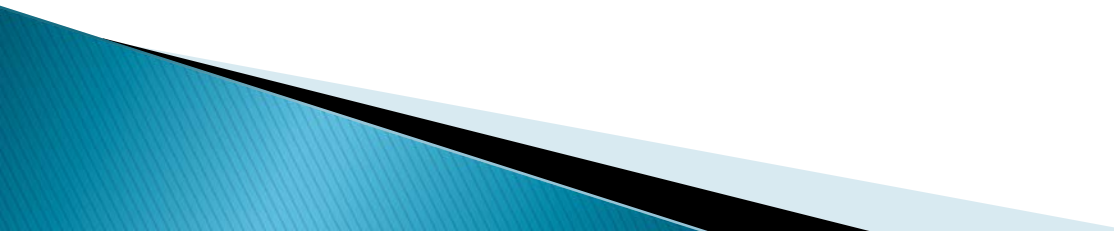
Recommendations, cont.

- ▶ Remember that text messages -- as well as posts in online chat forums, and content and messages shared on social networking sites such as LinkedIn and Facebook -- are written communications just as much as email or paper letters.
 - ▶ Follow the same standards for professionalism, decorum and disclosure that you would if you were writing a memo or client letter.
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Recommendations, cont.

- ▶ Beyond emails and texts, more clients may be reaching out to you via social media such as LinkedIn or Facebook or on newer mobile-only platforms such as WhatsApp and Snapchat.
- ▶ The following bullet points offer some general advice to consider when engaging in these semi-public communication channels:
 - Participate in LinkedIn, Facebook and other platforms for social networking to share general personal and professional information.
 - Make sure you or your staff members monitor these services as often as you do email in boxes to ensure that you do not miss any client communications.

Recommendations, cont.

- ▶ Participate in LinkedIn, Facebook and other platforms for social networking to share general personal and professional information.
 - Simply publishing a profile or page with information from your website, including contact information via email and phone, may be sufficient.
 - The best practice for practitioners who have limited time for or interest in managing their social media is to maintain minimal public professional accounts on these services for client interactions and to avoid “friending” or otherwise connecting with clients on private personal accounts that are separate from your public identity.
 - Another option is to use the law firm’s website as the holding place for biographical information, contact information, lists of journal articles and presentations and even a blog, if you choose.
 - That way the updating of your information is handled in a centralized fashion and the law firm maintains control over the content as well as the branding.
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Recommendations, cont.

- ▶ Make sure you or your staff members monitor these services as often as you do email in boxes to ensure that you do not miss any client communications.
 - In most cases, the appropriate reply is to direct the client to contact you via email or phone call to discuss a matter further.
 - Conversely, if you do not have the resources to monitor an account on a social networking service or mobile app, it may be best to close or delete it.
 - For example, commentators have suggested that a blog is only worth doing (for Search Engine Optimization, or SEO) if you are willing to provide new content at least every two weeks.
 - Ask yourself whether obviously stale or outdated content actually detracts from the image you want to present.

Recommendations, cont.

- ▶ Be personable and upbeat in your online presence, even in private accounts.
 - This is your “best self” that you want to project.
 - Take care not to “overshare” or to tread into dangerous conversational waters, such as sharing intimate personal details, partisan opinions or negative content.
- ▶ Remember that an emailed screenshot from an offended “friend” is all that separates your private content from going public.
 - Don't run afoul of rules regarding false advertising or “puffery.”
 - Avoid specifically branding yourself an “expert” or “specialist” without checking with the bar association and legal ethics opinions in your state. (See Indiana Rules of Professional Conduct, Rule 7.4. Communication of Fields of Practice and Specialization)

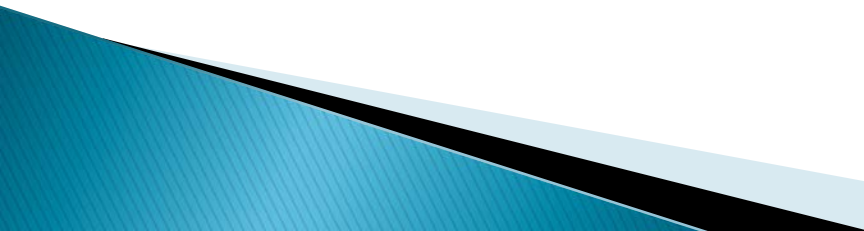
Recommendations, cont.

- ▶ Avoid creating or sharing any content that could be construed as "practicing law" in other jurisdictions reachable via social sharing or Internet searches.
 - Include a disclaimer in any online professional profiles that your communications sent via these channels do not automatically create an attorney–client relationship or necessarily constitute actionable legal advice.
 - Although primarily concerned with non–lawyers providing legal services/legal advice, along with the technology to render this (LegalZoom), issues with respect to the unauthorized practice of law (UPL) are front–and–center at the American Bar Association as well as state bar associations.

