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### *Legal Practice and Technology – A Dinosaur's concerns*

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The use of sophisticated and up to date technology is of obvious benefit to legal practices, but your risk management techniques should be equally sophisticated and up to date.

I recall that when I first commenced practice – sometime in the late Jurassic period – fax machines were new and exciting. Those early fax machines printed out their messages on shiny thermal paper – usually on long rolls. It didn't take long for firms to realise that the ink used on the thermal paper started to fade and, after months, (or weeks if you were unlucky), it became impossible to read the message, so a sensible risk management practice developed of making a photocopy of every new incoming fax before it was filed so that there would be a legible copy of the fax on the file.

A few years on - sometime in the early Cretaceous period – new fax machines became available that would print out on normal A4 paper with proper stable ink that didn't fade so the practice of copying every new fax thankfully died out (just like the Tyrannosaurus Rex). Now, of course, if anyone bothers to send a fax the transmissions are usually received and distributed as emails.

So, what is the point of these historical musings?

Law Claims and the Law Society have had recent claims experience and enquiries concerning the "new" technological tools available to practitioners such as mobile phones and electronic files. "New", of course, is a relative term, because mobile phones and electronic files have been around for some time and are used widely, but I wonder how many practitioners think carefully through the risk management issues of their use in legal practice?

In a recent claims matter, for example, it was the case that a practitioner and their client had been exchanging text messages, some of which were substantive, and which were not on the lawyer's file. It was necessary, for the purposes of responding to the claim, to trace through the arrangements made for a particular meeting between the lawyer and their client and also to see what advice might have been given via text message. The process of taking a screenshot and then emailing the message was time consuming and difficult enough, even though there was, in this case, a relatively short time (less than a year) between the sending of the messages and the search for them. Heaven knows what would have happened had there been a much longer time delay, a lost phone, a new phone or a new SIM card in the mix as well.

Whilst it is undoubtedly convenient for lawyers to be able to contact their clients (and vice versa) by mobile phone - and your author is not such a dinosaur so as to deny the ubiquity of mobile communication - it should always be remembered that text messaging is an relatively informal and potentially impermanent method of communication and no substantive advice should be given via text message, Facebook Messenger, Whats App or the like. It should also be obvious that methods of communication such as Snapchat, which are designed to be impermanent, should not even be contemplated as a way of communicating in a legal practice.

There are more substantive concerns regarding text messages: the Ethics & Practice unit received a recent enquiry regarding the receipt of instructions to disburse funds via text message. This sort of thing rings alarm bells in relation to both professional conduct and negligence. The advice from Ethics & Practice is that any instructions received via SMS should be verified by a telephone call and a contemporaneous file note of the instructions should be made because you can't be sure that you are actually communicating with your client. Some of you will be saying that, *"Well, you can't be sure who is on the other end of an email address either"* – and the safe course is to confirm email instructions as well, particularly if the instruction concerns the disbursement of trust funds.

Another area of concern for this curmudgeonly Dinosaur is electronic files. Law Claims is increasingly encountering difficulties in piecing together a comprehensive file where practitioner files are maintained electronically.

Again, changes in computer systems and/or servers, or the storage of relevant information across a number of devices (desk-top computers, tablets or – god forbid- mobile phones) can often cause difficulties and delays in compiling a useful version of the client's file so that proper responses to claims can be made. Of course, not every paper file is maintained perfectly either, but there are special difficulties with electronic files that need to be dealt with. It is important to get everything relevant from every relevant device and every cache or directory to where it should be.

It is also important for there to be proper back-ups made regularly and for security and confidentiality to be taken seriously. Back-ups should be regular, reliable and tested. As anyone who has lost data can attest, an up to date back up is essential. A back up plan is the best strategy to prevent disaster. A back up plan could include backing up your data in 3 different places (a local back-up drive, an iCloud based system and at an alternative geographical location away from the office) verifying the backup by running a test and regular testing to ensure that the back-up can be retrieved. No one expects a fire, cyberattack or disaster in their office. Be prepared, otherwise your data and files might, like the Dinosaur, become extinct.

**GRANT FEARY**

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