Recommendations, cont.

- ▶ Avoid posting any location-aware content such as photos, geotagged updates or "check-in's when taking part in confidential meetings with clients, even if that content doesn't seem to relate to your discussion.
 - Similarly, do not hint at or offer any details in status updates on social media that reference confidential client matters.
 - A sharp-eyed observer may be able to piece together information from these posts that violates your client's privacy and confidentiality and may damage your case.

Recommendations, cont.

- ▶ Don't seek client referrals directly from your followers on social media.
 - It can be seen as pestering or, worse, violating professional prohibitions.
 - ▶ Many online forums and closed discussion groups exist for attorneys in different practice areas and for “venting” about professional issues.
 - Never assume that conversations that take place on websites or within apps such as Facebook will always remain private, even if your account or post is marked as such.
 - Don't discuss current or prospective litigation in blogs, online forums or on social media.
 - Don't share anything that risks waiving attorney–client privilege, attorney work–product or any of the confidentiality doctrines or otherwise violates professional ethics.
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Recommendations, cont.

- ▶ Make sure that everyone you work with understands the rules of ethics regarding privacy and disclosure for social media and online posts.
 - It is advisable for the law firm to have an Acceptable Use Policy that covers email, Internet, social media, etc. and that includes the right to monitor.
 - In addition, a variety of professionals, such as paralegals and legal assistants, have their own codes of conduct that cover confidentiality.
 - Moreover, under Rules 5.1, 5.2 and 5.3, the lawyer has the duty to supervise not only employees of the law firm, but also any third-party vendors, consultants and contractors and would extend to website developers, law firm marketing companies, etc.
- ▶ As with email and text messages, when in doubt if a post or chat message is appropriate, the best practice is often not to send it.

Recommendations – “Friending”

- ▶ Among the issues that an attorney needs to consider when “friending”, including for investigation someone (plaintiff, witness, judge) or for networking, are the duty of candor, *ex parte* communications and the appearance of impropriety.
- ▶ Barone also discusses the need for care when “friending” between attorneys and judges.
- ▶ Another issue may be whether there is a difference between various social media vendors.
- ▶ For example, the premise of LinkedIn and its overall content is intended for professional purposes while Facebook and other sites may tend to contain more personal information and perhaps less formality about the kinds of information that are shared and caution in making connections. (See Further reading)

Managing Client Expectations

- ▶ In addition to Rule 1.4 as included in Section A, Legal Ethics of Email, the Indiana Rules of Professional Conduct feature Rule 1.3 on Diligence.
- ▶ According to the 2013–2014 Annual Report of the Disciplinary Commission of the Supreme Court of Indiana:
 - Ranked in order of complaint frequency, the alleged misconduct types most often giving rise to grievances are *Actions in Bad Faith, Communications or Non-Diligence, Improper Withdrawal, Not Acting With Competence, Improper Influence, Excessive Fees and Personal Misconduct*, with complaints about poor communications or non-diligence being close to one and a half times as frequent as the next category of alleged misconduct.

Managing Client Expectations, cont.

- ▶ In terms of actual numbers, out of the 689 grievances filed with the Indiana Disciplinary Commission in 2013–2014, 155, or 22.5%, were for the alleged misconduct of communications/non-diligence.
- ▶ The good news is that this is a reduction from the previous year as a percentage of total grievances filed (down from 27.28% in 2012–2013).
- ▶ On the other hand, a disturbing trend is a marked increase in the number of grievances filed for actions in bad faith, up from 1.09% of the total in 2012–2013 to 27.43% in 2013–2014.
- ▶ Eight grievances, representing 1.16%, were filed for disclosure of confidences in 2013–2014, along with 13 grievances (1.89%) for alleged misconduct in advertising.

Recommendations

- ▶ This problem can be readily addressed so that grievances for lack of communication and non-diligence are avoided.
 - It is important to set expectations at the beginning of the representation about how often and under what circumstances the client will be contacted.
 - In this world of television lawyers and instantaneous technology such as texts and email, clients may have a very unrealistic view about the speed of progress in a case. [N.B.: Professor Hook has the same problem in her role as a faculty member, especially since she teaches online courses. Students expect a nearly contemporaneous response.]
 - Educating the client that this speedy resolution of disputes is not based in reality will be important.

Recommendations, cont.

- ▶ The lawyer can use technology to provide communication to the client, such as regularly generated letters that are sent to the client that provide a general update about the case.
 - General information about various legal matters for the public that is provided on the law firm's website may also be helpful.
 - More technologically-savvy law firms may consider allowing the client to have access to certain materials.
 - This resource is especially appropriate if the clients are sophisticated and if the cases more likely are focused on business-related matters rather than personal matters.
 - The lawyer may also want to set specific timeframes in which he/she is likely to return a client's phone call or respond to email.

Recommendations, cont.

- ▶ Stated in the previous section, but it cannot be overstated:
 - In the interests of confidentiality and avoiding the waiver of attorney–client privilege, the lawyer should discuss forms of communication with the client and the risks that some of these may pose (such as using an employer–provided computer network to send email to the lawyer or a fax machine in a public area).
 - The client should indicate which method or methods of communication are going to be both accessible to the client and secure, so that confidentiality is preserved.

Recommendations, cont.

- ▶ Email, the web and other information technologies can be convenient, save costs and make attorneys and their staffs more productive.
 - For example, a great deal of law-related information, including cases, statutes and journal articles, is now available for free through the Internet as opposed to expensive legal research vendors.
 - On the other hand, that same technology can result in reduced productivity if used improperly or to excess.
 - Studies show that employees lose an inordinate amount of time because of personal use of email and web.
 - Moreover, a number of companies have found themselves in a swirl of litigation when the employer's systems have been used to denigrate the company, to harass, stalk or discriminate against other employees or to misappropriate or share confidential or proprietary information.

Recommendations, cont.

- ▶ While it is impractical to totally forbid personal use of information technology, the law firm will want to have an Acceptable Use Policy that is reviewed in detail and signed by all employees as well as anyone else who has access to the law firm's systems.
 - Included in the policy should be a statement that the law firm is allowed to monitor the use of its systems.
 - Likewise, being stern with oneself about the time-wasting behaviors related to technology will help to minimize the distractions that email, the web and social networks can present.
 - Not only does the attorney want to model the behavior expected of staff, but nothing destroys morale as quickly as seeing that the rules do not apply to those at the top.

Recommendations, cont.

- ▶ Before subscribing to listservs, blogs and RSS feeds, question whether these really add to your knowledge base and whether the contributors have the requisite expertise in the field or area of practice.
 - Before you commit to blogging or providing podcasts, be sure that you will have enough time to provide a credible product on a regular basis.
 - So much of what is retrieved through an Internet search is just one person's view without anything of a more substantial or scholarly basis.
 - How often do you email back and forth with someone to make lunch plans when it would be simpler and quicker just to pick up the phone?

Recommendations, cont.

- ▶ Nelson, Calloway and Kodner suggest that before incurring any technology expense, we think about “time in a bucket” – and that the underlying question that should be posed is whether the technology will shift this time positively rather than negatively.
 - The same approach to “time in a bucket” can be applied to the use of technology.
 - Surfing the web or viewing YouTube videos can provide helpful information, but it can also waste time.
 - People spend an inordinate amount of time texting and posting information on social networking sites and then reading what others have responded.

Recommendations, cont.

- ▶ In terms of professional information, decide what is truly important to include on a biography on the law firm's website or your LinkedIn profile and then endeavor to make this as current and long-lasting as possible, either because the information will not change that often or can easily be updated.
 - The time saved by avoiding these distractions can be better used to make certain that you are responding to client inquiries and communications in a timely manner and avoid a harried feeling by being bombarded with so much media content from so many sources that means that you are not as careful with using communications technologies as you should be.
 - The time that you save can also be used to investigate how you can use software and staff to streamline your operations so that routine communications can be handled more efficiently.

Notifying Court of Date Changes and Requesting Extensions

- ▶ Often parties need to seek the continuance of a hearing or the continuance of a deadline due to a variety of circumstances.
 - The applicable rules of procedure and/or the local rules of that court may describe the procedure for seeking that continuance or extension.
 - Usually the procedure involves contacting the opposing counsel to obtain that counsel's consent to your request prior to filing the motion with the court.
 - Should the opposing counsel not consent to your request, you note your efforts to contact the counsel and that the opposing party objects or at least does not consent to your request.
 - If the opposing party consents to your request, you note that in the body (and sometimes in the title) of the motion.
 - If the request for the continuance or extension is opposed, the court will decide if the request is appropriate and rule on the motion.

Notifying Court of Date Changes and Requesting Extensions

- For example, the Local Rules of the Southern District of Indiana provide a procedure for requesting extensions of time (Local Rules, Effective 8/7/2015, <http://www.insd.uscourts.gov/local-rules>, accessed 10/28/15) in Rule 6-1 and for continuances in civil cases in Rule 16-3.
- Likewise, the Hamilton County Local Rules (<http://www.hamiltoncounty.in.gov/DocumentCenter/Home/View/61>, accessed 10/28/15) include LR29-TR00-205.30 regarding dates for trial settings and LR29-TR53-206 governing requests for continuances.



Any Questions?

Thank you for attending our presentation!